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[PRIVY COUNCIL.]

[On appeal from the High Court of Judicature at Bombay.]

PRESENT:—LORD THANKERTON, LORD DU PARCQ, LORD OAKSEY, LORD MORTON OF HENRYTON AND MR. M.R. JAYAKAR.

Govindram Seksaria (a firm) and another .. *Appellants**

v.

Edward Radbone .. *Respondent.*

Contract Act (IX of 1872), section 65—Compensation contemplated by—Contract for sale of machinery which "became void" on the outbreak of war after part of the machinery had been delivered and part payments had been made—Claim to recover the balance of the value of machinery delivered in excess of the price paid—Facts to be proved to sustain claim—Principles which should guide the Court in deciding such a claim.

Under section 65 of the Contract Act, the alternatives are to restore any advantage "or to make compensation for it to the person from whom he received it". This means valuing or quantifying in money the advantage retained, if retained it be.

Where a contract for sale of certain machinery by a German firm to an Indian firm "became void" on the outbreak of war after part of the machinery had been delivered and part payments had also been made and a claim was made by the Custodian of Enemy Property for British India (in whom the assets of the sellers had since become vested) for compensation in respect of the value of the machinery delivered and accepted and used by the buyers, in excess of the amounts paid to the sellers,

Held: The Custodian could not recover any sum in his action as claimed unless he proved that the value of the "advantage" which the buyers had received under the contract, *i.e.*, of the machinery which had been delivered to them, was greater than the sum already paid by them, that sum being admittedly an "advantage" which the Custodian had received under the contract. Moreover, the value of the machinery which was delivered to the buyers, for the purposes of section 65 of the Contract Act, must be taken to be the value of that machinery in India immediately after the contract had become void by reason of Section 65 of the Act. In estimating that value, a Court would have to take into account the fact that the balance of the machinery contracted to be supplied could not be supplied from Germany and the services of the technical staff of the sellers could not be had. Further, the Court would have to consider the question whether or not the buyers were able to procure from other sources the balance of the machinery contracted to be sent from Germany, and, if so, at what price and within what period of time and what quantity or quality of products could be produced by the machinery so assembled.

Sir Valentine Holmes, K.C., S. P. Khambatta K.C., and J. M. R. Jayakar for Appellants.

H. V. Willink, K.C. and *J. F. Donaldson* for Respondent.

Their Lordships' judgment was delivered by

LORD MORTON OF HENRYTON.—This is an appeal from a decree of the High Court of Judicature at Bombay, dated 4th December, 1944, made in its appellate jurisdiction, setting aside the decree of that Court dated 10th April, 1944, made in its original jurisdiction, and giving judgment for the respondent for Rs. 99,043. The history of the case begins with a contract made on 9th September, 1938, between the first appellants of the one part and Francke Werke, A. G. of Bremen, Germany,

*P.C. App. No. 78 of 9146. 14th October, 1947.

and Hansa (India) Trading Company Limited of Bombay (therein and hereinafter referred to as " the sellers ") of the other part. By the contract the first appellants agreed to buy, and the sellers agreed to sell, certain machinery with all the necessary accessories, as specified in Schedule A to the contract, for a complete oil refining and hydrogenating plant.

The relevant terms of the contract may be summarised as follows :

(*i*) By Cl. 1 it was provided that the delivery by the sellers was to consist of the machinery etc., specified in Schedule A. The sellers were also to supply free of charge complete sets of drawings showing the arrangement in detail of the buildings and execution drawing of foundations.

(*ii*) By Cl. 2 the total price for the plant as specified in Schedule A was to be 1,77,500 Reichmarks, delivered c.i.f. Karachi Port. This price was to include all export, packing, forwarding and insurance charges. By subsequent written agreement between the parties, it was agreed that delivery should be c.i.f. Bombay.

(*iii*) Clause 3 contained the terms of payment which was to be made by instalments as follows :

(*a*) 25 per cent. of the total price (*i.e.* 44,375 Reichmarks) on the signing of the contract ;

(*b*) 25 per cent. of the value of each consignment against shipping documents the total being 44,375 Reichmarks ;

(*c*) 25 per cent. of the total value of the order after completion of the erection of the whole plant, on the plant being found mechanically satisfactory on trial ;

(*d*) 25 per cent. of the total value of the order 4 months after the payment under (*c*) ;

payment was to be made in free Reichmarks and the rate of the exchange was fixed at 12.40 Reichmarks to the pound sterling.

(*iv*) Clause 6 provided that the sellers should send a qualified erector for the erection of the plant.

Clause 7 provided that the sellers should despatch their Chief Chemist to start the plant, prove to the first appellants that the gurantees given by the sellers were satisfied, and train the staff in the handling of the plant. The first appellants were to pay, in respect of the service of the erector and of the Chief Chemist, agreed amounts over and above the price for the plant specified in clause 2 of the Contract.

(*v*) Clause 9 provided that the sellers were to be responsible for the due fulfilment of all the guarantees of the manufactured articles and the quality of the product as given in Schedule B to the contract.

(*vi*) Schedule A sets out the specification of the plant. This specification, as subsequently revised by the parties, contained 64 items. Schedule B contained guarantees on three matters :—

(*a*) That the plant would be supplied complete, except for certain items specified in Schedule C, which though agreed to be necessary to make the plant complete were not to be supplied by the sellers.

(*b*) That, the first appellants having guaranteed that their existing refinery produced 12 tons of refined oil per 24 hours, this refinery together with the plant supplied by the sellers would produce 25 tons of faultless hydrogenated product with an average melting point of 43° C. within 24 hours. The raw materials to be used for this purpose were specified in the guarantee.

(*c*) That the hydrogenated product produced in this plant should be of prime white colour and completely tasteless and odourless and should not develop any smell whatsoever even after storing it in sealed containers for 6 months.

The contract was subsequently varied in certain other respects by correspondence between the parties, but no one of such variations is relevant for the purpose of this appeal.

On 1st January, 1939, the first appellants paid the first instalment of the price, amounting to 44,375 Reichmarks which was equivalent to Rs. 50,212. By an agreement dated 27th July, 1939, the first appellants agreed to sell to the second appellants all the right, title and interest of the first appellants in the plant and accessories comprised in the contract.

At the end of July or the beginning of August, 1939, delivery was made in Bombay of the greater part of the machinery comprised in the contract. The invoice value of this delivery was 1,58,000 Reichmarks which represents approximately nine-tenths of the total contract price. This consignment was accepted by the appellants without complaint and was taken by them to the place where the factory was to be erected. The second appellants, in accordance with Cl. 3-(b) of the contract set out above, paid to the sellers in respect of this delivery the sum of 39,500 Reichmarks, representing 25 per cent. of the 1,58,000 Reichmarks. 39,500 Reichmarks was the equivalent of Rs. 45,798. This payment and the payment made on the 1st January, together total 83,875 Reichmarks or Rs. 96,010. Against this total payment the appellants had received goods of the value, as the respondent alleges, of 158,000 Reichmarks, the equivalent of Rs. 1,83,200. The appellants had thus, as the respondent submits, at this stage received under the contract an " advantage " to the value of Rs. 87,190 being the difference between the value of the goods received by them under the contract and the amount which had been paid by them to the sellers.

Two further small consignments of machinery were despatched by the sellers from Germany, but these consignments had not arrived in India on 3rd September, 1939, when war was declared between the United Kingdom and Germany. The ships carrying these consignments did not reach India and no further deliveries under the contract were made. Section 65, Contract Act provides as follows :

" When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it or to make compensation for it, to the person from whom he received it."

Their Lordships agree with the following comment of Stone, C.J., upon this section :

" Compensation for an advantage may appear to be a contradiction in terms, since compensation connotes a measure of loss or damage and not the value of an advantage. It should be noted that in section 56 the expression used is ' compensation for any loss ' and that under section 64 the party rescinding the contract is to restore any ' benefit '. Under section 65 the alternatives are to restore any advantage ' or to make compensation for it to the person from whom he received it.' This must mean valuing or quantifying in money the advantage retained, if retained it be."

It is common ground between the parties that on the outbreak of war the contract in question " became void " within the meaning of section 65. It is also common ground that by virtue of the Enemy Property (Custody and Registration) Order, 1939, the property and assets of the sellers, both of whom were enemy firms within the definitions in R. 103, Defence of India Rules, became vested in the respondent (hereafter called " the Custodian ") as the Custodian of Enemy Property for British India.

On and after 14th September, 1939, certain correspondence took place between the second appellants on the one hand and the Custodian and certain other parties on the other hand. Reference must be made later to this correspondence. On 7th August, 1942, the Custodian made a formal claim against the first and second appellants for payment of the sum of Rs. 87,190 within eight days. No such payment was made, and the Custodian began the action out of which this appeal arises by his plaint dated 29th August, 1942. It is convenient to quote para 20 of the plaint :—

" 20. The plaintiff says that the defendants have admittedly received goods and machinery worth 1,58,000 Reichmarks equivalent to Rs. 1,83,200, which they have taken delivery of, and not only have they not offered at any time to return the same to the Sellers or to the plaintiff but they have actually used the same in erecting a plant and have been working the same. The plaintiff submits that the defendants are bound to pay to the plaintiff the value thereof less the said sum of Reichmarks

83,875 equivalent to Rs. 96,009-4-1 which they have already paid to the Sellers in terms of the contract as stated hereinabove. The plaintiff estimates the advantage received by the defendants under the circumstances aforesaid at Rs. 87,190 being the difference between the value of the machinery supplied to the defendants, *viz.*, Reichmarks 1,58,000 equivalent to Rs. 1,83,200 less the said sum of Reichmarks 83, 875 equivalent to Rs. 96,009-4-1 which the defendants have paid to the Sellers in terms of the said contract. The plaintiff submits that the defendants have in the events that have happened become liable to pay to him the said amount, either as compensation for the said advantage or otherwise and claims the same accordingly from the defendants."

The Custodian claimed the sum of Rs. 87,190 with interest and costs.

By their written statement the first and second appellants contested this claim. They also put forward a counter-claim which was abandoned by them at the trial of the action. Paragraph 15 of the written statement is as follows :

"15. With reference to para 20 of the plaint the defendants deny that they have received goods and machinery worth Rs. 1,83,200. Such parts of the goods and machinery as were delivered were valueless except as scrap material without the parts which remained to be delivered. Further the price contracted for includes the services of an expert erector and of a chief chemist. In order to make use of the goods and machinery delivered the defendants were compelled to procure parts to substitute for the missing parts and were put to an expense of Rs. 1,27,746. Many of the said parts so procured were inferior and some second hand and the machinery and plant as ultimately installed is of less value to the extent of Rs. 40,000 than the plant to be supplied and erected under the contract. The defendants say that if they derived any advantage from the goods and machinery delivered beyond the scrap value which was Rs. 10,000 such advantage was not of greater value than Rs. 23,113 whereas they have paid Rs. 96,009-4-1. The plaintiff has consequently received an advantage to the extent of Rs. 72,896-4-1 particulars of which sum are hereto annexed and marked No. I."

Blagden J, dismissed the suit and the counter-claim and the Custodian appealed from the dismissal of his suit. The High Court in its Appellate Jurisdiction (Stone C.J., and Kania, J.) allowed the appeal and gave judgment for the Custodian for the sum claimed with interest. From that decision the appellants appeal.

Apart from the terms of certain documents, which will be considered later, their Lordships feel no doubt that the decision of Blagden, J., was correct. The result of section 65, Contract Act, was that, as from 3rd September, 1939, each of the parties became bound to restore to the other any advantage which the restoring party had received under the contract of sale. In their Lordships' view, the custodian could not recover any sum in his action, as pleaded, unless he proved that the value of the "advantage" which the appellants had received under the contract, i.e., of the machinery which had been delivered to them, was greater than the sum of 83, 375 Reichmarks, that sum being admittedly an "advantage" which the Custodian had received under the contract. Moreover, in their Lordships' view, the value of the machinery which was delivered to the appellants, for the purposes of section 65 of the Act, must be taken to be the value of that machinery in India immediately after the contract had become void by reason of section 65. In estimating that value, a Court would have to take into account the fact that the balance of the machinery contracted to be supplied could not be supplied from Germany, and the fact that the appellants could no longer have the services of a qualified erector sent from Germany and of the sellers' Chief Chemist. Further, the Court would have to consider the question whether or not the appellants were able to procure from other sources the balance of the machinery contracted to be sent from Germany, and,, if so, at what price and within what period of time, and what quantity and quality of products could be produced by the plant so assembled.

In their Lordships' view the Custodian failed to prove before Blagden, J., that the machinery delivered was worth more than 83,375 Reichmarks. The only witness called on behalf of the Custodian was plainly not qualified by his experience to give expert evidence on the relevant question, and the learned Judge appears to have attached no importance to his evidence.

The appellants also called one witness, who gave evidence to the effect that the appellants bought the missing parts of the machinery, and that their factory "was made to run continuously on 27th July, 1941." He offered to produce a statement showing how the machinery worked in 1941 and 1942 but the Advocate-

General, who appeared for the Custodian, objected to the production of this statement and it was never in fact produced. At the conclusion of his judgment, Blagden, J., said :

> " The fact is that I have no satisfactory evidence in the present case that the defendants-purchasers or either of them have received an advantage under the contract which became void by the start of this war. They might have or might not. For the price they paid they got part of what they contracted for. Whether on the whole they put into their pockets more than they paid for, I think it is impossible to say. But if it were necessary for me to do so on this evidence I should be inclined to think that they did not, but it is sufficient to say that on the evidence in this case it is not proved that they have".

Their Lordships read this passage as meaning that in the view of the trial Judge the Custodian had failed to prove that the advantage which the appellants had received under the contract of sale was of a greater value than 83,875 Reichmarks. With this view they agree.

It remains however, to consider the effect of certain documents to which the appellate Court attached great importance. The first of them is a letter of 14th September, 1939, from the second appellants to the Deputy Controller of Enemy Firms. In that letter the writers refer to the receipt of " machineries worth R. M. K. 1,58,000 " but in their Lordships' view this phrase was merely a reference to the invoice price of the machinery so far delivered under the contract. Having regard to the terms of this letter as a whole, no part of it can fairly be construed as an admission that the machinery delivered was actually worth that sum, in the hands of the appellants, after the contract had become void and delivery of the balance of the machinery from Germany had become impossible. On 8th November, 1939, the second appellants wrote :

> " As you are aware there is a regular agreement between us by which you have first to fulfil certain guarantees before any further payments are made to you. These further payments have also been guaranteed by us through the Netherlands Trading Society and unless and until these guarantees are fulfilled by you, we do not see how you can make any claim on us for any further payments. Please also note that owing to the non-supply of machineries from your side and non-fulfilment of the terms of our agreement by you, we shall be put to great loss and damage for which our claim is outstanding against. The machineries already supplied to us are of no more use to us than scrap iron in the absence of the remaining machineries and of their erection and commercial working under your guarantees. Please, therefore, take immediate steps to supply us the remaining machineries and fulfil all the guarantees under the agreement dated 9th September, 1938".

At this time neither party seems to have realised the effect of Section 65, Contract Act, but it is to be noted that even at this early stage the appellants were raising the vital point as to the value of the machinery on their hands " in the absence of the remaining machineries and of their erection and commercial working under your guarantees." The same point is raised, in more detail, in a letter of 6th April, 1940, from the appellants to the Custodian. A form subsequently filled up by the second appellants, which is relied upon by the appellate Court as an admission was expressed to be :

> " subject to the terms and conditions of agreement dated 9th September, 1938, and to the details given and claims made by us in our letters 538 of 14th September, 1939 and 321 of 6th April, 1940, addressed by us to you and is without prejudice to our counter-claims for loss and damage caused to us by non-fulfilment of the guarantees given by Hansa (India) Trading Co., Ltd., in the agreement dated 9th September, 1938 ".

In these circumstances their Lordships can attach no importance to this form as an admission, nor can find any other document which constitutes an admission of the vital fact which had to be proved by the Custodian in order to achieve success in his action against the appellants. As this fact was not established, either by the evidence or by admission, it follows that the decision of Blagden, J., was right.

For these reasons, their Lordships will humbly advise His Majesty that this appeal should be allowed and the decree of Blagden, J., should be restored. The Custodian (respondent) must pay the appellants' costs here and in the appellate Court.

Solicitors for Appellants : *T. L. Wilson & Co.*

Solicitors for Respondent : *Solicitor, India Office.*

V.S. ——— *Appeal allowed.*

[PRIVY COUNCIL.]

(On appeal from the Federal Court of India[1])

PRESENT :—LORD SIMONDS, LORD NORMAND, LORD MORTON OF HENRYTON, LORD MACDERMOTT, SIR MADHAVAN NAIR AND SIR JOHH BEAUMONT.

H. H. B. Gill and another .. *Appellants**

v.

The King-Emperor .. *Respondent.*

Criminal Procedure Code (*V of* 1898), *section* 197 *and Government of India Act* (1935), *section* 270—*Sanction—Necessity—Test—Penal Code* (*XLV of* 1860), *sections* 161 *and* 165—*Public servant prosecuted for an offence under section* 161 *or with an offence under section* 120-*B read with section* 161 *or section* 165—*Sanction in respect of charge under section* 120-*B read with section* 420—*Alteration into one under section* 120-*B read with section* 161—*If necessitates fresh sanction—Operation of section* 230, *Criminal Procedure Code—Evidence Act* (I of 1872) *section* 10—*Admissibility of evidence—Conditions binding on the trial and appellate Courts.*

It is impossible to differentiate between section 197, Criminal Procedure Code and section 270 of the Government of India Act. The words in the two sections have precisely the same connotation. A public servant can only be said to act or to purport to act in the discharge of his official duty, if his act is such as to lie within the scope of his official duty. The test as to the necessity for sanction is whether the public servant, if challenged, can reasonably claim that, what he does he does in virtue of his office.

According to this test, no sanction under section 197, Criminal Procedure Code would be needed when a public servant is charged either with an offence under section 161, Penal Code or with an offence under section 120-B read with either section 161, 165 or 420 of the Penal Code.

Section 230 of the Criminal Procedure Code is clearly part of the code which becomes operative when once a sanction has been given under section 197. Hence, when sanction has been given in respect of a charge under section 120-B read with section 420, Penal Code and the charge is subsequently altered into one under section 120-B read with section 161, there would be no necessity for a fresh sanction where the original complaint refers to facts which may equally support either of the charges.

Just as a trial judge may admit evidence under section 10, Evidence Act, when he has such a reasonable ground or belief as is postulated, yet must reject it if at a later stage of the trial that reasonable ground of belief is displaced by further evidence, so the appellate Court when it has no such belief at all, refuse also to admit evidence which was admissible only upon the footing of the belief being entertained. It is not correct to say that in a conspiracy charge, evidence once admitted remains admissible evidence whatever new aspect the case may bear whether in the original or appellate Court.

Sir Valentine Holmes, K.C. and *Pullan* for Appellant.

Sir Walter Monckton, K.C. and *J. Megaw* for Respondent.

Their Lordships' judgment was delivered by

LORD SIMONDS.—This appeal which is brought from a judgment of the Federal Court of India[1] dated the 11th December, 1946, raises questions of difficulty and general importance. They relate in the first place to the problem which has so often been debated in the Courts of India in regard to the meaning and effect of section 197 of the Code of Criminal Procedure and in the second place to the admissibility of evidence upon a charge of conspiracy.

The nature of the case demands that the facts should be set out at some length.

As a result of the judgment now under appeal the Appellants H.H.B. Gill and A. Lahiri stand convicted for offences under section 165 read with section 120-B of the Indian Penal Code.

The appellant Gill joined the Indian Army Ordinance Corps in December, 1939. He was appointed Staff Captain in the Contracts Directorate from January 1940 and in April, 1941, he was given the temporary rank of Major as Deputy Assistant Director of Contracts at Calcutta. In this office he was responsible for the issue and acceptance of tenders for purchase of material in compliance with indents made by the proper authorities.

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*P.C. Appeal No. 57 of 1947. 17th February, 1948.

[1] (1947) 1 M.L.J. 129 : 1946 F.L.J. 112.

The Appellant Lahiri is the proprietor of the Baranagore Engineering Works. In that capacity he obtained numerous contracts for supplying Government requisites through the appellant Gill and other officers.

As a result of secret enquiries which, for reasons that need not be further investigated, the Deputy Superintendent of Police, Calcutta, thought fit to make into the affairs of Gill. It was found that Gill had on the 21st May, 1941, received from Lahiri a cheque for Rs. 500. A search warrant was then obtained for the search of Lahiri's house. The warrant was executed on the 11th October, 1942, and the police took possession of a diary kept by Lahiri and of the counterfoils of his cheque book in which there were notes purporting to refer to Gill in the handwriting of Lahiri. Upon these materials with others to which reference will be made, it was determined that criminal proceedings should be instituted against Gill and Lahiri and accordingly steps were taken to obtain what were thought (so far as Gill was concerned) to be the necessary consent and sanction under section 270 of the Government of India Act, 1935, and section 197 of the Code of Criminal Procedure as amended by the Government of India (Adaptation of Indian Laws) Order, 1937. It is convenient to set out these sections. They are as follows :—

Section 270 of the Government of India Act (1935).

" *Indemnity for Past Acts.*—(1) No proceedings civil or criminal shall be instituted against any person in respect of any act done or purporting to be done in the execution of his duty as a servant of the Crown in India or Burma before the relevant date, except with the consent, in the case of a person who was employed in connection with the affairs of the Government of India or the affairs of Burma, of the Governor-General in his discretion, and in the case of a person employed in connection with the affairs of a Province, of the Governor of that Province in his discretion".

Section 197 of the Code of Criminal Procedure (as amended).

" (1) When any person who is a Judge within the meaning of section 19 of the Indian Penal Code, or when any Magistrate, or when any public servant who is not removable from his office save by or with the sanction of a Provincial Government or some higher authority, is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction—

(A) in the case of a person employed in connection with the affairs of the Federation, of the Governor-General exercising his individual judgment ; and

(B) in the case of a person employed in connection with the affairs of a Province, of the Governor of that Province exercising his individual judgment,

(2) The Governor-General or Governor, as the case may be, exercising his individual judgment may determine the person by whom, the manner in which the offence or offences for which, the prosecution of such Judge, Magistrate or public servant is to be conducted, and may specify the Court before which the trial is to be held.

(3) In relation to the period elapsing between the commencement of Part III of the Government of India Act, 1935, and the establishment of the Federation, the references in this section to the Federation and to the Governor-General exercising his individual judgment shall be construed as references to the Governor-General in Council ".

On 28th January, 1943, the consent of the Governor-General under section 270 was given to the institution of proceedings against Gill in the following terms:—

" Under section 270 (1) of the Government of India Act, 1935, I, Victor Alexander John Marquess of Linlithgow, acting in my discretion consent to the institution of criminal proceedings against Major H.H.B. Gill, formerly Deputy Controller of Purchase, Supply Department, Calcutta for having Committed during the years 1941 and 1942 offences punishable under section 161 and section 120-B read with section 420 of the Indian Penal Code ".

On the 3rd February, 1943, Sanction of the Governor-General in Council under section 197 of the Code of Criminal Procedure was given in similar terms.

It is to be observed that the sanctions refer to " offences punishable under section 161 and section 120-B read with section 420 of the Indian Penal Code " and it is convenient here to set out these sections together with section 120-A and section 165 of the Indian Penal Code which are also relevant :

" 120-A. *Definition of Criminal Conspiracy.*—When two or more persons agree to do, or cause to be done—

(1) an illegal act, or

(2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy :

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation.—It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object.

120-B. *Punishment of Criminal Conspiracy.*—(1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, transportation or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in this Code for the punishment of such conspiracy, be punished in the same manner as if he had abetted such offence.

(2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six months, or with fine, or with both.

Section 161. Whoever, being or expecting to be a public servant, accepts or obtains, or agrees to accept, or attempts to obtain from any person for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person, or for rendering or attempting to render any service or disservice to any person, with the Legislative or Executive Government of India, or with the Government of any Presidency, or with any Lieutenant Governor, or with any public servant, as such, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Explanations.—" Expecting to be a public servant ". If a person not expecting to be in office obtains a gratification by deceiving others into a belief that he is about to be in office, and that he will then serve them, he may be guilty of cheating, but he is not guilty of the offence defined in this section.

" *Gratification* ".—The word " gratification " is not restricted to pecuniary gratification, or to gratifications estimable in money.

" Legal remuneration " : The words " legal remuneration " are not restricted to remuneration which a public servant can lawfully demand, but include all remuneration which he is permitted by the Government, which he serves, to accept.

" A motive or reward for doing ". A person who receives a gratification as a motive for doing what he does not intend to do, or as a reward for doing what he has not done, comes within these words.

Section 165 : Whoever being a public servant, accepts or obtains, or agrees to accept or attempts to obtain, for himself, or for any other person any valuable thing without consideration or for a consideration which he knows to be inadequate :

from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted or about to be transacted by such public servant, or having any connection with the official functions of himself or of any public servant to whom he is subordinate ;

or from any person whom he knows to be interested in or related to the person so concerned ;

shall be punished with simple imprisonment for a term which may extend to two years, or with fine or with both.

SECTION 420.—*Cheating and dishonestly inducing delivery of Property.*—Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

These sanctions having been obtained, on the 25th February, 1943, the Deputy Superintendent of Police filed a complaint in the Court of the Chief Presidency Magistrate, Calcutta, and it appears to their Lordships that it is relevant to observe that the complaint refers to a number of facts which the police purported to have then discovered and that while, as has already been stated, the sanctions related only to offences (*a*) under section 161 and (*b*) under section 120-B read with section 420, the same facts or some of them would appear equally to support charges under section 120-B read with section 161 or with section 165

On the 4th May, 1943, the Chief Presidency Magistrate (Mr. R. Gupta) framed the following charges :

1. Against Gill and Lahiri.

" That you, between March 1941 and July, 1942, along with others unknown, at Calcutta and other places were parties to a criminal conspiracy to cheat the Government of India in the Department

of Supply by dishonestly or fraudulently inducing its Financial Officers to pay larger sums of money than due to you Anil Lahiri of Baranagore Engineering Works in respect of contracts for the supply of Anti-gas Respirator Spring Compressor No. 3 and Decking Spikes by means of false representation regarding the acceptability of the rates quoted by Baranagore Engineering Works and character and capacity of supply made by them in preference to those of other firms and you thereby committed an offence punishable under section 120-B read with section 420 of the Indian Penal Code and within my cognizance."

2. Against Gill only.

"That you on or about the 21st day of May, 1941, at Calcutta, being a public servant to wit, Deputy Controller of Purchase in the Department of Supply, Government of India, obtained from Anil Lahiri of Baranagore Engineering Works Rs. 500 (Rupees Five hundred) by encashment of cheque (Exhibit 4) as gratification other than legal remuneration for showing in the exercise of your official functions favour to the said Anil Lahiri in the matter of the contract for the supply of Anti-gas Respirator Spring Compressor No. 3 and you thereby committed an offence punishable under section 161 of the Indian Penal Code and within my cognizance."

3. Against Lahiri only.

"That you on or about the 21st day of May, 1941, at Calcutta, abetted Major H. H. B. Gill in the commission of the offence under section 161 of the Indian Penal Code by paying him Rs. 500 by cheque (Exhibit 4) as gratification other than legal remuneration for showing, in the exercise of his official functions as Deputy Controller of Purchase, favour to your firm Baranagore Engineering Works in the matter of the contract for the supply of Anti-gas Respirator Spring Compressor No. 3, which offence was committed in consequence of your abetment and you thereby committed an offence punishable under section 109 read with section 161 of the Indian Penal Code and within my cognizance."

It has not been disputed that these charges at least were framed strictly in accordance with the consent and sanction given. It has, however, been urged by learned counsel for Gill that it was not competent for the Magistrate to try the appellants upon any other charges or for any other offences. To this matter their Lordships will recur.

On the 29th June, 1943, both Gill and Lahiri were examined and made statements under section 342 of the Code of Criminal Procedure and on the 19th August, 1943, the Chief Presidency Magistrate gave judgment. He held that the charge of conspiracy under section 120-B read with section 420 had not been establised and acquitted both the accused. On the second charge also against each of the accused under section 161 he found that the evidence fell short of the standard required to convict: he, therefore, acquitted them both.

An appeal against this order of acquittal was preferred by the Superintendent and Remembrancer of Legal Affairs, Bengal, to the High Court of Judicature at Fort William in Bengal. It was heard on the 8th December, 1944, by Roxburgh and Ormond, JJ., who made an order in the following terms :—

"The order of acquittal is set aside and the case is remanded to the Chief Presidency Magistrate for trial on an amended charge of conspiracy to take (*sic*) and receive bribes and also on the charges under sections 161 and 161/109 of the Indian Penal Code as previously framed."

It may be noted parenthetically that section 109 refers to abetment.

Thus section 420 drops out of the conspiracy charge and section 161 takes its place.

No further sanction under the sections already cited was obtained or asked for.

On the 22nd June, 1945, Mr. Palmer, who had succeeded Mr. Gupta as Chief Presidency Magistrate, framed a new charge of conspiracy in the following terms :—

"That you between March, 1941 and July, 1942, at Calcutta and elsewhere were parties to a criminal conspiracy with the object of you Major (now Captain) H. H. B. Gill being a public servant to wit, the Deputy Controller of Purchases in the Department of Supply, to accept from you Anil Lahiri a contractor in the name of Baranagore Engineering Works and you Anil Lahiri to give to the said Major (now Captain) H. H. B. Gill gratifications other than legal remuneration as a motive or reward for showing in the exercise of you Major Gill's official functions, favours or for rendering or attempting to render any service to you the said Anil Lahiri in the matter of your contracts for the supply of Anti-gas Respirators Spring Compressors and Decking Spikes and in consequence thereof offences punishable under section 161 of the Indian Penal Code were committed, and you Major (now Captain) H. H. B. Gill and Anil Lahiri thereby committed an offence punishable under section 120-B read with section 161 of the Indian Penal Code."

The separate charges under section 161 and section 161/109 (which related to the cheque for Rs. 500) were retained unaltered.

Upon these charges, old and new, Gill and Lahiri were duly tried. A large number of witnesses gave evidence for the prosecution. Both Gill and Lahiri were examined by the learned Magistrate under section 342 of the Code of Criminal Procedure, while Gill also put in a written statement and an additional written statement. Amongst the evidence adduced by the prosecution and admitted by the Court, were the diary and cheque counterfoils and notes to which reference has already been made. That these documents which will be compendiously referred to as " Lahiri's notes ", were evidence against Lahiri is not denied. Nor is it to be denied that they would be at least cogent evidence against Gill, if against him they were admissible. The question which must be presently considered is whether they are admissible against him.

On the 13th August, 1945, the Chief Presidency Magistrate gave judgment, and, in view of the importance which upon one part of the case this matter has assumed, it is relevant to note how he dealt with Lahiri's notes.

" These payments," he said, " do not form the subject of separate charges, but evidence of these payments has been let in firstly as proof of the conspiracy and secondly under sections 14 and 15 of the Evidence Act as facts tending to show the intention or lack of good faith of the parties in connection with the payment of Rs. 500 in May, 1941, which forms the subject matter of the separate charge."

In the result the learned Magistrate, while disbelieving the explanation given by the defence in regard to the cheque for Rs. 500 (the subject of the separate charge), did not consider that an offence had been proved under section 161 but held that it was quite clear that an offence under section 165 had been committed. Accordingly without formally amending or reframing the charges, he convicted both Gill and Lahiri of conspiracy under section 120-B read with section 165 and he also convicted Gill on the separate charge under section 165 and Lahiri on the separate charge under section 165 read with section 109. He sentenced Gill to simple imprisonment for three months and to a fine of Rs. 210 under section 165 and Lahiri to a similar term and fine. He passed no separate sentence on the conspiracy charge.

Both Gill and Lahiri appealed to the High Court against conviction and sentence, while the Provincial Government applied for enhancement of sentence. By its judgment dated the 12th April, 1946, the High Court (Blank and Ellis, JJ.) set aside the convictions on the separate charges but maintained the convictions on the charge of conspiracy under section 165 read with section 120-B and sentenced each of the accused to three months' simple imprisonment. The opinion of the High Court in regard to the separate charge may be summarised by saying that in the view of the Court the accused had given an explanation of the transaction, the truth of which it was not for them to prove beyond all reasonable doubt, and that on the evidence it was not possible to find that the transaction was more than suspicious. If so, it appears to their Lordships to follow that the High Court neither disbelieved the explanation nor (which comes to the same thing) thought that there was reasonable ground for disbelieving it. In the case of the High Court also it is important to note how Lahiri's notes were dealt with.

" In our opinion," they said, " the entries in the notebook together with the entries in the counterfoils are explicable only on the hypothesis that Lahiri gave the amounts mentioned to Gill and we agree therefore with the learned Magistrate's finding that the conspiracy is established."

This makes it clear that Lahiri's notes were admitted as evidence not only against Lahiri but also against Gill on the conspiracy charge, and the question at once arises upon what ground they were so admissible.

The High Court also had to consider the questions of general importance indicated earlier in this judgment. They were (1) whether sanction was necessary to the institution of proceedings against Gill and (2) assuming that it was necessary whether the sanctions in fact given justified cognizance being taken of the altered charges under section 161 read with section 120-B and further whether in any event sentence for an offence under section 165 read with section 120-B could be justified.

Upon these questions the High Court held (*a*) that sanction was not necessary under section 270 of the Government of India Act, (*b*) that sanction was necessary under section 197 of the Code of Criminal Procedure, but that (*c*) the sanction in fact given was sufficient to cover the subsequent proceedings. Their view was that when the sanction had been granted :

> " the bar of taking cognizance was lifted . . . . and thereby the provisions of the Code of Criminal Procedure were attracted."

And they held that all subsequent proceedings were authorised by that Code.

After some delay owing to an abortive petition to this Board which was dismissed on the ground that the High Court had not withheld its certificate under section 205 of the Government of India Act, 1935, Gill and Lahiri, having obtained the proper certificate, appealed from the judgment of the High Court to the Federal Court of India.

On the 11th December, 1946, the Federal Court (Spens, C.J. and Zafrulla Khan and Kania, JJ.[1]) dismissed both appeals and it is convenient to state what matters appear to have been raised before that Court and how they were dealt with.

In the first place the Court (whose judgment was delivered by Zafrulla Khan, J.) dealt with the so-called constitutional question which arose under section 270 of the Government of India Act. The Court held that no consent was necessary for the institution of proceedings in respect of an offence under section 120-B read with section 161

> " Inasmuch as an agreement by a public servant to receive illegal gratification and the receipt of such gratification by him cannot be said to be acts done or purporting to be done in the execution of duty."

In coming to this conclusion the Court followed its own earlier decision in *Huntley's case*[2]. Secondly (though earlier in its own judgment) the Court held that, even if sanction under section 270 was necessary, the sanction given was adequate and no further sanction was necessitated by the order of the High Court whereby the case was remanded for trial on fresh charges.

Next with regard to the sanction under section 197 of the Code of Criminal Procedure, the Court, while thinking it unnecessary to discuss or determine the necessity for such sanction, was of opinion that (as in the case of the sanction under section 270) the sanction which was in fact given enabled the Chief Presidency Magistrate to take cognizance of the offences set out in the sanction and that the subsequent course of the proceedings would be regulated and was justified by the relevant provisions of the Code of Criminal Procedure. The Court did not specifically refer to section 230 of that Code, which deals with the question of a new or altered charge in cases where sanction is necessary, but their Lordships do not doubt that it was this section (amongst others) that the Court had in mind.

Finally the Court dealt with the competence of the Magistrate to record a conviction under section 120-B read with section 165 when the charge was for an offence under section 120-B read with section 161 and after a close analysis of the relevant offences held that under section 238 of the Code such a course was justified.

The Court stated that no other issue was raised before it. This statement was challenged by counsel for the appellants who urged that at any rate an attempt had been made to argue the question arising upon the admissibility of evidence to which reference has been made.

From the order of the Federal Court an appeal has by special leave been brought and has now to be considered by their Lordships and they would first observe that, inasmuch as there was not (as is sometimes done) any special limitation imposed upon the subject-matter of appeal, it must be open to the appellants to rely upon any ground of appeal which would normally be open to them. They do not think it right therefore, to exclude the argument upon the admissibility of evidence, which in truth is not only of vital interest to the appellants but also raises a question of general importance.

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1. (1947) 1 M.L.J. 129 : 1946 F.L.J. 112. (1944) F.C.R. 262.
2. (1944) 1 M.L.J. 503 : (1944) F.L.J. 167 :

Upon the questions raised before the Federal Court their Lordships are of the following opinion.

The necessity of a sanction under section 270 of the Government of India Act was expressly disclaimed by counsel for the appellants. It is sufficient, therefore, for their Lordships to say that they see no ground for challenging the decision of the Federal Court in *Huntley's case*[1], which in this case the Court has followed. If this is so, it is unnecessary to consider the scope of the sanction that was in fact given.

The Federal Court has not expressed an opinion upon the necessity of a sanction under section 197 of the Code, but, as the High Court has expressed the view that such a sanction was in this case necessary and upon this much-vexed question the Board has heard full argument, their Lordships think it right to express their own view.

In the first place their Lordships find it impossible at least in relation to an offence of this character to distinguish between section 270 and section 197. The words in section 270

"In respect of any act done or purporting to be done in the execution of his duty as a servant of the Crown"

appear to them to have precisely the same connotation as the words in section 197 (1):

"Any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty."

It is idle to speculate why a change of language was made. But, if a temporal meaning is not given, as in their Lordships' view it clearly should not be given, to the words in section 197 "while acting, etc.", it is in their opinion impossible to differentiate between the two sections. In the consideration of section 197 much assistance is to be derived from the judgment of the Federal Court in *Hori Ram Singh* v. *R.*[2] and in particular from the careful analysis of previous authorities which is to be found in the opinion of Varadachariar, J. Their Lordships, while admitting the cogency of the argument that in the circumstances prevailing in India a large measure of protection from harassing proceedings may be necessary for public officials, cannot accede to the view that the relevant words have the scope that has in some cases been given to them. A public servant can only be said to act or to purport to act in the discharge of his official duty, if his act is such as to lie within the scope of his official duty. Thus a Judge neither acts nor purports to act as a Judge in receiving a bribe, though the judgment which he delivers may be such an act: nor does a Government medical officer act or purport to act as a public servant in picking the pocket of a patient whom he is examining, though the examination itself may be such an act. The test may well be whether the public servant, if challenged, can reasonably claim that, what he does, he does in virtue of his office. Applying such a test to the present case, it seems clear that Gill could not justify the acts in respect of which he was charged as acts done by him by virtue of the office that he held. Without further examination of the authorities their Lordships, finding themselves in general agreement with the opinion of the Federal Court in the case cited, think it sufficient to say that in their opinion no sanction under section 197 of the Code of Criminal Procedure was needed.

This being their opinion, it is not strictly necessary to consider the second point that was raised, *viz.*, whether, if a sanction was necessary, the subsequent proceedings were justified by the sanction that was in fact given. But they think it desirable to say that upon this question they fully concur in the judgment of the Federal Court in this case. Section 230 of the Code of Criminal Procedure is clearly part of the Code which becomes operative when once a sanction has been given under section 197, and, as has been pointed out in the earlier part of this judgment, the whole of the facts, which would justify equally a charge under section 120-B read

1. (1944) 1 M.L.J. 503 : (1944) F.L.J. 167 : (1944) F.C.R. 262.

2. (1939) 2 M.L.J. Supp. 23 : (1939) F.C.R. 159.

with section 420 and a charge under section 120-B read with section 161, are stated in the complaint originally filed by the Deputy Superintendent of Police which at the same time exhibited the sanctions already obtained. It is an inference, which at this late stage of the proceedings cannot properly be challenged, that the same facts were before the sanctioning authority when the sanction was given. If it was desired to raise such a question, that should have been done at the earliest moment when the prosecution could have supported by evidence the inference which even without it can fairly be drawn. Their Lordships were pressed by learned counsel for the appellants with the recent decision of the Board in *Moraka's case*, (unreported) but in that case the facts were wholly different and the decision gives no help to the appellants. Their Lordships are, therefore, of opinion that, if any sanction under section 197 was necessary, such sanction was given as justified the Court in taking cognizance of the altered charges.

The question then arises whether the Court, having proper cognizance of the proceedings, ought to have convicted the appellants of conspiracy and for the purpose of this question it is immaterial whether the conviction was under section 120-B read with section 161 or with section 165. It is here necessary to re-capitulate certain facts. The learned Chief Magistrate found the appellants guilty of the specific charges alleged against them under section 161. And it may well be that, disbelieving the explanation which Gill gave of the transaction the subject of that charge, he had reasonable ground in connection with the conspiracy charge for believing that Gill and Lahiri had conspired to commit the offence which was the subject of that charge, so that under section 10 of the Indian Evidence Act the notes made by Lahiri were admissible in evidence against Gill. That section, so far as relevant, provides that where there is reasonable ground to believe that two or more persons have conspired together to commit an offence, anything written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by one of them, is a relevant fact against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it. But it must be observed (*a*) that apart from the evidence relevant to the specific charge there was no other competent evidence upon which such reasonable ground for belief could be rested and (*b*) that the notes were clearly not admissible against Gill unless section 10 could be invoked. It was plainly admitted by counsel for the respondent that it was upon section 10 only that he relied for the admission of such evidence, though it is not clear what course was taken in this respect in the Courts of India. Upon the case going to appeal, the High Court accepted or at least did not reject the explanation given by Gill in regard to the specific charge, and having accepted it were left with nothing upon which they could found the belief that Gill and Lahiri were conspiring to commit an offence. But without this belief they could not under section 10 justify the admission of Lahiri's notes as evidence against Gill and without such evidence they had no material upon which they could convict him of conspiracy. The case undoubtedly presents some curious features and learned counsel were not able to refer their Lordships to any case in the Courts of India where a similar set of circumstances had been reviewed. But it appears to their Lordships that just as a trial Judge may admit evidence under section 10, when he has such a reasonable ground of belief as is postulated, yet must reject it if at a later stage of the trial that reasonable ground of belief is displaced by further evidence, so the appellate Court, which has from the outset refused that belief, must refuse also to admit evidence which was admissible only upon the footing of the belief being entertained. It is not the true view that in a conspiracy charge of this kind evidence once admitted remains admissible evidence whatever new aspect the case may bear whether in the original or the appellate Court.

Applying this principle to the present case, their Lordships are of opinion that the conviction of Gill cannot be sustained and, since the charge is one of conspiracy, it follows that Lahiri's conviction also falls.

In this view of the case it is unnecessary to consider the final question that was raised whether, upon the assumption that the Court had proper cognizance of the case, a conviction could be recorded not under section 120-B read with section 161 but under section 120-B read with section 165 and their Lordships express no opinion upon it.

For the reasons above appearing their Lordships will humbly advise His Majesty that these appeals should be allowed and the convictions of the appellant Gill and the appellant Lahiri under section 120-B read with section 165 of the Penal Code quashed.

Solicitors for Appellants : *W. W. Box & Co.*

Solicitor for Respondent : *Solicitor, High Commissioner for India.*

V.S. *Appeal allowed.*

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Lahore.)

PRESENT :—LORD SIMONDS, LORD NORMAND AND LORD MACDERMOTT.

The Commissioner of Income-Tax, West Punjab, N.W.F. and Delhi Provinces, Lahore .. *Appellant.**

v.

The Tribune Trust, Lahore .. *Respondent.*

Income tax Act (XI of 1922), sections 4 (3) (i), 33 and 66 (2)—Assessment validly made—If rendered a nullity because it may be held invalid, if challenged in appeal—Tax payer's remedies apart from the Act based on principles of equity and good conscience—Incompatibility with the scheme of the Act—Scope of section 33 of the Act—If confers a general relief—Section 66 (2)—Reference—Order under section 33—Competency—Test.

An assessment duly made which may ultimately be held to be invalid in that it does not give effect to the provision for exemption contained in section 4 (3)(*i*) of the Income-tax Act, is not thereby rendered a " nullity."

The Income-tax Act exhaustively defines the obligations and remedies of the tax-payer. It would be incompatible with this that he should have a collateral right, necessarily vague and ill-defined, founded on the principles of equity and good conscience. The only remedies of the tax-payer, whether in regard to appeal against assessment or to claim for refund, are to be found within the four corners of the Act. It is the Act which prescribes both the remedy and the manner in which it may be enforced.

Section 33 of the Income-tax Act creates no right in the assessee. In its language and in its context it appears ill-designed for such a purpose. It follows upon a number of sections which determine the rights of the assessee and is itself, as its language clearly indicates, intended to provide administrative machinery by which a higher executive officer may review the acts of his subordinates and take the necessary action upon such review. It cannot be interpreted as conferring a general relief.

A reference under section 66 (2) would not lie from an order under section 33 unless that order is prejudicial to the assessee. An order can only be said to be prejudicial to the assessee when he is, as a result of it, in a different and worse position than that in which he was placed by the order under review.

In respect of the assessment for the year 1932-33, the assessee claimed an exemption under section 4 (3) (*i*) of the Income-tax Act. The matter was finally decided by the Privy Council in favour of the assessee. Meanwhile, during the pendency of the appeal to the Privy Council assessments continued to be made in respect of the same property till 1938-39 disallowing the claim for an exemption and they not having been appealed against, became final before the decision of the Privy Council. After the Privy Council allowed the claim of the assessee in respect of 1932-33 the assessee applied to the Commissioner under section 33 of the Income-tax Act to re-open the assessments for those years and to quash the assessments as they had become a nullity in view of the Privy Council decision holding that the assessee's property was exempt from taxation by virtue of section 4 (3) (*i*) of the Act. It was rejected by the Commissioner. On a case being stated on the direction of the High Court,

Held : The assessments were duly made by the Income-tax officer in the exercise of his duty and could not be said to be a nullity merely on the ground that if they had been challenged in due time they might have been set aside.

The assessee was not entitled to claim a right to general relief under section 33.

The reference was incompetent from the outset as the order of the Commissioner on the assessee's application under section 33 was not prejudicial to the assessee in the sense that after the order it was in a worse position than before the order was made.

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*Privy Council Appeal No. 83 of 1946. 14th October, 1947.

J. M. Tucker, *K.C.* and *B. Sen* for Appellant.

C. L. King, *K.C.* and *R. K. Handoo* for Respondent.

Their Lordships' Judgment was delivered by

LORD SIMONDS.—This appeal is brought from a judgment of the High Court of Judicature at Lahore dated 23rd March, 1944 which was delivered on a reference made by the Commissioner of Income-tax, West Punjab, N.W.F. and Delhi Provinces under section 66 (3), Income-tax Act (XI of 1922) pursuant to a mandamus issued by the same Court on 3rd April, 1941. The appeal raises somewhat complicated questions of procedural and substantive law and it is necessary to state the facts at some length. The respondents, the Tribune Trust, which will generally be referred to as "the respondents", was created by one Sardar Dayal Singh in the year 1898 and it appears to have been assessed to, and to have paid, income-tax on the income profits or gains of its property, from the year 1917-18 to the year 1931-32. But in respect of its assessment for the year 1932-33 it raised an objection on the ground that it was exempt from taxation by virtue of section 4 (3) (*i*), Income-tax Act already mentioned, which provides,

"This Act shall not apply to the following classes of income :—(i) any income derived from property held under trust or other legal obligation wholly for religious or charitable purposes. . . . ."

This claim led to a reference to the High Court of Judicature at Lahore under section 66 of the Act. That Court, on 4th June, 1935, held, contrary to the contention of the respondent that its income was not exempt from tax. The respondent appealed to His Majesty in Council, and this Board, after referring the matter back to the Commissioner for further findings of fact, on 13th June, 1939, reversed the judgment of the High Court and held that the income, in respect of which the respondent had been assessed for the year in question, was exempt from tax. Their Lordships' decision is reported in *Tribune Press Trustees, Lahore* v. *Income-tax Commissioner*[1].

The assessments of the respondent's income for the years subsequent to 1932-33 were held in abeyance pending the judgment of the High Court in the matter of the assessment for that year, but after its judgment in June, 1935, assessments were completed in accordance therewith and payments were duly made by the respondent in respect of the assessments for the years 1933-34, 1934-35, 1935-36, 1936-37, 1937-38, 1938-39, and also in respect of supplementary assessments for the years 1931-32 and 1936-37.

The history of these assessments is briefly as follows :—

1931-32.—A supplementary assessment was made under section 23 (4) read with section 34 of the Act on 14th November, 1936. An appeal to the Assistant Commissioner was dismissed as no appeal from an order under section 23 (4) was then competent, and an application to the Commissioner under section 33 was also rejected.

1933-34 and 1934-35.—Orders of assessment were passed under section 23 (3) on 4th of September, 1935. The respondent appealed to the Assistant Commissioner under section 31 and its appeals were rejected on 31st August, 1936. No further action was taken by the respondent.

1935-36.—The assessment was made under section 23 (3) on 27th January, 1936. No appeal was filed.

1936-37.—The assessment was made under section 23 (3) on 11th November, 1937. An appeal was rejected by the Assistant Commissioner on 14th May, 1938. No further action was taken by the respondent.

1937-38.—The assessment was made under section 23 (3) on 26th January, 1938. No appeal was filed.

1938-39.—The assessment was made under section 23 (3) on 26th October, 1938. No appeal was filed.

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1. (1939) 2 M.L.J. 444 : L.R. 66 I.A. 241 : I.L.R. 1939 Lah. 445 (P.C.).

The relevant dates of the different stages of these assessments are tabulated below :—

Assessment year.	Date of Assessment Order.	Date of payment.	Appellate order dismissing appeal.
1931-32 supplementary	24—11—36	22— 1—37	22—7—37
1933-34 ..	4— 9—35	21—10—35	31—8—36
1934-35 ..	4— 9—35	21—10—35	31—8—36
1935-36 ..	27—11—36	4— 1—37	..
1936-37 ..	11— 9—37	4—10—37	14—5—38
1936-37 supplementary	26—10—38	8—12—38	..
1937-38 ..	26— 1—38	26— 3—38	..
1938-39 ..	26—10—38	7— 1—38	..

It is not disputed that all these assessments had been made and had become final and conclusive before this Board gave its decision in respect of the assessment for the year 1932-33. On 30th August, 1939, the respondent wrote to the Commissioner of Income-tax, the present appellant, submitting that in view of this decision of the Board all the assessments above mentioned should be cancelled. The material part of his letter is as follows :—

"In this connection I have further to submit that in view of the same order our assessment for the years referred above should also stand cancelled. You will, therefore, very kindly review those orders and grant us the refund due to us. All these assessments with the exception of supplementary one made under section 34 for the year 1931-32, relate to the years subsequent to the year for which our appeal has been accepted by the Privy Council. The supplementary assessment for the year 1931-32 was also made after the year 1932-33 and as such that too was illegal and has to be set aside. For your convenience I have prepared a statement showing the refund due to us for the remaining years."

This letter was followed by a letter dated 25th October, 1939, from the respondent's advocate in which he requested that the appellant would treat the earlier letter "as a joint petition under section 33, Income-tax Act" and praying that the assessments in question might be quashed.

At this stage it is relevant to note precisely what course the Commissioner took; for some argument has been founded upon it. He appears to have treated it as a matter of course that his consideration of the matter should be invoked under section 33 and he made an order, so describing it, on 23rd November, 1939, in the following terms :—

"In accordance with the recent decision of the Privy Council a refund has been granted to the assessees in respect of their assessment for the year 1932-33. The present petition relates to the assessments for 1931-32 (supplementary), 1933-34, 1934-35, 1935-36, 1937-38 and 1938-39. It was open to the assessees to keep those assessments alive by having them included in the reference to the Privy Council. As they did not do so, I can see no reason for re-opening the assessments at this stage."

Their Lordships will at a later stage comment on the terms of this order. Disappointed by this failure, the respondent on 22nd January, 1940, filed seven petitions (one in respect of each asssessment) to the appellant praying him to state a case and refer it to the High Court at Lahore under section 66 (2) of the Act on two questions of law which were said to arise under the said order. These questions were in substance (1) whether the assessments in question should not have been quashed under section 33 of the Act in view of the decision of the Privy Council in regard to the 1932-33 assessment and (2) whether the order of 23rd November, 1939, refusing to re-open the assessments was legally correct. On 9th April, 1940, the Commissioner dismissed these petitions declining to state a case as in his opinion there was no question of law arising which was a proper subject for reference under the section. To this aspect of the case their Lordships will later recur.

The respondent then moved the High Court by seven separate applications (one in respect of each asessment) praying that the Commissioner might be required under section 66 (3) of the Act to state a case on certain questions which were alleged to arise out of his said order of 23rd November, 1939. On 3rd April, 1941, the High Court acceded to these applications and directed the Commissioner to state a case for reference under section 66 upon the following questions which it thus reformulated :—

"(A) Whether there were any remedies open to the assessee by which he could have kept the assessments alive for the purposes of demanding a refund under section 33 ?

(B) Whether the matter of the assessability of the assessee was not *res judicata* by reason of the Privy Council decision . . . . ?

(C) Whether, in view of the matter between the parties being assessability of the assessee assessments made subsequent to the year 1932-33 are not *ultra vires* and therefore no assessment in the eye of the law at all ? "

Pursuant to this direction the Commissioner on 1st April, 1943, stated a case and in effect gave his opinion upon the several questions as follows :—(*A*) Yes ; (*B*) Not as regards any assessment except that for the year 1932-33 ; (*C*) the assessments were not *ultra vires*. He also made some further observations upon the question whether in the circumstances of the case a reference lay, and made a preliminary submission that it did not lie. The reference was duly heard by the High Court and on 3rd March, 1944, judgment was delivered by Din Mohammad, J., with whom Sale, J., agreed. It is significant of the difficulties of the case that once more the questions were formulated and were re-stated in the following form :

"(1) Whether the assessments made subsequent to the years 1932-33 including the supplementary assessment for the year 1931-32 were a nullity in view of the decision of their Lordships of the Privy Council . . . . . ?

(2) Whether the Commissioner of Income-tax acted improperly in refusing to exercise the discretion vested in him to cancel the said assessments and to order the repayment of the sums received from the assessees on account of those assessments ?

(3) Whether the assessees could be denied the relief claimed by them under section 33, Income-tax Act, on any valid ground ? "

The High Court rejected the preliminary submission of the Commissioner holding that its own previous decision on this matter could not be questioned and upon the questions as restated in the case held in favour of respondent (1) that the assessments in question were a nullity, (2) that the Commissioner had acted improperly in refusing to exercise the discretion referred to and (3) that the respondent could not be denied the relief claimed by him under section 33 on any valid ground. From this decision the present appeal has been brought.

Reference must now be made to the relevant sections of the Income-tax Act and, while, strictly, the only matters of appeal are the questions as finally settled in the case stated, it will not be found possible to avoid reference to the jurisdictional point which formed the subject of the earlier decision, of the High Court. So closely interlocked are the procedural and substantive law of income-tax.

The incidence of income-tax in India is governed by the Indian Income-tax Act, 1922, as subsequently amended. Chapter I, consisting of sections 3 and 4, is headed " Charge of Income-tax " and section 4, which by sub-section (1) enacts that, save as thereinafter provided, the Act shall apply to all income, profits or gains as therein defined, by sub-section (3) makes the provision for exemption which has already been set out earlier in this judgment. The exemptions are numerous and include " Agricultural income " which is elaborately defined in section 2 (1).

Chapter III consisting of sections 6 to 17 inclusive is headed " Taxable income " and defines the heads of income, profits and gains which are chargeable to tax and by whom the tax shall be paid. The respondent attached some importance to the fact that in contradistinction to the language of section 4 (3), sections 14 and 15, which also confer exemption, open with the words " The tax shall not be payable ". In their Lordships' opinion the difference in language does not create a different legal result.

Chapter IV, headed " Deductions and Assessments " and consisting of sections 18 to 39 inclusive, deals elaborately with these two subjects. It prescribes in detail the duties of the income-tax authorities and the obligations and rights of the assessee and in particular by section 30 defines the right of appeal to the Assistant Commissioner against an assessment and the limit of time within which an appeal may be brought, and by section 31 defines the powers and duties of the Assistant Commissioner upon the hearing of an appeal. This section contains

a proviso that the Assistant Commissioner shall not enhance an assessment unless the appellant has had a reasonable opportunity of showing cause against such an enhancement. Section 32 provides that any assessee objecting to an order passed by an Assistant Commissioner under section 28 or to an order enhancing his assessment under sub-section (3) of section 31 may appeal to the Commissioner within 30 days of the date on which he was served with notice of such order. This section provides by sub-section (3) that in disposing of the appeal the Commissioner may after giving the appellant an opportunity of being heard pass such orders thereon as he thinks fit. Their Lordships pause at this point to observe with what particularity the rights of the assessee in regard to appeal are defined. The sections to which reference has been made are couched in language which is apt to create rights and to define their limits. Then comes section 33 round which so much argument has ranged.

Section 33 enacts :

"(1) The Commissioner may of his own motion call for the record of any proceeding under this Act which has been taken by any authority subordinate to him or by himself when exercising the powers of an Assistant Commissioner under sub-section (4) of section 5. (2) On receipt of the record the Commissioner may make such enquiry or cause such enquiry to be made and, subject to the provisions of this Act, may pass such orders thereon as he thinks fit : Provided that he shall not pass any order prejudicial to an assessee without hearing him or giving him a reasonable opportunity of being heard."

It is this section, as the third question in the case stated indicates, upon which the respondent relies as establishing a right to relief, and their Lordships will recur to it, observing however that in its language and in its context it appears ill-designed for such a purpose.

Sections 33-A to 39 deal with specific matters which do not require to be noticed.

Chapter V, as its heading "Liability in Special Cases" indicates, deals in sections 40 to 44 with certain special cases, as does Chapter V-A.

Chapter VI deals with Recovery of Tax and Penalties and calls for no comment.

Chapter VII headed "Refunds" deals in sections 48 to 50-A with that subject. There has been considerable amendment of these sections but there has been no amendment which affects the matter under appeal. Upon the assumption which appears to be justified by the concluding words of section 48 (4) of the Amending Act of (1939) that the operative provisions are contained in the Act before its amendment in 1939, the position in regard to refund is that, if the Assistant Commissioner or the Commissioner in exercise of their respective appellate powers is satisfied that the amount of tax paid by an assessee for any year exceeds the amount with which he is properly chargeable for that year, he shall cause a refund to be made by the Income-tax Officer of any amount found to have been wrongly paid or in excess. But there is an important proviso, *viz.*, section 48-A (3) [which in the Amending Act was replaced by section 48 (4)], that nothing in the section shall operate to validate any objection or appeal which is otherwise invalid or to authorise the revision of any assessment or other matter which has become final and conclusive or the review by any officer of a decision of his own which is subject to appeal or revision or where any relief is specifically provided elsewhere in the Act, to entitle any person to any relief other or greater than that relief.

Chapter VIII deals with offences and penalties. Chapter IX with super-tax and Chapter IX-A with certain special matters. Chapter X is headed "Miscellaneous" and contains the important section 66 under which upon a case stated reference can be made to the High Court.

This section 66 provides (1) that if in the course of any assessment under the Act or any proceeding in connection therewith other than a proceeding under Chapter VIII a question of law arises, the Commissioner may either on his own motion or on reference from any Income-tax authority subordinate to him draw up a statement of the case and refer it with his own opinion thereon to the High Court ; (2) that within 60 days of the date on which he is served with notice of an order under section 31 or section 32 or of an order under section 33 enhancing

an assessment or otherwise prejudicial to him the assessee, in respect of whom the order or decision was passed, may by application as therein mentioned require the Commissioner to refer to the High Court any question of law arising out of such order or decision and the Commissioner shall within 60 days of the receipt of such application draw up a statement of the case and refer it with his own opinion thereon to the High Court : Provided that a reference shall be from an order under section 33 only on a question of law arising out of that order itself and not on a question of law arising out of a previous order under section 31, or section 32 revised by the order under section 33. It is further provided by section 66 (3) that, if the Commissioner refuses to state a case on the ground that no question of law arises, the assessee may apply to the High Court which may require the Commissioner to state a case and refer it. It is this jurisdiction which, as already stated, has been successfully invoked in this case.

Finally it is necessary only to refer to section 67 of the Act which provides that no suit shall be brought in any Civil Court to set aside or modify any assessment made under this Act and no prosecution, suit or other proceeding shall lie against any Government officer for anything in good faith done or intended to be done under the Act.

Having thus briefly reviewed the relevant sections of the Act under whicht he respondent was in fact aassessed to income-tax and paid it their Lordships return to the questions in the case stated.

The first, and perhaps the most important, question, is whether the assessments were a " nullity ". This is the word ultimately chosen to express the legal concept upon which the respondent founds its claim to relief. Their Lordships find some difficulty in understanding what is meant by the word in its present context. The assessments were duly made, as they were bound to be made, by the Income-tax officer in the proper exercise of his duty. If this Board had otherwise decided the appeal which came before it in 1939, they would have stood unquestionable and unquestioned. It does not appear to their Lordships that they were a " nullity " in any other sense than that if they had been challenged in due time they might have been set aside. But the same thing is true of every assessment which is open to successful challenge and it is just because convenience of administration demands that the validity of an assessment shall be tested in a particular way, that the Income-tax Act provides that way and at the same time enacts by section 67 that it shall be tested in no other way. Their Lordships in the course of reviewing the Act observed upon the language of the section conferring the exemption now in question. They would repeat that they do not find in it any justification for the view that an assessment, which may ultimately be held to be invalid in that it does not give effect to the provision for exemption, is thereby rendered a " nullity ". In coming to this conclusion they find strong support in the recent decision of this Board in *Raleigh Investment Co., Ltd.* v. *Governor-General in Council*[1].

Their Lordships then must answer the first question by saying that the assessments were not a nullity.

It is then upon the footing that there were assessments validly made, which were effective until they were set aside, that the second question must be answered. This question does not in terms refer to section 33 of the Act, as does the third question. But it is the power of revision or review contained in that section upon which the respondent relies. It is necessary then to ask what is the " discretion " vested in the Commissioner and what is intended by the use of the word " improper " in connection with its exercise.

Upon the first part of this question their Lordships are placed in a position of some embarrassment as was learned counsel for the appellant, by an admission which appears to have been made by or on behalf of the appellant in the High Court, for it seems that it was there conceded that section 33 empowered the Commissioner to grant to the respondent all the relief that it claimed, to set aside all

1. (1947) 2 M.L.J. 16 : L.R. 74 I.A. 50 : 1947 F.L.J. 45 (P.C.).

assessments whether or not they had under the provisions of the Act become final and conclusive, and to order the refund of all sums paid, whether or not the time for appeal had expired. Their Lordships must not be taken as assenting to this view of the Commissioner's powers, but they will, nevertheless, assume for the purpose of this appeal that he had such a power and will upon that assumption proceed to consider whether his action in refusing to exercise it in favour of the respondent was improper.

Upon this part of the case the argument for the respondent, which found favour with the High Court, was that the refusal of the Commissioner was "improper" in the sense that it was contrary to equity and good conscience that money should be retained which ought never to have been paid. It was not very clear how far this argument was based on the premise, now held by their Lordships to be fallacious, that the assessments were a "nullity", but it can presumably be placed on a broad ethical basis whatever may be the true view of the assessments Upon this footing, then the argument must be that the assessee has a right enforceable against the Commissioner to require refund of tax paid by him upon grounds of equity and good conscience, though the assessment has been made and the tax received in good faith.

Their Lordships cannot accept this argument. They have reviewed the Code of Income-tax law for the purpose of showing that it exhaustively defines the obligations and remedies of the tax-payer. It would be wholly incompatible with this that he should have a collateral right, necessarily vague and ill-defined, founded on the principles of equity and good conscience. Their Lordships are of opinion that the only remedies open to the tax-payer, whether in regard to appeal against assessment or to claim for refund, are to be found within the four corners of the Act. This view of his rights harmonises with the provision of section 67 to which reference has already been made, that no suit shall be brought in any Civil Court to set aside or modify any assessment made under the Act. It is the Act which prescribes both the remedy and the manner in which it may be enforced.

It has however as a subsidiary argument been urged on behalf of the respondent that it appears upon the face of the order of the Commissioner of 23rd November, 1939, that he exercised improperly the discretion assumed to be vested in him and that his order should therefore be set aside. It is true that the sentence

"It was open to the assessees to keep these assessments alive by having them included in the reference to the Privy Council"

is not happily expressed, but it is sufficiently clear that what the Commissioner had in mind was that it was open to the assessees to have availed themselves of the procedure which the law provided, including if necessary an appeal to His Majesty in Council and that, as they had not done so, he refused to re-open the assessments. This was in fact the reason and, as their Lordships think, a valid reason for the course that he took. Moreover their Lordships, even if they thought that the Commissioner had not expressed himself with sufficient clarity, could do no more than send the matter back to him for further consideration. They would not, upon so slender a ground, conclude that he had exercised his discretion improperly and direct him to exercise it differently.

The third question in the case stated is

"Whether the assessees could be denied the relief claimed by them under section 33, Income-tax Act, on any valid ground?"

The fallacy implicit in this question has been made clear in the discussion of the first two questions. It assumes that section 33 creates a right in the assessee. In their Lordships' opinion it creates no such right. On behalf of the respondent the well-known principle which was discussed in *Julius* v. *Bishop of Oxford*[1] was invoked and it was urged that the section which opens with the words "The Commissioner may of his own motion" imposed upon him a duty which he was bound

1. (1880) 5 A.C. 214.

to perform upon the application of an assessee. It is possible that there might be a context in which words so inapt for that purpose would create a duty. But in the present case there is no such context. On the contrary section 33 follows upon a number of sections which determine the rights of the assessee and is itself, as its language clearly indicates, intended to provide administrative machinery by which a higher executive officer may review the acts of his subordinates and take the necessary action upon such review. It appears that as a matter of convenience a practice has grown up under which the Commissioner has been invited to act " of his own motion " under the section and where this occurs a certain degree of formality has been adopted. But the language of the section does not support the contention, which lies at the root of the third question and is vital to the respondent's case, that it affords a claim to relief. As has been already pointed out, appropriate relief is specifically given by other sections ; it is not possible to interpret section 33 as conferring general relief.

Their Lordships therefore can only answer the third question by saying that it is wholly misconceived and that, if the respondent claimed relief under section 33 his claim was rightly rejected.

Their Lordships have felt much doubt whether they should refer to the procedural point which arises under sections 33 and 66 (2), *i.e.*, whether, where the Commissioner acting under section 33 makes an order refusing to set aside an assessment, his order is " otherwise prejudicial " to the assessee, so that the latter can under section 66 (2) require him to refer any question of law arising from such order to the High Court. This question was raised before the High Court at an earlier stage in these proceedings and the decision of that Court was not appealed. On the present appeal the learned counsel for the appellant has placed in the forefront of his case the contention that there was no order by the Commissioner prejudicial to the assessee out of which any of the questions of law decided by the High Court could be said to have arisen. From this the conclusion is drawn that there was no jurisdiction in the High Court to entertain the reference. Having decided this case on the merits adversely to the respondent so that in any case they must humbly advise His Majesty that this appeal should be allowed, their Lordships think it is not strictly necessary to decide the point. But having heard argument upon it and considered the conflicting decisions in the Courts of India they have come to a clear conclusion which they think it right to express. It appears to them that an order made by the Commissioner under section 33 can only be said to be prejudicial to the assessee when he is, as a result of it, in a different and worse position than that in which he was placed by the order under review. If the assessee has a complaint against any assessment or order made by a subordinate officer, he has the appropriate and specific remedy which the Act provides. The Commissioner may act under section 33 with or without the invitation of the assessee ; if he does so without invitation, it is clear that, if he does nothing to worsen the position of the assessee, the latter can acquire no right ; the review may be a purely departmental matter of which the assessee knows nothing. If on the other hand the Commissioner acts at the invitation of the assessee and again does nothing to worsen his position, there is no justification for giving him a new right of appeal. He has a specific right of appeal against the assessment or order of the subordinate officer, which is subject to its own time limit. That he cannot enlarge by taking a course which is on his part purely voluntary. This view of the section is confirmed by the exception. For it is proper that, where the Commissioner does make an order which worsens the position of the assessee, the latter should have a right of appeal, since against that order he has no other right. It is further confirmed by the proviso to section 66 (2) which limits a reference from an order under section 33 to cases where the question of law arises out of that order itself and excludes it where the question of law arises out of a previous order under section 31 or section 32 which is revised under section 33. In the case in which a reference is permitted, there is a new point of law which could not be otherwise the subject

of appeal ; in the case in which it is excluded, the point of law was one that could have been appealed under the appropriate section.

For these reasons their Lordships are of opinion that a reference does not lie from an order under section 33 unless that order is prejudicial to the assessee in the sense that he is in a worse position than before the order was made. Applying that principle to the present case their Lordships are of opinion that, as the Commissioner did not enhance the assessments made upon the respondent or otherwise alter his position for the worse, the reference was from the outset incompetent. They would only add that the respondent could not make an otherwise incompetent reference competent by adducing a reason for setting aside the assessment which was not available to it at the date of the assessment. For the reasons above stated their Lordships are of opinion that this appeal must be allowed and the judgment of the High Court of Judicature at Lahore of 23rd March, 1944, set aside and they will humbly advise His Majesty accordingly. In the special circumstances of this case they think it right to order that the parties should bear their own costs of this appeal and of all the proceedings in the High Court.

Solicitor for Appellant : *The Solicitor, India Office.*

Solicitors for Respondent : *Douglas Grant and Dold.*

V.S. *Appeal allowed.*

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Madras[1].)

PRESENT :—LORD SIMONDS, LORD MORTON OF HENRYTON AND SIR MADHAVAN NAIR.

Sri Kakulam Subrahmanyam and another .. *Appellants**

v.

Kurra Subba Rao .. *Respondent.*

Transfer of Property Act (IV of 1882), section 53-A—" The transferor "—Refers to person who contracts by writing signed by him or on his behalf—Minor on behalf of whom mother and guardian enters into contract of sale—Minor is " the transferor " for purposes of section 53-A.

The words " the transferor " in section 53-A refer back to the person who " contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf."

As the act of the mother and guardian of a minor in entering into a contract of sale of the immoveable properties of the minor to discharge his father's debts is an act on behalf of the minor, the latter is the person who most aptly answers the description of " the transferor " in section 53-A of the Transfer of Property Act and he would be debarred from enforcing against the transferee any right in respect of the property of which the transferee is in possession, other than a right expressly provided by the terms of the contract of sale.

Subrahmanyam v. *Subba Rao,* (1944) 1 M.L.J. 147 : I.L.R. (1944) Mad. 749, reversed.

C. S. Rewcastle, K.C. and *Phineas Quass* for Appellants.

Sir Herbert Cunliffe, K.C. and *P. V. Subba Rao* for Respondent.

Their Lordships' Judgment was delivered by

LORD MORTON OF HENRYTON.—This is an appeal from a judgment of the High Court of Judicature at Madras dated 22nd November[1], 1943, affirming the judgment of the District Judge of Guntur dated 20th April, 1942, who had allowed the respondent's appeal from the judgment of the Subordinate Judge of Bapatla, dated 31st July, 1939.

Leave to appeal to His Majesty in Council was given by the High Court of Judicature at Madras on the ground that the case involved a substantial question of law as to the true construction of section 53-A of the Transfer of Property Act.

That section is in the following terms :

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* P. C. Appeal No. 31 of 1946. 26th February, 1948.

1. (1944) 1 M.L.J. 147 : I.L.R. (1944) Mad. 749.

"53-A. *Part performance.*—Where any person contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that the contract, though required to be registered has not been registered, or, where there is no instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

Provided that nothing in the section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof."

The facts giving rise to this appeal are not now in dispute, having regard to the findings of the courts in India. The respondent and his father constituted a Hindu joint family. The respondent's father died on 4th October, 1935, leaving him surviving his widow and the respondent, who was then and is still a minor.

Prior to his death the respondent's father had incurred certain debts, including a debt of Rs. 16,000 owing to the appellants and secured by two promissory notes and debt of Rs. 1,200 owing to one Ramayya and secured by a mortgage. By an agreement in writing, dated 29th November, 1935, the respondent "being minor by guardian and mother Manikyamma", to quote the words of the agreement, agreed to sell the lands in suit to the appellants for Rs. 17,200. The purchase price was to be applied as to Rs. 16,000 in discharging the promissory notes and as to Rs. 1,200 in discharging the mortgage debt owing to Ramayya. The contract provided that a sale deed was to be executed, registered and delivered to the appellants, at their expense and upon their request.

The appellants duly paid off the mortgage debt of Rs. 1,200 and in December, 1935, they were let into possession of the lands contracted to be sold, but no sale deed was ever executed or registered. On 10th September, 1938, the respondent commenced the present suit by his mother and next friend Manikyamma, claiming possession of the lands contracted to be sold and mesne profits. The propriety of the contract of sale was challenged before the Subordinate Judge, but, to quote the judgment of the High Court,

"The Courts below have found and the finding has not been challenged before us, that the plaintiff's father had left a large amount of debts which could not have been discharged from the income of the family properties and that it was necessary and beneficial to sell some of them for the purpose."

The Subordinate Judge held, *inter alia*, that section 53-A of the Transfer of Property Act protected the appellants and dismissed the suit. His decision was reversed by the District Judge of Guntur, who made an order for possession in favour of the respondent, subject to his paying to the appellants Rs. 17,200 with interest from the date of suit. An appeal by the present appellants to the High Court of Judicature at Madras was dismissed.

Their Lordships entertain no doubt that it was within the powers of the mother as guardian to enter into the contract of sale of 29th November, 1935, on behalf of the respondent for the purpose of discharging his father's debts, and that if the sale had been completed by the execution and registration of a deed of sale, the respondent would have been bound under Hindu law. As the sale was not so completed, it is conceded by counsel for the appellants that the present appeal must fail unless the appellants are entitled to the protection afforded by section 53-A of the Transfer of Property Act. They are entitled to that protection if, but only if, the respondent comes within the words "the transferor or any person claiming under him". If he does, the section bars him from obtaining the relief claimed by him in the present suit and the appeal must succeed. If he does not, the order for possession made in his favour was right and the appeal must be dismissed.

Their Lordships think it is clear that the words "the transferor" refer back to the person who "contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf." Counsel for the respondent rely upon section 11 of the Indian Contract Act which is as follows :

"Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject."

They submit that, having regard to that section and to the decision of their Lordships' Board in *Mohori Bibee* v. *Dharmodas Ghose*[1], a minor cannot be a person who contracts. It is clear that, if the mother and guardian had taken no part at all in the transaction, the respondent could not have entered into a valid contract to sell the land in suit to the appellants, but it is equally clear that such a contract could and did come into existence in the present case, and the question for decision is—was the person who contracted, within the meaning of section 53-A, the respondent or his mother?

The position of a guardian under the Hindu law was considered by their Lordships' Board in the case of *Hanoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonwaree*[2], and the following passage is to be found at page 412 :

"They consider that the acts of the *Ranee* cannot be reasonably viewed otherwise than as acts done on behalf of another, whatever description she gave to herself, or others have to her."

Thus the act of the mother and guardian in entering into the contract of sale in the present case was an act done on behalf of the minor appellant. The position of the minor under such a contract is discussed in the following passage, with which their Lordships agree, in Pollack and Mulla's Indian Contract and Specific Relief Acts, 7th Edition, p. 70 :

"A minor's agreement being now decided to be void, it is clear that there is no agreement to be specifically enforced ; and it is unnecessary to refer to former decisions and distinctions, following English authorities which are applicable only on the view now overruled by the Privy Council."

The learned authors are here referring to the decision in the case of *Mohori Bibee* v. *Dharmodas Ghose*[1] already cited. They continue :

"It is, however, different with regard to contracts entered into on behalf of a minor by his guardian or by a manager of his estate. In such a case it has been held by the High Courts of India, in a case which arose subsequent to the governing decision of the Privy Council, that the contract can be specifically enforced by or against the minor, if the contract is one which it is within the competence of the guardian to enter into on his behalf so as to bind him by it, and, further if it is for the benefit of the minor. But if either of these two conditions is wanting, the contract cannot be specifically enforced at all."

In the present case neither of the two conditions mentioned is wanting, having regard to the findings in the Courts in India. It would appear, therefore, that the contract in the present case was binding upon the respondent from the time when it was executed. If the sale had been completed by a transfer, the transfer would have been a transfer of property of which the respondent, not his mother, was owner. If an action had been brought for specific performance of the contract, it would have been brought by or against the respondent and not by or against his mother.

Having regard to all the circumstances, their Lordships are of opinion that the respondent is the person who most aptly answers the description of "the transferor" in the sense in which these words are used in section 53-A. It follows that he is debarred by the section from obtaining the relief claimed by him in the present action, which was rightly dismissed by the Subordinate Judge.

For these reasons their Lordships will humbly advise His Majesty that this appeal should be allowed and the Order of the Subordinate Judge restored. The respondent must pay the appellants' costs of this appeal and of the proceedings in India.

Solicitors for the Appellants : *Douglas Grant & Co.*

Solicitors for the Respondent : *T. L. Wilson & Co.*

V.S. ——— *Appeal allowed.*

1. (1903) L.R. 30 I.A. 114 : I.L.R. 30 Cal. 539 (P.C.).
2. (1856) 6 M.I.A. 393.

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Madras.)

PRESENT:—LORD NORMAND, LORD MACDERMOTT AND SIR JOHN BEAUMONT.

Pethu Reddiar and others .. *Appellants**

v.

Rajambu Ammal .. *Respondent.*

Civil Procedure Code (V of 1908), section 110—Applicability—High Court decreeing suit setting aside fourteen sales and a power of attorney—Leave to appeal to the Privy Council granted to three vendees only as regards the sales in their favour—Value of the subject of the suit and that of properties in dispute in appeal in the aggregate exceeding Rs. 10,000—Granting of leave, if proper.

The High Court decreed a suit setting aside fourteen sales and a power of attorney and granted leave to appeal to the Privy Council to three of the vendees only as regards the sales in their favour. The value of the subject of the suit in the Court of the first instance was upwards of Rs. 10,000 and the value of all the properties in dispute on appeal to the Board exceeded, in the aggregate this sum.

On a preliminary objection that the High Court had no power to grant leave having regard to the terms of section 110, Civil Procedure Code, for the purposes of which the case of each appellant must be regarded *separately*,

Held, negativing the objection, the case was not one of an appeal involving several appellants each of whom sued or was sued in respect of some distinct or unrelated cause of action and it was unnecessary to consider the applicability of section 110, Civil Procedure Code and on the facts of the appeal there was but one " matter in dispute," and the mere circumstance of a plurality of appellants cannot make it otherwise.

S. P. Khambatta, K.C. and *Phineas Quass* (for *Dingle Foot*) for Appellants.

H. J. Umrigar for Respondent.

Their Lordships' Judgment was delivered by

LORD MACDERMOTT.—The litigation from which this appeal arises was commenced on 20th April, 1932, by one Somasundara Reddiar against some 18 defendants for the purpose of setting aside a power of atorney and 14 sale deeds all of which had been executed by Somasundara, the plaintiff, in favour of one or other of the defendants. The power of attorney was dated 21st September, 1931. The sale deeds were executed on various dates ranging from 16th November, 1931 to 5th March, 1932. Somasundara sued as a person of unsound mind and a pauper, by his wife and next friend Rajambu Ammal, the present respondent, whom he had married in 1927 when he was about 17 years old. The relief sought was that all the documents mentioned should be set aside and possession given of the properties the subject of the sale-deeds. In their substance the grounds of this claim were (1) that Somasundara was not of sound mind within the meaning of section 12 of the Indian Contract Act, 1872, at the dates of the transactions in question, and (2) that those transactions had all been induced by undue influence, as defined in section 16 of the said Act, on the part of the defendants or some of them.

The suit thus started ran an involved and tedious course, the details of which need not now be recounted at length. The following summary of the proceedings leading to the appeal to the Board will suffice for present purposes. In 1936, Somasundara died and his widow, the respondent, was substituted as plaintiff as her husband's legal representative. On 25th February, 1941, the Subordinate Judge of Trichinopoly dismissed the suit save in respect of three of the said sale deeds which he set aside, apparently on the ground of lack of consideration. He held that the pleas of unsoundness of mind and undue influence had not been established. In reaching this conclusion he disregarded the testimony of two doctors produced as witnesses in support of the claim (and who had not been examined before him) as being " perfectly worthless and completely biased". The defendants whose sale deeds had been set aside did not appeal from this decision. But the plaintiff did and her appeal was allowed by the High Court of Judicature at Madras on 28th

*P. C. Appeal No. 35 of 1946. 2nd March, 1948.

April, 1944. The Court (Krishnaswami Ayyangar and Somayya, JJ.,) held that Somasundara had not the requisite capacity to contract as laid down in section 12 of the Contract Act and that his " helpless state and weak mind were taken advantage of by unscrupulous persons." It decreed accordingly that the power of attorney and the II sale deeds which had been upheld by the Subordinate Judge be set aside, that the plaintiff be put into possession and that the question of mesne profits be determined under Order XX, Rule 12 of the Civil Procedure Code. On 15th December, 1944, the High Court granted leave to three of the defendants, the present appellants, to appeal to His Majesty in Council. The position, as the matter now comes before their Lordships, therefore, is that all the 15 transactions impugned in this suit have been set aside and of these only four—the sale deeds in which the appellants were concerned as transferees—are the subject of the present appeal. Particulars of these four are as follows :

Transferee.	*Date.*	*Considerationas stated.*	*Exhibit No.*
1st Named Appellant ..	16—11—1931	Rs. 3,000	XIV
Do. Do. ..	22— 1—1932	Rs. 100	XIX
2nd Do. Do. ..	18— 1—1932	Rs. 250	XXIII
3rd Do. Do. ..	19— 1—1932	Rs. 4,000	XX

On the appeal coming on for hearing counsel for the respondent submitted, as a preliminary point, that the High Court had not power to grant leave to appeal having regard to the terms of section 110 of the Code of Civil Procedure. The material part of this section reads thus :

" In each of the cases mentioned in clauses (*a*) and (*b*) of section 109, the amount or value of the subject-matter of the suit in the Court of first instance must be 10,000 rupees or upwards, and the amount or value of the matter in dispute on appeal to His Majesty in Council must be the same sum or upwards, or the decree or final order must involve, directly or indirectly, some claim or question to, or respecting, property of like amount or value."

It was not disputed that the value of the subject-matter of the suit in the Court of first instance was upwards of Rs. 10,000 or that the value of all the properties in dispute on appeal to the Board exceeded, in the aggregate this sum. But it was urged that, for the purposes of section 110, the case of each appellant must be regarded *separately* and that, when this was done the value of each matter in dispute on appeal to His Majesty in Council was less than Rs. 10,000. It was assumed that the property alleged to have been transferred to each of the three appellants was below this figure in value at all material times and, accordingly, the net question for determination was whether or not the values of the properties comprised in the sale deeds, the subject of this appeal, could be aggregated for the purposes of this section. The High Court held in favour of aggregation and certified on that basis, distinguishing the decision in *Vaithilinga Mudaliar* v. *Somasundaram Chettiar*[1], and other cases said to have followed it. In the opinion of their Lordships the High Court was clearly right in the view it took. This was not the case of an appeal involving several appellants each of whom sued or was sued in respect of some distinct or unrelated cause of action, and it is unnecessary to consider the applicability of section 110 to appeals of that kind. Here, the case of the respondent against each appellant and of each appellant against the respondent depended, in its substance, on the view taken of the evidence as a whole and turned on the same issue regarding the capacity of Somasundara. On the facts of this appeal there was, indeed, but one " matter in dispute " unless the mere circumstance of a plurality of appellants decrees otherwise. On the true construction of the section their Lordships were unable to see any ground for such refinement and they therefore overruled the preliminary objection.

Turning to the merits, it is clear that the appeal hinges on a question of fact which must be determined on the evidence. As this has been fully reviewed in the Courts in India their Lordships do not find it necessary to enter upon a detailed examination of the documentary and oral evidence adduced by the parties. The lay witnesses called in support of the plaint made the case that Somasundara

1. (1918) 36 M.L.J. 119 : I.L.R. 42 Mad. 228.

began to lose his reason some two or years after his marriage. Among these witnesses were the plaintiff and her mother who, no doubt, had an interest in the suit. But it may be observed in this connection, that their views as to Somasundara's sanity had been expressed a considerable time before the earliest of the transactions challenged in these proceedings for, on 20th August, 1930, the plaintiff had caused a notice to be published in the District Gazette, Trichinopoly, warning all concerned that any money dealings with her husband would not be valid on account of his lunacy. The numerous witnesses called on behalf of the defendants were all lay and except for two (Nos. 23 and 24), who openly supported the plaintiff, they together made the case that Somasundara had always been a person of sound mind. In this conflict of testimony the importance of the two medical witnesses examined for the plaintiff need not be emphasised. Of these, Dr. G. R. Parasuram was Deputy Superintendent of the Government Mental Hospital at Madras. He had examined Somasundara in February, 1931, and again at the end of July and beginning of August, 1932. He found symptoms of dementia *praecox* and formed the conclusion on both occasions that Somasundara was not sane. On the second examination he observed a deterioration in appearance but found his mental condition much as before. The second medical witness was Dr. S. P. Sarma the District Medical Officer of Trichinopoly. He had Somasundara under observation from the 15th till the 28th July, 1932, and found him of unsound mind and incapable of managing his affairs. The attitude of the Subordinate Judge to the testimony of these witnesses has already been remarked. The High Court found itself unable to adopt that attitude. It saw no reason to discredit either of the medical witnesses and it is plain that their testimony played an important part in leading the High Court to reverse the decision of the Subordinate Judge.

After a careful consideration of the evidence their Lordships are satisfied, beyond any question, that the view taken by the High Court was the right view and should be affirmed. They can see no reason to justify the strictures passed upon the medical testimony by the Subordinate Judge. The evidence of these witnesses seems to have been based on a concientious examination of the patient. Their competence was not in any way challenged and there is nothing in the case to suggest that either had any interest in the suit or bias in favour of the plaintiff. The strange sequence of transactions which were the subject of the present and another contemporaneous suit and which left Somasundara stripped of his possessions, and thus qualified to sue as a pauper, offers strong corroboration of the medical testimony and of the substance of the story told by the plaintiff. In their Lordships' opinion the whole weight of the evidence supports the finding that Somasundara was of unsound mind throughout the relevant period. There remains for consideration a subsidiary point raised on behalf of the first-named appellant, Pethu Reddiar. The consideration stated in the sale deed made in his favour and dated 16th November, 1931 (Ex. XIV), was Rs. 3,000. According to the document this amount was made up of five sums of Rs. 294-8-0, Rs. 195-14-0, Rs. 1,100, Rs. 1,150 and Rs. 259-10-0, respectively. Of these the first three were due by Somasundara on foot of decrees which this appellant was to discharge by payment, the fourth was said to be due to this appellant as surety for Somasundara on a promissory note, and the fifth was stated in the sale deed to be the amount of cash received by Somasundara. It was admitted that the first item had not been discharged, but this appellant claimed that he was entitled to recoupment in respect of the other sums in the event of his appeal failing and the sale deed being set aside. The High Court was satisfied that the decrees for Rs. 195-14-0 and Rs. 1,000 had been paid but was not satisfied as to the payment of the other items or that this appellant had paid the decrees out of his own monies.

As the evidence stands their Lordships are of opinion that the decree payments of Rs. 195-14-0 and Rs. 1,100 should be regarded as paid by this appellant, Pethu Reddiar, out of his own pocket for the benefit of Somasundara, but they share the doubts of the High Court as to the other payments alleged. In the circumstances of the present case their Lordships consider that Pethu Reddiar

will, upon complying with the orders affecting him in the suit, be entitled to be recouped the said sums amounting to Rs. 1,295-14-0, and no more, and that he should be at liberty to take credit for such amount in the ascertainment of mesne profits provided he has so complied.

Their Lordships will therefore humbly advise His Majesty that the appeal be dismissed and the decree of the High Court affirmed without prejudice to the right of Pethu Reddiar, the first-named appellant, to recoupment of the sum of Rs. 1,295-14-0 as aforesaid. The appellants must pay the costs of the appeal.

Solicitors for Appellants : *Douglas Grant & Co.*

Solicitors for Respondent : *T. L. Wilson & Co.*

V.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HAPPELL AND MR. JUSTICE GOVINDARAJACHARI.

T. N. V. Kailasa Thevar .. *Appellant**

v.

V. Ramaswami Ayyangar and others .. *Respondents.*

Madras Agriculturists' Relief Act (IV of 1938)—Mortgage decree—All mortgagors agriculturists—Applications by all except one to scale down the decree amount—Decree scaled down as against those who applied but not as against the defendant who did not apply—Decree one and indivisible—Payments towards the decree by judgment-debtors against whom decree was scaled down—Difference between scaled down amount and payments made deposited by the defendant who had not applied for scaling down—Application by him for entering up satisfaction and release of hypotheca—If can be ordered.

In a suit by the mortgagee, the mortgage was held binding on all the defendants and while scaling down was not ordered with reference to the 1st defendant (though he was an agriculturist) as he made no application for scaling down of the decree when the Act came into force, scaling down was ordered so far as the other defendants were concerned, as they had made the necessary applications. In the decree passed there was no specification of the different interests in the hypotheca of the several defendants. Thereafter applications were made by the first defendant for amendment of the decree under section 19 of the Madras Agriculturists' Relief Act. It was dismissed as also his application for permitting him to file an application to have the decree scaled down as against him also. A revised final decree was passed as no payment under the preliminary decree was made, 'that the mortgaged property in the aforesaid preliminary decree mentioned or a sufficient part thereof be sold.' The other defendants made certain payments towards the decree, when it was put into execution. Then the first defendant deposited an amount equal to the difference between the amount of the scaled down decree against the other defendants and the payments made by them and prayed that the deposit should be accepted and full satisfaction entered up and the entire hypotheca released from the mortgage.

On a question whether the first defendant was entitled to ask for those reliefs, notwithstanding that so far as he was concerned the decree was not scaled down under the Act,

Held, (*i*) As the defendants other than the first defendant could, by payment of the scaled down amount, get the property freed from the burden of the mortgage on the principle of unity and indivisibility of the mortgage and by the terms of the decree, and as the decree-holder could sell the mortgage security only for the reduced amount, there was no reason for holding that further execution of the mortgage decree could not be resisted by the first defendant by payment of what still remained due out of the amount to which the decree was scaled down.

(*ii*) As the decree was scaled down at the instance of all the mortgagors but one and in view of the restrictions imposed on the mortgagee's rights permitting him to proceed against the mortgage security only for the scaled down amount, there was no logic in refusing to allow the remaining judgment-debtor alone to deposit the balance due and thereby resist the execution of the mortgage decree for anything more than the scaled down amount.

(*iii*) The first defendant was also not precluded from claiming the relief by reason of anything which happened in the course of the execution proceedings.

Case-law discussed.

Appeal against the order of the District Court of East Tanjore, dated the 5th July, 1947, in E.A. No. 78 of 1947 in O.S. No. 30 of 1934.

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* A. A. O. No. 328 of 1947. 12th December, 1947.

T. V. Muthukrishna Aiyar and *S. Ramachandra Aiyar* for Appellant.

R. Kesava Aiyangar and *T. K. Sundararaman* for Respondents.

The Judgment of the Court was delivered by

Govindarajachari, J.—The appellant in the above appeal was the first defendant in O.S. No. 30 of 1934 on the file of the District Court, East Tanjore, at Negapatam. The main facts which led up to this appeal are the following :

The first defendant for himself and on behalf of his minor brother, the 2nd defendant, and the guardian of defendants 3 to 7 who are the sons of a cousin of the 1st and 2nd defendants gave a simple mortgage over some properties to the plaintiffs. The mortgage was sued on and resulted in a preliminary decree, dated 15th May, 1937 and a final decree, dated 28th January, 1938. It was held that the mortgage was not binding on the 2nd defendant and the decree fixed the amount payable by defendants 1 and 3 to 7 at Rs. 1,08,008. Defendants 3 to 7 filed Appeal No. 48 of 1938 in this Court contending that the mortgage was not binding on them and that their shares should not have been made liable. The 1st defendant was also a party to this appeal. The plaintiffs appealed in A.S. No. 248 of 1938 against the decree of the trial Court in so far as it refused them relief against the 2nd defendant's share. Both the appeals were against the preliminary decree. The Madras Agriculturists' Relief Act IV of 1938 came into force during the pendency of the appeals and petitions were filed by defendants 2 to 7 praying that the decree which may be passed by the High Court may be scaled down in accordance with the provisions of that Act. These petitions were sent down by the High Court to the trial Court for investigation and report. The 1st defendant participated in the investigation along with the other defendants and it was reported to the High Court that all the defendants were agriculturists. The High Court held that the mortgage was binding on the 2nd defendant and that his share also was therefore liable. The contention of defendants 3 to 7 that the mortgage was not binding on them was rejected, with the result that it was finally decided by the High Court that the mortgage was binding on the interests of all the mortgagors. Scaling down of the decree was ordered so far as defendants 2 to 7 were concerned while no scaling down was ordered with reference to the 1st defendant who made no application. Clause 3 of the decree of the High Court declares that the amount due from the 2nd defendant as scaled down is Rs. 49,255 apart from costs. Clause 4 contains a direction that the same amount should be paid by defendants 2 to 7 into Court. Clause 5 provides that in default of payment as directed above, the other directions regarding the sale of the mortgaged properties and the payment to the plaintiffs of the amount due to them contained in the said decree of the lower Court shall apply in the case of the 2nd defendant also. This is followed by clause 6 which states that the decree of the lower Court "in other respects subject to the directions in clauses 3 and 4 above and as against the 1st defendant be, and hereby is confirmed." We may add that the preliminary decree of the lower Court providing that in default of the payment which had been directed, the plaintiff may apply to the Court for a final decree for the sale of the mortgaged property and that on such application being made the mortgaged property or a sufficient part thereof shall be directed to be sold, was in no way altered by the decree passed by the High Court in the appeals. That is to say, there was no specification of the different interests in the hypotheca of the several defendants.

The 1st defendant applied to the trial Court in I.A. No. 104 of 1942 for an amendment of the decree under section 19 of Madras Act IV of 1938. This petition was dismissed. He also applied to the High Court for the re-hearing of the appeals and for permitting him to file an application to have the decree scaled down as against him. These petitions too were dismissed. A revised final decree was passed by the District Court on 25th September, 1943. This merely states that the payment directed by the preliminary decree of the trial Court dated 15th May, 1937, as modified in appeal by the High Court has not been made and proceeds to direct "that the mortgaged property in the aforesaid preliminary decree mentioned or a sufficient part thereof be sold."

The decree was put into execution. There were three payments by defendants 2 to 7 of Rs. 24,000, 30,000 and 18,610-12-0 on 20th January, 1947, 27th January, 1947 and 17th February, 1947, respectively. On the 6th of March, 1947, the 1st defendant filed E.A. No. 78 of 1947 stating that the scaled down debt stood at Rs. 75,342-11-8 on 16th December, 1946, that as payments amounting to Rs. 72,610-12-0 had already been made, there was still due Rs. 3,200-1-4 and that making a small allowance for mistakes in calculations regarding interest or execution costs he was depositing along with his application Rs. 3,215 and prayed that the deposit should be accepted and full satisfaction of the decree should be entered up and the entire hypotheca released from the mortgage. This application was resisted by the decree-holders and the lower Court dismissed it. This appeal is against that order of dismissal.

The principal point that arises for determination is whether the 1st defendant can have the relief prayed for notwithstanding that so far as he was concerned the decree stood at well over one lakh of rupees representing the amount due under the terms of the mortgage without any scaling down under the provisions of Madras Act IV of 1938. It has been contended by Mr. Muthukrishna Iyer, counsel for the appellant, relying on a series of decisions that his client cannot be denied the relief now sought as one of several mortgagors can pay the mortgage amount and redeem the entire mortgage notwithstanding that he is interested only in a portion of the hypotheca and that as the lesser amount has been declared payable by defendants 2 to 7, the 1st defendant need pay only the amount for the purpose of getting the entire hypotheca discharged from the mortgage.

We must state at the very outset that in the working of the Madras Agriculturists' Relief Act alongside the provisions of the Transfer of Property Act several curious and novel situations have arisen for which it has not always been possible to find solutions which are completely and perfectly logical.

Certain principles have, however, been evolved in the course of the application of the several provisions of the former Act in the light of which we consider that the question that has now arisen has to be judged.

The first of the decisions relied on by Mr. Muthukrishna Iyer is *Arunachalam Pillai* v. *Seetharam Naidu*[1]. In that case the mortgagors were agriculturists. The equity of redemption had, however, been purchased at a Court auction by a non-agriculturist. Certain subsequent encumbrancers in respect of one of the items of the hypotheca were also agriculturists. In a suit on the mortgage praying for the recovery of Rs. 8,500, a preliminary decree for sale was passed only for the reduced sum of Rs. 3,050 in accordance with the provisions of the Madras Agriculturists' Relief Act against all the defendants including the Court-auction-purchaser of the equity of redemption. The plaintiff mortgagee appealed to the High Court but his appeal was dismissed and the preliminary decree for sale was upheld. The following passage from the judgment of the High Court states the principle on which the decision proceeded :

"When the 12th respondent purchased the properties in Court-auction, he took them subject to the burden of the appellant's mortgage and, if the burden is by reason of the provisions of section 8 referred to above reduced without payment, the purchase proves to that extent an advantageous one, and there is nothing in the Act to deprive him of the fruits of his lucky purchase, even though he is not an agriculturist. He gets the benefit of the scaling down not because the provisions of the Act apply to him, for obviously they do not. but because such benefit is a necessary incident of his purchase under the general law and the Act does not deprive him of it."

In *Marina Ammayi* v. *Mirza Bakhar Beg Sahib*[2], the facts were slightly different but the same result was reached. Here again the mortgagors were agriculturists. Some of the items of the hypotheca had been purchased by non-agriculturists. The mortgagors and the purchasers obtained a preliminary decree for redemption before Madras Act IV of 1938 came into operation. After the Act came into force the mortgagors applied under section 19 and as more than twice the amount of

1. (1941) 1 M.L.J. 561 : I.L.R. (1941) Mad. 930. 2. (1941) 1 M.L.J. 547.

the principal had already been paid to the decree-holder full satisfaction of the decree as a whole was entered up. The correctness of this was questioned in the High Court and it was contended on behalf of the decree-holder that satisfaction of the decree should have been entered up only as against the mortgagors-agriculturists, and not as against the purchasers-non-agriculturists. The contention was rejected and it was held that redemption of the mortgage as a whole could not be denied and that in entering up satisfaction of the decree as a whole the Court would only be allowing to the agriculturist-mortgagors the full benefits of the Act and not necessarily benefiting the non-agriculturists-purchasers of portions of the hypotheca. The decision in *Ramier* v. *Srinivasiah*[1], to which we shall have occasion to refer at some length presently was distinguished.

Nachiappa Chettiar v. *Ramachandra Reddiar*[2] and *Subramanian Chettiar* v. *Ramachandra Reddiar*[3] arose out of the same litigation the facts of which may be shortly stated. The mortgagors, defendants 1 to 4 were agriculturists. Some of the items of the hypotheca were purchased by defendants 5 to 8 who were non-agriculturists and some other items by defendants 9 to 12 who were agriculturists. The 13th defendant who was a purchaser from the 9th defendant of three items was also an agriculturist. It is unnecessary to refer to the other defendants. A preliminary decree was passed on 13th September, 1937, providing that

> "defendants 1 to 4 and 5 to 13 . . . . do pay into Court on or before the 13th March, 1938, or any later date upto which time for payment may be extended by the Court, the said sum of Rs. 1,13,836-4-10."

After the Act came into force defendants 1 to 12 applied for amendment of the decree under section 19. The applications of the mortgagors (defendants 1 to 4) and of defendants 9 to 12 were allowed and the amount was scaled down to Rs. 36,000. The application of defendants 5 to 8 was rejected on the ground that they were not agriculturists. They appealed to this Court in Appeal No. 295 of 1939. The judgment in the appeal is reported in *Nachiappa Chettiar* v. *Ramachandra Reddiar*[2]. Referring to defendants 5 to 8 the High Court observed :

> "These defendants are admittedly not agriculturists within the meaning of Madras Act IV of 1938 and cannot, therefore, put forward any claim under that Act to have the mortgage debt scaled down. But these defendants contend that, if the debt is scaled down at the instance of the mortgagor who is an agriculturist and claims the benefits of the Act, the properties purchased by these defendants subject to the suit mortgage could be proceeded against only for the scaled down amount and no more, under the general law relating to mortgages."

They then stated that the contention is supported by the decisions in *Arunachalam Pillai* v. *Seetharam Naidu*[4], *Marina Ammayi* v. *Mirza Bakhar Beg Sahib*[5], and *Satyanarayanamurthi* v. *Sathiraju*[6], and an unreported decision in Appeals Nos. 118 and 119 of 1939. *Ramier* v. *Srinivasiah*[1] was again referred to and distinguished. We sent for the papers in the appeal reported in *Nachiappa Chettiar* v. *Ramachandra Reddiar*[2], and find that the High Court directed the amendment of both the preliminary and final decrees in the following way. In the prelimiary decree it was directed that for the words "debt due by the 9th defendant," the words "debt due by defendants 5 to 8 and" were to be substituted and similarly in the final decree for the words "the items which are in the possession of defendants 1 to 4 and 9 to 12" the words, "the items which are in the possession of defendants 1 to 4, 5 to 8 and 9 to 12" were directed to be substituted. It should be observed that by this decision and by the decision in *Arunachalam Pillai* v. *Seetharam Naidu*[4], the High Court held that when the mortgagors-agriculturists apply for scaling down, the preliminary decree for sale as also the final decree should direct the sale of the hypotheca only for the amount so scaled down notwithstanding that the purchasers of some or all of the items of the hypotheca are non-agriculturists. In other words if the mortgagee seeks to bring the hypotheca to sale he can only do so for

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1. (1940) 2 M.L.J. 872 : I.L.R. (1941) Mad. 336.
2. (1942) 1 M.L.J. 510.
3. (1946) 2 M.L.J. 429.
4. (1941) 1 M.L.J. 561 : I.L.R. (1941) Mad. 930.
5. (1941) 1 M.L.J. 547.
6. (1942) 1 M.L.J. 506.

the smaller amount though the purchaser is, ex-hypothesi, a non-agriculturist and may be thereby indirectly benefited by the scaling down. The subsequent happenings in the litigation which finally culminated in *Subramanian Chettiar* v. *Ramachandra Reddiar*[1], have now to be told. Sometime after the disposal of A.S. Nos. 23 and 24 of 1938 which along with A.S. No. 295 of 1939 were dealt with by the High Court in its judgment dated 3rd February, 1942, a part of which has been reported in *Nachiappa Chettiar* v. *Ramachandra Reddiar*[2], the 13th defendant applied for the amendment of the decree but his application was rejected on the ground that it was "much too late to give effect to his contentions." Subsequently the decree-holder initiated execution proceedings and in the course of such execution proceedings the scaled down amount of Rs. 36,000 with subsequent interest and incidental charges was deposited into Court at the instance of defendants 1 to 4 and others who had obtained relief under the Act and satisfaction of the decree was entered up so far as they were concerned. The 13th defendant thereupon applied for the entering up of satisfaction of the decree even as against himself on the ground that the mortgage debt being indivisible and having been discharged by payment of the scaled down amount by the mortgagors the whole debt was wiped out and the property purchased by him automatically became freed from the encumbrance. His application was rejected by the trial Court but was allowed by the High Court in its decision reported in *Subramanian Cheettiar* v. *Ramachandra Reddiar*[1]. One clause in the final decree passed in that case which incorporated all the amendments which had been ordered from time to time may usefully be quoted here :

> "It is ordered and decreed that out of the items of the hypotheca the items which are in the possession of defendants 1 to 4, 5 to 8 and 9 to 12 be and are liable only for the sum of Rs. 36,000 with interest thereon at 6¼ per cent. per annum from 1st October, 1937 to 13th March, 1938 and thereafter at 6 per cent. per annum with full costs as allowed under the preliminary decree."

The argument in the High Court on behalf of the decree-holder was that the true effect of the decree was to fix the liability of each set of defendants separately and independently, so that when the liability of one set of defendants was reduced by the application of the provisions of the Act and a similar reduction was not expressly made as against other defendants the decree must be construed as operating in respect of the full amount as originally decreed as regards the latter. This argument was not accepted by the High Court and the learned Judges held that there was no apportionment of the liability under the mortgage as between the several sets of defendants :

> "The decree was for a single amount even as the amount due under the mortgage was a single liability. The amount has, no doubt, been reduced as regards persons who sought and obtained relief under the Madras Agriculturists' Relief Act . . . . . If the reduced debt of the mortgagor is paid, the hypotheca is freed from the encumbrance as against every person who claims interest in any part thereof."

Reference was made earlier in the judgment to the decisions in *Nachiappa Chettiar* v. *Ramachandra Reddiar*[2], *Marina Ammayi* v. *Mirza Bakhar Beg Sahib*[3], *Arunachalam Pillai* v. *Seetharam Naidu*[4], and *Satyanarayanamurthi* v. *Sathiraju*[5], as laying down this principle.

Mr. Muthukrishna Iyer claims that the principle laid down in a series of decisions commencing with *Marina Ammayi* v. *Mirza Bakhar Beg Sahib*[3], and ending with *Subramanian Chettiar* v. *Ramachandra Reddiar*[1] applied to the present case, and that the 1st defendant's application must be allowed and a full satisfaction of the decree entered up.

Mr. Kesava Aiyangar, counsel for the respondents, argues contra and contends that the facts of the present case call for the application rather of the principle laid down in *Ramier* v. *Srinivasiah*[6] and *Srinivasa Thathachariar* v. *Siva Subramania Chettiar*[7].

1. (1946) 2 M.L.J. 429.
2. (1942) 1 M.L.J. 510.
3. (1941) 1 M.L.J. 547.
4. (1941) 1 M.L.J. 561 : I.L.R. (1941) Mad. 930.
5. (1942) 1 M.L.J. 506.
6. (1940) 2 M.L.J. 872 : I.L.R. (1941) Mad. 336.
7. (1942) 2 M.L.J. 631 : I.L.R. (1943) Mad. 665.

First, as to these cases. In *Ramier* v. *Srinivasiah*[1] which as already stated, came in for comment and discussion in almost every subsequent case, the mortgagor was not an agriculturist. The puisne mortgagee was an agriculturist and the sub-mortgagee from the puisne mortgagee was a non-agriculturist. The puisne mortgagee was entitled to relief under the Act while the sub-mortgagee was not. The puisne mortgagee's application for amendment of the decree was dismissed by the lower Court but the High Court allowed it repelling the contention that the debt payable by an agriculturist falls outside the purview of the Act when it is also payable by a non-agriculturist. When it was pointed out that practical difficulties would arise in the working out of the rights of the parties if the puisne mortgagee's application for scaling down was to be allowed, the learned Judges indicated how, by adopting a suitable form, the decree could be drafted so as to give the agriculturist judgment-debtor the full benefit of the relief to which he is entitled under the Act while safeguarding the rights of the decree-holder as against those judgment-debtors who are not entitled to the benefits of the Act. This decision was referred to in *Marina Ammayi* v. *Mirza Bakhar Beg Sahib*[2], and put aside as not applicable to a case where the mortgagors were agriculturists though the purchasers were not. In *Arunachalam Pillai* v. *Seetharam Naidu*[3], after referring to the case in *Ramier* v. *Srinivasiah*[1], the learned Judges stated that it did not follow from that decision that a non-agriculturist debtor could, in no circumstances be benefited by the scaling down of a debt under the provisions of the Act. In *Nachiappa Chettiar* v. *Ramachandra Reddiar*[4], the learned Judges went further and after pointing out that in *Ramier* v. *Srinivasiah*[1], the mortgagor was a non-agriculturist, they remarked that the observations in the judgment in that case "even if a little too widely expressed must be understood with reference to the particular situation there dealt with and not as laying down any general proposition applicable to different facts." *Ramier* v. *Srinivasiah*[1] was also distinguished on its facts in *Satyanarayanamurthi* v. *Sathiraju*[5].

In *Srinivasa Thathachariar* v. *Siva Subramania Chettiar*[6], which is the principal decision relied on by Mr. Kesava Iyengar, the mortgagor and the purchaser of some item of the hypotheca were non-agriculturists, while the purchaser of some other items was an agriculturist. The debt was scaled down at the instance of the agriculturist purchaser while a similar relief was refused to the non-agriculturist purchaser. On behalf of the former it was contended that he was entitled to redeem the security as a whole on payment of the amount found payable by him and the Court was bound to enter up satisfaction of the whole decree. The learned Judges did not accept this argument and held that in the case before them the security must be deemed to be split up. They did not consider that the principle of the decisions in *Arunachalam Pillai* v. *Seetharam, Naidu*[3] *Nachiappa Chettiar* v. *Ramachandra Reddiar*[4], and *Marina Ammayi* v. *Mirza Bakhar Beg Sahib*[2], should be extended to a case where the mortgagor is not an agriculturist and the question arises between the purchasers of different portions of the hypotheca, one of whom is and the other is not an agriculturist. They referred to *Ramier* v. *Srinivasiah*[1], as ruling the case before them and observed :

> "that the principle that a mortgage is indivisible and can only be redeemed as a whole has to be trenched upon to the extent necessary for giving effect to the provisions of the Act in cases like the present where the mortgagor is not an 'agriculturist' and a person deriving title from him and bound by the mortgage is an 'agriculturist.'"

Both the decisions relied on by the respondent's counsel dealt with cases where the mortgagors were non-agriculturists. That being so there was no question of a non-agriculturist purchaser getting the benefit of the Act in the right of the mortgagor by the application of the principle of the unity and indivisibility of the mortgage, because (ex-concessi) the mortgagor was himself a non-agri-

1. (1940) 2 M.L.J. 872 : I.L.R. (1941) Mad. 336.
2. (1941) 1 M.L.J. 547.
3. (1941) 1 M.L.J. 561 : I.L.R. (1941) Mad. 930.
4. (1942) 1 M.L.J. 510.
5. (1942) 1 M.L.J. 506.
6. (1942) 2 M.L.J. 631 (633) : I.L.R. (1943) Mad. 665.

culturist and could consequently have no relief under the Act. The problem that arose in those cases was merely whether, when one of two persons holding a derivative interest in the mortgaged property is an agriculturist and the other is not, the right of the former against the mortgagee could be given effect to without jeopardising the right of the mortgagee against the latter, assuming of course that the mortgagor is not an agriculturist. It was held that the two rights could be so worked. Where, however, the mortgagor-judgment-debtor is an agriculturist the principle of the unity and indivisibility of the mortgage comes into play and the purchaser-judgment-debtor though a non-agriculturist gets the benefit of the scaling down effected at the instance of the former. This brings us to the distinction which Mr. Kesva Iyengar suggests between the present case and the cases relied on for the appellant. He argues that the principle laid down in those cases is applicable only to a non-agriculturist purchaser who seeks indirectly the benefit of a scaling down ordered in favour of an agriculturist mortgagor and that the principle cannot be invoked in the present case because the 1st defendant is not a purchaser but is a co-mortgagor with defendants 2 to 7.

We may observe in passing that nothing turns on the fact that the 1st defendant is also an agriculturist as now found by the learned District Judge and as found also by the report submitted to the High Court during the pendency of A.S. Nos. 48 and 248 of 1938. What matters is that the 1st defendant did not succeed in getting the decree scaled down though his failure was the result of his own laches and dilatoriness.

We consider, however, that the principle underlying the cases relied on for the appellant is applicable to the present case notwithstanding the slight difference in the facts to which we have already adverted. In *Narender Narain Singh* v. *Dwaraka Lal Muddur*[1], the Judicial Committee pointed out at page 408 of the report how one of the several mortgagors can redeem the entire mortgage and proceed for contribution subsequently against his co-mortgagors. They say,

> " This is a mortgage for one entire sum, and the property although held in certain shares was mortgaged as a whole to the extent of five annas and a fraction, and was redeemable only upon payment of the entire sum. Each and every one of the mortgagors was interested in the payment of that money and the redemption of the estate and each and every one of them had a right by payment of the money to redeem the estate seeking his contribution from the others."

In *Huthasanan Nambudri* v. *Parameswaran Nambudri*[2], after stating that a mortgage for an entire sum is from its very purpose indivisible, Subramania Iyer, J., with whom Moore, J., concurred observed as follows :

> " This character of indivisibility exists not only with reference to the mortgagee who may generally be more benefited thereby, but also with reference to the mortgagor. And save as a matter of special arrangement and bargain entered into between all the persons interested, neither the mortgagor nor the mortgagee, nor persons acquiring through either a partial interest in the subject, can, under the mortgage, get relief except in consonance with the principle of indivisibility referred to."

It is obvious that defendants 2 to 7 could on payment of the scaled down amount, have the entire hypotheca exonerated from the mortgage liability. It is equally manifest from the decisions in *Arunachalam Pillai* v. *Seetharam Naidu*[3] and *Nachiappa Chettiar* v. *Ramachandra Reddiar*[4], that the decree for sale, whether preliminary or final, should, in such cases and even where the relief of scaling down is denied to some of the judgment-debtors, direct the sale of the property only for the scaled down amount. We have already set out the relevant portions of the decree of the High Court giving directions as to the framing of the preliminary decree and also the revised final decree drawn up by the lower Court. There is nothing in them to show that any direction was intended or given in a manner different from what was held to be proper and legal in the two decisions just referred to. If, therefore, defendants 2 to 7 could, by payment of the scaled down amount, get the property freed from the burden of the mortgage and if the decree-holder could proceed to sell the mortgage

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1. (1877) L.R. 5 I.A. 18 : I.L.R. 3 Cal. 397 (P.C.).
2. (1899) I.L.R. 22 Mad. 209.
3. (1941) 1 M.L.J. 561 : I.L.R. (1941) Mad. 930.
4. (1942) 1 M.L.J. 510.

security only for the reduced amount, there is no reason for holding that further execution of the mortgage decree could not be resisted by the first defendant by payment of what still remains due out of the amount to which the decree was scaled down. The learned District Judge refused to apply the principle laid down in *Subramanian Chettiar* v. *Ramachandra Reddiar*[1], and the cases which preceded it. He thought that the present case is distinguishable from *Subramanian Chettiar* v. *Ramachandra Reddiar*[1]. We are unable to see any substantial ground of distinction. It may be noticed incidentally that while in *Subramanian Chettiar* v. *Ramachandra Reddiar*[1], there was a reference to the liability of the items of the hypotheca which were in the possession of defendants 1 to 4, 5 to 8 and 9 to 12 only for the reduced amount of Rs. 36,000 there is not in the present case, even that differentiation between the items in which defendants 2 to 7 may be interested and those in which the 1st defendant may be interested. In analysing the several cases cited before him the learned District Judge stated their effect in the form of four propositions. He enunciated the first of them as follows :

> "Where in a mortgage, some of the mortgagors are agriculturists and other mortgagors are non-agriculturists, there can be a decree for one amount (*i.e.*, the scaled down amount) against the agriculturist-mortgagors and for another amount (an unscaled amount) against the non-agriculturist mortgagors."

He cited in support of the proposition in *Ramier* v. *Srinivasiah*[2]. It is clear that the decision quoted is no authority for the proposition, as, in that case the mortgagor was as already stated a non-agriculturist while the puisne mortgagee was an agriculturist and the sub-mortgagee from him was an agriculturist. It is strange that there has been no reported decision where some of the mortgagors get the decree amount scaled down while other mortgagors do not succeed in doing so. For the reasons stated above we are of opinion that cases like that will be governed by the rule enunciated in the line of decisions of which *Subramanian Chettiar* v. *Ramachandra Reddiar*[1] is the latest.

A further point has been taken by Mr. Kesava Iyengar that assuming the first defendant can have full satisfaction of the decree entered up after payment of the entire scaled down amount by defendants 2 to 7, he cannot himself move the Court for entering up such satisfaction of the decree when only a part of that amount is paid by defendants 2 to 7, himself offering to pay the balance. This objection found favour with the Court below and in support of it we have been referred to the decisions in *Sree Rajah Vadravu Viswasundara Rao Bahadur* v. *Vadlamannati Kausalaramayya*[3], and *Suganatha Mudaliar* v. *Kuppuswami Chetti*[4], where the relief enjoyed by a non-agriculturist purchaser of the whole or a part of the hypotheca when the burden on the property is lightened by the mortgagors being given relief under Madras Act IV of 1938 is described as a "fortuitous benefit" or as an "accidental result." It will be noticed, however, that the expressions were used while dealing with the question "whether a non-agriculturist purchaser can move for the passing of a mortgage decree for a lesser amount when the mortgagor-agriculturist himself does not claim the relief and it was held that he cannot so move. When, however, the decree is scaled down at the instance of all the mortgagors but one as in this case and in view of the restriction imposed on the mortgagee's rights in such a case permitting him to proceed against the mortgage security only for the scaled down amount and no more, there is no logic in refusing to allow the remaining judgment-debtor to deposit the balance due and thereby resist the execution of the mortgage decree for anything more than the scaled down amount. It is no doubt somewhat odd that when a person is declared liable to pay a larger amount he should, on payment or tender of a smaller amount, get his property exonerated from liability, but this is inherent in and arises out of the proposition established by the decisions already dealt with, namely, that by the application of the principle of unity and indivisibility of a mortagage decree a non-agriculturist can indirectly get relief which

1. (1946) 2 M.L.J. 429.
2. (1940) 2 M.L.J. 872 : I.L.R. (1941) Mad. 336.
3. (1946) 2 M.L.J. 72.
4. (1947) 2 M.L.J. 273.

he cannot directly get. If at the time when the first defendant deposited Rs. 3,215 into Court the decree-holders could take out execution proceedings against the mortgage security only for the realisation of that amount there is, in our opinion, no principle or compelling authority to hold that he cannot deposit the amount and save his property and that he must wait for defendants 2 to 7 to deposit that amout. In fact the argument on behalf of the respondents, decree-holders, goes much further and claims that they can proceed against portions of the hypotheca in which the 1st defendant is interested not merely for the balance remaining outstanding out of the scaled down amount but of the entire amount for which the 1st defendant was held to be liable less the amount so far realised by payment by the other judgment-debtors. On a construction of the decree in the light of the decisions which have laid down the true limits of the rights of the mortgagee in such cases we are unable to accept the contention. The decree cannot at all be read as providing for the realization of Rs. 49,000 from the shares of defendants 2 to 7 and of the balance from the share of the 1st defendant. There is no such splitting up or apportionment. It may also be pointed out that defendants 2 to 7 will not get the full benefit of the scaling down of the debt to which they are entitled if the decree were to be so read or even if the decree were to be read as permitting a realization of the larger amount by the sale of any portion of the hypotheca as they cannot, in either event, claim contribution from the 1st defendant.

It has next been argued by Mr. Kesava Iyengar that the appellant is precluded from claiming relief which he now seeks because of estoppel and constructive *res judicata* which are said to arise by what happened in the course of certain execution proceedings. In the first place it must be pointed out that there is no reference to any *res judicata* actual or constructive, in the statement of objections filed by respondents 1 and 2. In paragraph 11 of that statement the plea of estoppel is put forward in a vague way. It would oppear that notice of the Execution Petition No. 2 of 1943 filed by the decree-holders was served on the 1st defendant. After he was so served there was an order dated 24th November, 1945 " Proclaim and sell on 28th January, 1946." The properties were divided into convenient lots. There was apparently an agreement between the 2nd defendant and the decree-holders that the former should pay Rs. 24,000 and get his properties which were lots 2 and 6, exonerated from the decree. This was done. A similar agreement between the decree-holders and defendants 3 to 7 resulted in the payment of two sums Rs. 30,000 and 18,610-12-0 by them and the stoppage of the sale of lots 1, 4 and 5 in which they were evidently interested. These three payments were all on or before 17th February, 1947. On the 20th February, 1947, the 1st defendant applied for the adjournment of the sale of lots 7 and 8 in which he was interested alleging that he had arranged with a third party for the payment of the amount due from him, the decree being on such payment assigned to the said person. With the consent of the decree-holders the sale was adjourned to 10th March, 1947. On the 6th March, however, the 1st respondent deposited the amount of Rs. 3,215 and filed the application out of which this civil miscellaneous appeal arises. It is not mentioned in the affidavit filed by the 1st defendant in support of the application for an adjournment on 20th February, 1947, what amount was due from him. According to his present contention Rs. 3,215 or a little less was alone due. Assuming that he offered to make the payment with the help of a third party to whom the decree is to be assigned and on the basis of such representation made the respondents agreed to the adjournment which the Court granted, it is difficult to find how any estoppel arises or how it operates. Before the date to which the sale stood adjourned the appellant paid what is said to be all that is due from him. Beyond stating that the receivers had changed this position to their detriment by the representation of the first defendant the statement of objections does not specify what the detriment was and how it was occasioned. There is a reference to the satisfaction of the claims against defendants 2 to 7 and the withdrawal of the appeal to the Privy Council filed against them by the decree-holders.

It is difficult to see what bearing these facts can have on the plea of estoppel sought to be raised against the 1st defendant. In our opinion the learned District Judge rightly overruled this plea. Assuming that it is open to us to entertain the argument as to constructive *res judicata* notwithstanding the absence of any reference to it in the statement of objections, we must hold that there is no substance in it either. According to the 1st defendant even after the three payments made by defendants 2 to 7 there was still due Rs. 3,215 in order to make up even the scaled down amount of the decree. He could not have therefore, at that stage pleaded that there is no executable decree. It has been held that objections as to the amount of the decree can be raised in later execution proceedings though they were not raised in prior execution proceedings. See *Ulaganatha Mudaliar* v. *Malavedu Alagappa Mudaliar*[1] and that there can be no constructive *res judicata* as to the amount due under a decree by reason of the failure on the part of the judgment-debtor to object at an earlier stage in the execution proceedings to the figure claimed in the execution petition. (See *Bapamma* v. *Vengayya*[2].)

We, therefore, overrule the pleas of estoppel and constructive *res judicata* and hold that the 1st defendant is not precluded from claiming the relief which he is now seeking by reason of anything which happened in the course of the execution proceedings. In the result we allow the appeal and order the petition filed by the first respondent as prayed for with costs here and in the Court below.

V.P.S.

Appeal allowed.

[THE FEDERAL COURT OF INDIA.]

(On appeal from the High Court of Judicature at Fort William in Bengal.)

PRESENT :—H. J. KANIA, *Chief Justice*, S. FAZL ALI AND M. PATANJAL SASTRI, JJ.

Criminal Appeal No. VIII of 1947.

Sudhir Kumar Dutt .. *Appellant**

v.

The King .. *Respondent.*

Intervenor : The Governor-General of India.

Criminal Appeal No. IX of 1947.

Jiban Krishna Bose .. *Appellant*

v.

The King .. *Respondent.*

Intervenor : The Governor-General of India.

Criminal Appeal No. X of 1947.

Probodh Chandra Ghosh .. *Appellant*

v.

The King .. *Respondent.*

Intervenor : The Governor-General of India.

Ordinance (XXIX of 1943), *section* 6 *and Criminal Procedure Code (V of* 1898), *sections* 68, 69 *and* 257—*Summoning of witnesses for defence in trial by a Special Tribunal under Ordinance XXIX of* 1943—*Contravention of the provisions of section* 257, *Criminal Procedure Code—Effect.*

A Special Tribunal constituted under Ordinance XXIX of 1943 has according to section 6 of the Ordinance to follow the procedure prescribed by the Criminal Procedure Code for the trial of

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1. A.I.R. 1929 Mad. 903.

2. (1937) 1 M.L.J. 296.

* 23rd April, 1948.

warrant cases. Section 257 of the Criminal Procedure Code is one of the sections applicable to the trial of warrant cases. The language of sub-section (1) of section 257 is imperative and the trial Court has no discretion under it to refuse to issue process to compel the attendance of any witness cited by the accused after he has entered upon his defence, unless it is of the opinion that the application should be refused for any of the reasons which are specified in the section and which it is bound to record.

Where the Special Tribunal overlooked the salutary provisions of sections 68 and 69 of the Criminal Procedure Code and sent the summonses to the witnesses cited by the accused by ordinary post and not one of them had appeared and on that the Tribunal refused to adjourn the case to enable further process to issue,

Held: In view of the serious irregularity in sending the summonses by ordinary post, no inference could be legitimately drawn against the accused from the fact that there was no response from any of the witnesses to whom summons had been sent. The refusal of the Tribunal, at that stage to give the necessary aid to the accused in procuring the attendance of his material witnesses was a contravention of the clear provisions of section 257 of the Criminal Procedure Code and amounted to a denial of a valuable right which the law has conferred on an accused person and that therefore there had to be a rehearing of the appeal by the High Court after giving an opportunity to the accused to take steps for the enforcing of the attendance of those witnesses and after considering the evidence of such of these witnesses as may appear in Court.

P. R. Das, Senior Advocate, Federal Court (*B. Banerji*, Advocate, Federal Court, with him), instructed by *Ganpat Rai*, Agent, for the Appellant (In Criminal Appeal No. VIII of 1947).

B. Banerji, Advocate, Federal Court, instructed by *Ganpat Rai*, Agent, for the Appellant (In Criminal Appeal No. IX of 1947).

Mehdi Imam, Advocate, Federal Court, instructed by *Ganpat Rai* Agent, for the Appellant (In Criminal Appeal No. X of 1947).

K. P. Khaitan, Senior Advocate, Federal Court (*M. M. Sen*, Advocate, Federal Court and *Abani Chatterjee*, Advocate, Calcutta High Court, with him), instructed by *P. K. Bose*, Agent, for the Respondent (In all the Appeals).

Sir Noshirwan P. Engineer, Advocate-General of India (*H. K. Bose*, Advocate, Federal Court, with him), instructed by *K. Y. Bhandarkar*, Agent, for the Intervenor (In all the Appeals).

The Judgment of the Court was delivered by

Fazl Ali, J.—These are appeals under section 205 (1) of the Government of India Act by three persons who along with one Captain Mathams were tried by a Special Tribunal constituted under Ordinance XXIX of 1943 on a number of charges which have been summarised in the judgment under appeal as follows :—

(*a*) Against all : that they were parties to a criminal conspiracy to cheat the Government of India (section 120-B read with section 420).

(*b*) Against S. K. Dutt (Appellant No. 1) and J. K. Bose (Appellant No. 2) that they had attempted to cheat the Government of India;

and against R. W. Mathams and P. C. Ghosh (Appellant No. 3) : that they had abetted S. K. Dutt and J. K. Bose (section 420 read with 511).

(*c*) Against R. W. Mathams and P. C. Ghosh that they had accepted bribes of Rs. 18,000 and Rs. 12,000 respectively ;

and against S. K. Dutt and J. K. Bose that they had paid these bribes (section 420 read with 109 and section 161 and 161/109).

The Tribunal acquitted all the accused persons of the charges of conspiracy and the charges of attempting to cheat and abetment. They, however, convicted Mathams and P. C. Ghosh of bribery and S. K. Dutt and J. K. Bose of having given bribes of Rs. 18,000 and Rs. 12,000 to Mathams and Ghosh respectively and sentenced them to various terms of imprisonment ranging from three years to 18 months and payment of certain fines.

Thereafter the appellants as well as Mathams appealed to the High Court against their conviction and sentence on the charges relating to bribery and the Government appealed against the order of acquittal by the Tribunal on the charge of conspiracy. The High Court dismissed the appellants' appeals but allowed the Government appeal and convicted the appellants as well as Mathams under section 120-B read with section 420 and sentenced them to the same terms of imprisonment as had been awarded by the Tribunal, but made the two sentences concurrent. The High Court, however, granted a certificate under section 205 (1) of the Government of India Act. The appellants have thereupon appealed to this Court.

Briefly the facts of the case are these : Captain Mathams and P. C. Ghosh belonged to the Military Engineering Service (M.E.S.) and were the Garrison Engineer and Subdivisional Officer respectively in the Asansol division from the 1st June 1942 until the 15th August 1942. The appellant S. K. Dutt was the proprietor of a firm of contractors which carried on business under the name and style of British India Construction Company (B.I.C.C.). The head office of this firm was at Calcutta but it had also an office at Asansol under J. K. Bose to manage the execution of the contract works there. In 1942 the British India Construction Company was given in the Asansol division, amongst others, contract No. ASN/19 for the construction of two types of huts. The contract was not signed until the 12th August 1942, but as shown by a letter of the Garrison Engineer dated the 10th May 1942 the contractor was instructed to commence work forthwith. The estimated cost of the work under contract was Rs. 2,50,281 odd, but shortly after the work was started a part of the proposed construction work was abandoned and the value of the contract was reduced to nearly half the amount. During the progress of the work Rs. 1,74,000 were paid to the contractor on running account bills which, it is not disputed, exceeded the contract prices of all the buildings which had been constructed under the contract by about Rs. 56,000.

The prosecution case was that the contractor used to pay from time to time various amounts as illegal gratification to Mathams and other Military Engineering Service employees at Asansol under certain assumed names and when it was realised that there had been excess payments, attempts were made by his men at Asansol to make an arrangement with Mathams to get a Deviation Order (which presumably means an order sanctioning certain alterations in the original contract) to support the execution of additional work in order that the excess payments might be adjusted. On the 23rd January, 1943, S. K. Dutt who, it is suggested, did not know that any arrangement had been arrived at at Asansol between his men and Mathams and P. C. Ghosh wrote a letter to the Deputy Chief Engineer at Patna admitting that an excess payment had been made in respect of contract No. ASN/19 and asked for some fresh work to neutralise the same. According to the prosecution when Mathams and J. K. Bose came to know of this letter, they were perturbed and decided that it should be immediately withdrawn and S. K. Dutt was persuaded to write another letter to the Deputy Chief Engineer at Patna withdrawing the previous letter and stating that in fact other works, besides those mentioned in the contract, had already been done at the site. Subsequently in accordance with the alleged arrangement between J. K. Bose and Mathams, P. C. Ghosh (appellant No. 3) was deputed to take measurements of certain roads alleged to have been constructed by the contractor in the area and he included them in the final bill of the contractor though in fact these roads had, according to the prosecution, been constructed by the troops. Subsequently a final bill was drawn up in the office of the Military Engineering service bearing the date 15th March, 1943, for a total sum of Rs. 1,89,458 in which the said road work was included and shown as having cost Rs. 71,000 odd. This bill bears the signature of P. C. Ghosh as well as Mathams and Bose, but the date 15th March, 1943, appears opposite the signature of P. C. Ghosh only. The prosecution case is that in consideration of Mathams and P. C. Ghosh certifying this false bill, a

sum of Rs. 30,000 was paid to them as illegal gratification on the 17th March, 1943.

The appellant S. K. Dutt admittedly sent this sum on the 16th March, 1943, by a draft on a Bank at Asansol to J. K. Bose, who withdrew the sum late in the afternoon of 17th March. According to the prosecution case on the very same evening J. K. Bose accompanied by witness Souren Dut went to Mathams and paid Rs. 18,000 to him and shortly afterwards he paid Rs. 12,000 to P. C. Ghosh in the presence of Souren Dutt. After this a number of false vouchers (Exhibit 27 series) were prepared showing payments to certain parties (who according to the prosecution case were mere fictitious names) for road construction in order to account for the sum of Rs. 30,000 and these payments were also entered in an account book kept in the contractor's office at Asansol. Subsequently, a Deviation Order for the construction of the road was issued by Mathams, which according to the prosecution was antedated as 7th July, 1942, in order to show that the contractor had been directed to take up the construction of the road at that time. Before, however, the Deviation Order could be passed the police got information of the case and started investigation in October 1943 and ultimately sent up a charge-sheet against the appellants as well as Mathams.

The appellants denied the charges made against them and asserted that the Deviation Order was in fact issued on the 7th July, 1942, and the road for which the bill was prepared was in fact made by the contractor and not by any Military Unit. The common case of S. K. Dutt and J. K. Bose is that the latter in order to make a personal profit as a middle man did not inform his master about the order for the additional work but carried out the work himself through some contractors. In January, 1943, however, when S. K. Dutt wrote to the Deputy Chief Engineer admitting excess payment, J. K. Bose had to inform him about the road construction and he also wanted money from him to make payments to the sub-contractors who had done the work. It is also stated that some of these sub-contractors pressed S. K. Dutt personally for payment when he visited Asansol some days prior to 17th March. S. K. Dutt therefore sent a draft for Rs. 30,000 for paying the sub-contractors their legitimate dues and not for bribing Mathams or P. C. Ghosh. The appellants also repudiated the allegation that they used to employ code names to describe Mathams, Ghosh and other employees of the Military Engineering Service and that a number of vouchers had been prepared in the names of fictitious persons.

It may be stated here that the two Courts below have differed on a very material question, namely, whether the roads which were charged for in the bill of the 15th March, by the contractor, were made by the contractor or by the troops. The Tribunal while acquitting the appellants of the charge of cheating substantially accepted the case for the defence on the point and held that the road work as mentioned in the bill was done by the contractor and not by the troops. As regards the charge of bribery they observed as follows :—

"We have found that the motive set out in those charges for accepting the mon ey, namely, certifying as true the false final bill for contract ASN/19, has not been proved in the sense of which notice was given to the accused, that is, false on account of dishonest inclusion of the road work, but we do find that the two sums were paid by S. K. Dutt through J. K. Bose to Captain Mathams and P. C. Ghosh respectively as a gratification other than legal remuneration. That being so, there being no proof to the contrary we are compelled by the special rule of evidence laid down in sub-section 2 of section 9 of Ordinance XXIX of 1943 to presume that these sums were accepted as a motive or reward such as is mentioned in section 161, Indian Penal Code."

These observations, however, must be read with another passage in the judgment which we think ought to be quoted here. It runs as follows :—

"We know that the road work done under this contract was not up to specification . . . . . . We have already mentioned that Inspector Mukherji says that he found no road metal and when the Members of the Tribunal went to the spot to look at the road for themselves, they also found no sign of road metal. It may well be that these bribes were paid for passing such road, or other bad work. Captain Mathams says that he made the Company re-do parts of the road, so bad that

he disallowed 40,000 square feet of them and other work, but there is no evidence of it. On the other hand, the long correspondence between J. K. Bose and S. K. Dutt about the measuring up of the work by P. C. Ghosh and the discrepancies on this point and the frequent references to the squaring up of the Burnpur affair are not, we think, entirely explained by the defence case. Section 9 (2) relieves us from the necessity of finding the precise motive for the acceptance of the bribes, but we are satisfied on the evidence that there was every indication that such a motive existed."

It seems clear therefore that though the Tribunal did rely on section 9 (2) of Ordinance XXIX of 1943 in deciding the case they also found that apart from the presumption which that provision enabled them to draw, there was sufficient evidence of a circumstantial nature to prove a motive for the alleged bribe. The High Court went further than the Tribunal on this point and held that the precise motive which is stated in the charge of bribery and which according to the Tribunal had not been made out had been established. On this finding section 9 (2) of the Ordinance need not have been invoked. That section provides among other things that where in any trial before a Special Tribunal of an offence punishable under section 161 it is proved that an accused person has accepted or obtained any gratification other than legal remuneration or any valuable thing from a certain class of persons specified in that section, it shall be presumed, unless the contrary is proved, that he accepted that gratification or that valuable thing as a motive or reward such as is mentioned in section 161 without consideration or for a consideration which he knows to be inadequate.

The findings of the Tribunal as well as the High Court on the question of the motive for bribe have a direct bearing on the only so-called " constitutional point " which was raised by the appellants in the High Court, which was that section 9 (2) of the Ordinance on which the Tribunal had relied was *ultra vires*: The ground urged in support of this contention was that since an accused person cannot be examined on oath, the onus of proving any part of the prosecution case cannot be placed upon him and that to the extent that such a course is contemplated by section 9 (2) of the Ordinance it is *ultra vires*. The High Court had no difficulty in disposing of this contention as being without merit and pointed out in a few words that the defence argument merely amounted to saying "that the provision referred to was one which ought not to have found a place in the Ordinance—not that its introduction was *ultra vires*." The High Court did not state in so many words that the point did not arise upon the findings of the Tribunal as well as the High Court as both the Courts had held that there was some legal evidence apart from the presumption to be drawn under section 9 (2) to prove a motive or consideration for the alleged bribe. But the point was apparent on the face of the two judgments and did not need elaboration. In these circumstances it seems somewhat surprising that the High Court was persuaded to grant a certificate under section 205 of the Government of India Act. Such a certificate might well have been refused because the question raised was not a " substantial " question and also because strictly speaking it did not arise on the finding of either Court.

In this Court the learned Counsel appearing for the appellants did not press the point. As the only point on which the High Court granted a certificate under section 205 is without merit and was not pressed, these appeals should have ordinarily been dismissed, but after hearing Counsel for the appellants at some length on their application to urge other grounds we find that one of them requires serious consideration.

As will appear from what has been stated before, one of the crucial points in the case was whether the sum of Rs. 30,000 which was sent by S. K. Dutt to J. K. Bose on the 16th March, was spent by the latter in paying bribes to Mathams and Ghosh or it was spent in paying certain sub-contractors who had made the roads in question in Burnpur. On this point there were two conflicting versions before the Court and there can be no doubt that if the appellant could have succeeded in establishing that the payments were actually made to the sub-contractors that would have materially affected the decision of the Court not only on the charge of bribery but also on the charge of conspiracy to cheat, which, it is not disputed, turned to a large extent on the question of whether the roads in question had been

made on behalf of S. K. Dutt or by any army units as alleged by the prosecution. In order to establish his case J. K. Bose applied on the 27th March, 1946, for the examination of 15 witnesses most of whom are persons mentioned in the vouchers (Exhibit 27 series), that is to say, persons who, according to the appellants, were recipients of various sums of money out of the sum of Rs. 30,000 received by J. K. Bose from S. K. Dutt. This application was put up before the Tribunal on the 29th March, in the absence of the accused and their lawyers and the following order was made :—

> "The accused and his lawyers are not present, so that the Court is not in a position to ascertain whether it is necessary in the interest of justice to examine all these witnesses. In the circumstances let summonses issue on all of them on the understanding that the question whether their examination is necessary is left undecided. Summon for 8th April, 1946."

Section 68 of the Code of Criminal Procedure provides among other things that every summons issued by a Court shall be in duplicate and such summons shall be served by a police officer or subject to such rules as the Provincial Government may prescribe by an officer of the Court issuing it or other public servant. Section 69 provides that the summons shall if practicable, be served personally on the person summoned by delivering or tendering to him one of the duplicates of the summons and such person shall, if so required, by the serving officer, sign a receipt therefor on the back of the duplicate copy. These sections ensure a twofold safeguard for proper service ; firstly, by providing that the service should be effected by a police officer or an officer of the Court who should see that the summons is served in the manner provided in the Code and who should be able to report to the Court as to the manner in which the summons was actually served, and secondly, by authorising the serving officer to obtain a signed acknowledgment of the service which should ordinarily be treated as very cogent evidence of service. These salutary provisions were, however, entirely overlooked by the Tribunal who directed the summons to be sent by post—not even by registered post in which case some evidence would have been forthcoming as to who actually received the summons if it was received by any person. As a result of this irregular procedure a very unsatisfactory situation arose. On the 8th April when the parties appeared before the Court it was found that two of the envelopes containing summons had come back from the Dead Letter Office and with regard to the rest there was nothing to show whether they had been received by any of the addressees or by whom they were received. On that date the examination of the accused was also concluded and thereafter J. K. Bose made a fresh application for summoning the witnesses mentioned in his list of the 27th March but the Tribunal declined to summon them and recorded the following order :—

> "He (Bose) asked for summons on 15 persons of whom the first 14 were said to be the persons in whose names the vouchers Exhibit 26 series were (this should be Exhibit 27 series). Summonses were issued on all of them by post, only the name of the post office being given not the police station. Not one of them has appeared or communicated with the Court. It is the prosecution case that they are non-existent and that these vouchers were all forged to account for money paid as bribes. If the defence could have produced the persons to whom they say those payments were made they could have proved the prosecution false in a very important particular. Yet they have made no attempt to get into touch with these persons and the addresses which they have given are on their own admission addresses which they had in 1942. The accused S. K. Dutt who is equally interested is a contractor on his showing handling hundreds of contracts valued at over a crore of rupees and of "unlimited financial resources". We cannot believe that if these persons who, he says, were suppliers of his firm could prove his innocence, he would not have taken steps to trace them as soon as he knew the prosecution case on the point more than six months ago. Not one out of 14 has answered the summons. This fact speaks volumes.
>
> We will not adjourn the case to enable further process to issue."

It seems quite clear from this order that the Tribunal fully realised that the question as to whether the vouchers, Exhibit 27 series, were genuine or otherwise was a very material one. From this it must naturally follow that the persons in whose names the vouchers had been prepared were *prima facie* very material witnesses. Whether they were genuine payees or fictitious persons was clearly a question to be determined on evidence and could not be disposed of in the summary way in which the Tribunal has disposed of it. The question which

now arises is whether the order made by the Tribunal can under the circumstances be supported in law.

Section 6 of Ordinance XXIX of 1943 provides that a Special Tribunal constituted under the Ordinance shall follow the procedure prescribed by the Code of Criminal Procedure for the trial of warrant cases by Magistrates. Section 257 is one of the sections applicable to the trial of warrant cases and its first sub-section which is directly relevant to the present discussion runs as follows :—

> "If the accused after he has entered upon the defence applies to the Magistrate to issue any process for compelling the attendance of any witness for the purpose of examination or cross-examination or the production of any document or other thing, the Magistrate shall issue such process, unless he considers that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice. Such ground shall be recorded by him in writing."

It is to be noted that the language of the section is imperative and the trial Court has no discretion under it to refuse to issue process to compel the attendance of any witness cited by the accused after he has entered upon his defence, unless it is of the opinion that the application should be refused for any of the reasons which are specified in the section and which it is bound to record. Section 6 of the Ordinance which also may be read in this connection does not take us much further. It provides that a Special Tribunal may refuse to summon any witness if satisfied after examination of the accused that the evidence of such witness will not be material and shall not be bound to adjourn any trial for the purpose unless such adjournment is in its opinion necessary in the interest of justice. This provision was hardly applicable to the present case because it could not be said with any justification that the evidence of the witnesses for whom summons was applied for was not material, nor could it be said that any adjournment that might be necessary for the examination of the witnesses whose evidence was material was not in the interest of justice. The order-sheet in the case shows that the examination of the prosecution witnesses began on the 6th September 1945 and was concluded on the 26th March 1946 and a number of adjournments were granted during the interval. In these circumstances it would have been unreasonable to object to such adjournment as might have been necessary for calling the defence witnesses. The question then to be decided is whether there were any *prima facie* grounds for holding that the application made by the accused on the 8th April for summoning his witnesses was made for the purpose of vexation or delay or for defeating the ends of justice. In the order of the Tribunal which has been quoted, there is no express statement to that effect. What the Tribunal seem to lay stress on is firstly, that in spite of the fact that the evidence of these witnesses was so material to the defence the accused made no attempt to get into touch with them ; and secondly, that none of the witnesses on whose evidence the accused proposed to rely had answered the summonses issued on the 29th March. What conclusion the Tribunal wanted to draw from these facts is not clear from the order, but it seems that they were strongly inclined to accept the view pressed on them on behalf of the prosecution that the persons cited as witnesses by J. K. Bose were fictitious persons. This becomes clear on reading the following statement in paragraph 69 of their judgment.

> "The fact that not a single one of these witnesses produced an answer of any sort is a strong indication that the names were in truth fictitious".

All that we wish to say at this stage is that the conclusion arrived at by the Tribunal was premature and it was unfair to draw it without giving a reasonable opportunity to the accused to produce his evidence. It may be that the view which has been expressed by the Tribunal may ultimately turn out to be correct, but at the stage with which we are concerned, their refusal to give the necessary aid to the accused in procuring the attendance of his witnesses was a contravention of the clear provisions of section 257 of the Code of Criminal Procedure and amounted to denial of a valuable right which the law has conferred on an accused person. In view of the serious irregularity in sending the summonses by post instead of

sending them out as provided in section 68 of the Code of Criminal Procedure no inference could be legitimately drawn against the accused from the fact that there was no response from any of the witnesses to whom summons had been sent.

Our attention has been drawn to ground No. 9 of the memorandum of appeal filed by the appellants in the High Court which directly deals with the point under discussion and we are also informed by Mr. P. R. Das, Counsel for S. K. Dutt that this ground was strongly pressed by him in support of the appeal. The High Court has unfortunately not expressly dealt with it, but it has generally expressed its agreement with the findings of the Tribunal which, it is urged before us, include the finding that the vouchers Exhibit 27 series, are not genuine. It seems to us that before finally disposing of the appeal the High Court should have given a reasonable opportunity to the appellant J. K. Bose to produce his witnesses and if any of the witnesses appeared in Court it should have directed their evidence to be recorded as contemplated under section 428 of the Code of Criminal Procedure.

It was contended before us on behalf of the prosecution that section 257 has given a discretion to the trial Court to refuse to summon witnesses in certain cases and if in the exercise of that discretion the Court has refused to summon witnesses, its order cannot be reviewed by an appellate Court. The point does not need an elaborate answer because it has been considered and ruled out in many cases. As the Bombay High Court pointed out in a recent case *Hubli Electricity Co.* v. *Province of Bombay*[1].

"If there is an appeal from a decision of a Judge no opinion that he forms and no judicial discretion that he exercises can ever be final. It is always subject to review by the Court of Appeal."

In the result we allow the appeals and set aside the order of the High Court in so far as it concerns the appellants and direct that in place of the order of the High Court there shall be substituted an order directing that the appeal be reheard and finally determined after giving a reasonable opportunity to the appellant No. 2 to take such steps as he may be entitled to take in law for enforcing the attendance of the witnesses mentioned in his list of the 27th March and after considering the evidence of such of these witnesses as may appear before the Court.

V.S.

Appeals allowed.

[THE FEDERAL COURT OF INDIA.]

(Original Jurisdiction.)

PRESENT :—H. J. KANIA, *Chief Justice*, S. FAZL ALI AND M. PATANJALI SASTRI, JJ.

Ramgarh State .. *Plaintiff**

v.

The Province of Bihar .. *Defendant.*

Government of India Act (1935) *as adapted by the India (Provisional Constitution) Order* (1947), *sections* 6 *and* 204—*Original jurisdiction of the Federal Court—Scope and limits of—Acceding State—What is—Section* 204 (1) *Proviso, clause* (a)—"*A State*"—*Meaning—Scope and intention of the proviso.*

The Federal Court is not a Court of ordinary original civil jurisdiction in all matters and between all parties. Its original jurisdiction is derived from and is limited by section 204 of the Government of India Act as adapted by the India (Provisional Constitution) Order, 1947. It is wrong to say that the Federal Court would be competent to entertain a suit when there is no other Court in the land to decide questions of the kind raised by the plaint in the suit. Section 204 imposes limitations on the exercise of its original jurisdiction both as regards parties and the subject matter. Apart from the question of the relief claimed, unless a plaintiff comes within one or the other of the classes of parties mentioned therein (*i.e.*), the Dominion, the Provinces and the Acceding States, the Federal Court would have no jurisdiction to entertain his suit under section 204.

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* Case No. I of 1948.

1. (1947) 49 Bom. L.R. 92.

13th April, 1948.

No Indian State could be properly described as an Acceding State within the meaning of section 6 of the Act unless the Governor-General has signified his acceptance of an Instrument of Accession executed by the Ruler thereof.

The proviso to sub-section (1) to section 204 is designed only to restrict the jurisdiction where a State is a party to a dispute, to the cases enumerated in the sub-clauses of the proviso and in the context of this restrictive provision, the words " a State " in clause (*a*) of the proviso can only mean an Acceding State as referred to in sub-section (1) and cannot include a non-Acceding State so as to enlarge the scope of the jurisdiction.

The Judgment of the Court was delivered by

Patanjali Sastri, J.—This is a suit to obtain from this Court a declaration that,

" Ramgarh is entitled to be an Acceding State under section 204 of the Government of India Act as adapted by the Governor-General."

and that

" the defendant, the Province of Bihar, has no authority to legislate or exercise any powers of Government over the Ramgarh State or its Rulers or its subjects."

The plaint also seeks certain other ancillary reliefs to which it is not necessary now to make a detailed reference. The plaintiff claims that he is the " legal Ruler of the Ramgarh State" and as such entitled to the declaration of his status as against the defendant who " contemplates further invasion of his rights."

This plaint is a prolix document consisting of 72 paragraphs dealing mostly with the origin and history of the alleged State both before and during the British rule. It is admitted that Ramgarh was brought under the Bengal Permanent Settlement Regulation (XI of 1793) and was regarded and dealt with as a permanently settled zamindari till the 15th August, 1947. It is, however, alleged that for centuries before the Permanent Settlement, Ramgarh was a Sovereign State, and that the engagements with the British Government for payment of land revenue, etc., from the time of the Permanent Settlement were merely agreements entered into by Ramgarh as a feudatory State and involved no loss of sovereignty. It is further alleged that the *de facto* exercise of " what appears to be sovereign powers " by the British Power " must be attributed to an excessive extension of suzerainty due to the sufferance of the lawful Ruler of the State". It is claimed that the effect of section 7 of the Indian Independence Act, 1947, is that all treaties, engagements, obligations, etc., in respect of States lapsed as from the 15th August 1947, and that, in consequence, the original sovereign status of Ramgarh has revived, as from the said date,

" freed of all clouds in the form of different kinds of control, from all powers of jurisdiction exercised by the British Indian Government by agreement or sufferance or otherwise."

The plaint goes on to state that a memorial was submitted to His Majesty the King and the States Department of the Government of India praying for the recognition of the status of Ramgarh as a Native State but that the Provincial Government of Bihar,

" without jurisdiction to decide on the subject and without entering into the merits of the case."

rejected the same on 1st December, 1947.

The cause of action is alleged to have arisen,

" when the East India Company first interfered with the administration of the plaintiff State in the year 1772,"

and on the 15th August, 1947,

" when under the Indian Independence Act, 1947, the British suzerainty lapsed and the plaintiff was restored to its original position of absolute independence,"

and also on the 1st December, 1947, when the Governor of Bihar rejected the plaintiff's claim for recognition as a State.

The plaintiff invokes the original jurisdiction of this Court under section 204 of the Government of India Act as adapted by the India (Provisional Constitution) Order, 1947 (hereinafter referred to as " the Act "),

"inasmuch as there is no other Court in the land to decide such questions and inasmuch as the plaintiff State has expressed its willingness to be an Acceding State as understood by the Government of India Act, has submitted a memorial to His Majesty the King, the Secretary of State for India, to His Excellency the Governor-General of India, to the States Department of the Government of India, to His Excellency the Governor of Bihar and to the Political Secretary to the Government of Bihar and the plaintiff State is prepared to sign the Instrument of Accession any time such Instrument is forwarded to him for his signature".

As the plaintiff did not even allege in the plaint that Ramgarh is an "Acceding State," the suit was directed to be set down for hearing on the preliminary question whether this Court had jurisdiction to entertain the suit. Mr. Sanjib Kumar Chaudhuri, describing himself as the Advocate General of Ramgarh argued the point on behalf of the plaintiff.

Before dealing with the arguments based on section 204 of the Act we may mention, only to dismiss, the suggestion, somewhat faintly put forward, that this Court is competent to entertain the suit as there is no other Court in the land to decide questions of the kind raised by the plaint. This proceeds on a misapprehension of the true position. This Court is not a Court of ordinary original civil jurisdiction in all matters and between all parties. Its original jurisdiction is derived from and is limited by section 204 of the Act. That section runs thus :

204.—(1) Subject to the provisions of this Act, the Federal Court shall, to the exclusion of any other Court, have an original jurisdiction in any dispute between any two or more of the following parties, that is to say, the Dominion, any of the Provinces or any of the Acceding States, if and in so far as the dispute involves any question (whether of law or fact) on which the existence or extent of legal right depends:

Provided that the said jurisdiction shall not extend to

(*a*) a dispute to which a State is a party, unless the dispute –

(*i*) concerns the interpretation of this Act or of an Order in Council made thereunder before the date of the establishment of the Dominion, or of an order made thereunder on or after that date, or the interpretation of the Indian Independence Act, 1947, or of any order made thereunder, or the extent of the legislative or executive authority vested in the Dominion by virtue of the Instrument of Accession of that State ; or

(*ii*) arises under an agreement made under Part VI of this Act in relation to the administration in that State of a law of the Dominion Legislature, or otherwise concerns some matter with respect to which the Dominion Legislature has power to make laws for that State ;

(*iii*) arises under an agreement between that State and the Dominion or a Province, being an agreement which expressly provides that the said jurisdiction shall extend to such a dispute, and in the case of an agreement with a Province, has been made with the approval of the Governor-General ;

(*b*) a dispute arising under any agreement which expressly provides that the said jurisdiction shall not extend to such a dispute.

Sub-section (2) is not material here.

It will be noticed that the section imposes two limitations on the exercise of its original jurisdiction by this Court : (1) as to the parties, and (2) as to the subject matter. Assuming (without deciding) that the subject matter of the suit is of the kind described in the section, the question remains whether the plaintiff comes within one or the other of the classes of parties mentioned therein, *viz.*, the Dominion, the Provinces and the Acceding States. The only class within which the plaintiff seeks to bring himself is that of "Acceding State." It follows that if Ramgarh is not an Acceding State within the meaning of the Act, this Court would have no jurisdiction to entertain the suit under section 204 of the Act.

Elaborate considerations both of law and fact are put forward in the plaint in support of the claim that Ramgarh is a State. As we are dealing with the question of jurisdiction *in limine* for the present discussion we must assume that Ramgarh is a State. The question, however, remains whether it is an "Acceding State."

Now, section 6 of the Act, which provides for the accession of Indian States, lays down that an Indian State shall be deemed to have acceded to the Dominion,

"if the Governor-General has signified his acceptance of an Instrument of Accession executed by the Ruler thereof" (sub-section (1)).

A State which has acceded to the Dominion is referred to in the Act as an Acceding State and the Instrument by virtue of which a State has so acceded is referred to as the Instrument of Accession of that State—(sub-section (5)). These provisions make it clear that no Indian State could be properly described to be an Acceding State within the Act unless the Governor-General has signified his acceptance of an Instrument of Accession executed by the Ruler thereof. It is nowhere even suggested in the plaint that the plaintiff has executed an Instrument of Accession to the Dominion and that the Governor-General has signified his acceptance thereof. On the contrary, it is admitted that the plaintiff's memorial to the various authorities concerned in the matter praying for the recognition of Ramgarh as a Native State has been rejected, and all that is alleged is that,

> " the plaintiff State has expressed its willingness to be an Acceding State and is prepared to sign the Instrument of Accession at any time such Instrument is forwarded for plaintiff's signature."

This obviously is insufficient to bring Ramgarh within the definition of an Acceding State.

Learned counsel for the plaintiff however stressed the opening words of section 204 (" Subject to the provisions of this Act ") as supporting a wider construction of the section. He was, however, unable to refer us to any other provision of the Act showing that the Federal Court is empowered to exercise original jurisdiction in respect of matters, or as between parties, other than those specified in section 204. He suggested that the reference to " a State " in clause (*a*) of the proviso to sub-section (1) had the effect of extending the jurisdiction to cases where *any* State was a party to a dispute, provided only the dispute concerned matters, or arose under agreements, specified in sub-clauses (*i*), (*ii*) and (*iii*) of the proviso. We are unable to accept this contention as it is unsound. The proviso is designed only to restrict the jurisdiction, where a State is a party to a dispute, to the cases enumerated in the said sub-clauses, and in the context of this restrictive provision, the words " a State " can only mean an Acceding State referred to in sub-section (1) and cannot include a non-Acceding State so as to enlarge the scope of the jurisdiction. For the reasons mentioned above, we think the plaintiff is not an Acceding State within the meaning of the Act and we therefore declare that this Court has no jurisdiction to entertain the suit.

V.S. ——— *Suit dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction.)

PRESENT :—MR. JUSTICE YAHYA ALI.

In the matter of A. T. Vasudevan and others, minors.

A. S. Thiruvengada Mudaliar .. *Petitioner.**

Letters Patent (Madras), clause 17—Scope of the jurisdiction under—Power of High Court to appoint guardian in respect of the undivided property of minor members of a Hindu joint family and to sanction sale of such property—Hindu Law—Joint family—Manager—Sale of joint family property—Competency—No legal necessity but beneficial to interests of family.

In the exercise of its inherent jurisdiction vested in it under the Letters Patent, which jurisdiction is preserved by section 3 of the Guardians and Wards Act, the High Court has power to appoint a guardian in respect of the person and property of minors covering even their undivided interest.

The father and manager of a Hindu joint family who had besides five minor sons, two adult sons and his wife and an unmarried daughter who have rights of maintenance, applied under clause 17 of the Letters Patent for being appointed guardian of the ancestral joint family property belonging to the minor sons and for sanction of the sale of that property as being beneficial to the interest of the minor sons. On a question whether the High Court had jurisdiction to entertain such an application and power to pass the orders as prayed for,

Held, that the High Court would be justified in appointing the guardian both by virtue of the power conferred under clause 17 of the Letters Patent and of the practice in this High Court and according sanction to the proposed sale as, in the circumstances, it was highly advantageous and beneficial to the interests of the entire family including the minor coparceners, subject of course to proper safeguards being provided for the minors' share of the purchase money being invested in Government securities and deposited with the Registrar of the Court.

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* O.P. No. 75 of 1948. 16th March, 1948.

Joint family property can be sold by a manager if it is shown that it is clearly beneficial to the interests of the family even though there is no legal necessity justifying the transaction.

S. Panchapakesa Sastri and *A. R. Krishnaswami* for Petitioner.

A. V. Viswanatha Sastri guardian-ad-litem for minors.

The Court delivered the following

JUDGMENT.—This is an application under clause 17 of the Letters Patent of 1865 by A. S. Thiruvengada Mudaliar for being appointed guardian of the joint family property belonging *inter alia*, to his five minor sons and for sanction of the sale of that property as being beneficial to the interests of the minor sons. The petitioner as the father is the Karta of the family and he has besides the five minor sons two adult sons, and there are also his wife and an unmarried minor daughter who have rights of maintenance. The properties admittedly are ancestral immoveable properties consisting of lands in the villages of Sembiam and Paravallur measuring in the aggregate about 52 acres. Those villages were recently brought within the Municipal limits of Madras City and the lands therein have consequently risen in value. I shall deal with the facts bearing upon the beneficial nature of the proposed transaction at a later stage.

The first question is whether this Court has jurisdiction to entertain this application. It is not denied that under the Guardians and Wards Act no guardian of the property of an infant will be appointed where the minor is a member of an undivided family governed by the Mitakshara Law, the reason being as laid down by the Judicial Committee in *Gharibullah* v. *Kalaksingh*[1] that the infant's interest is not individual property. As observed by their Lordships, it has been well settled by a long series of decisions in India that a guardian cannot be appointed in respect of the infant's interest in the property of an undivided Mitakshara family. This was pointed out to be clearly right,

"on the plain ground that the interest of a member of such a family is not individual property at all and that therefore a guardian, if appointed, would have nothing to do with the family property."

This view has been acted upon in a series of cases collected in footnote (*n*) to paragraph 230 of Mayne's Hindu Law. It is, however, mentioned by the same learned author that the High Court has inherent jurisdiction to appoint a guardian of the property of the minor who is a member of the joint family even where the minor's interest in the property is an undivided share in the family property unlike under the Guardians and Wards Act. This jurisdiction is conferred by clause 17 of the Letters Patent which is in these terms :

"And we do further ordain that the said High Court of Judicature at Madras shall have the like power and authority with respect to persons and estates of infants, idiots and lunatics within the presidency of Madras, as that which is now vested in the said High Court immediately before the publication of these presents."

This is substantially a reproduction of clause 16 of the Letters Patent of 1862 in which it was stated that this Court would have the jurisdiction which was then vested in the Supreme Court. The jurisdiction of the Supreme Court was laid down in clause 32 of the Madras Charter of 1800 which is as follows :

"And we do hereby authorise the said Supreme Court of Judicature at Madras to appoint Guardians and Keepers for infants, and their estates, according to the order and course observed in that part of Great Britain called England."

That jurisdiction was exercised in England by the Chancellor in the Court of Chancery as a part of the general delegation of the authority of the Crown *virtute officii*. As it has been laid down in a series of cases in England, the Chancellor's jurisdiction has its foundation in the prerogative of the Crown flowing from its general power and duty as *parens patriæ*. Now the Court of Chancery in exercise of this jurisdiction does not permit the conversion of real property belonging to a minor into personal property ; but that is because under the English Law a distinction obtains between

1. (1903) L.R. 30 I.A. 165 : I.L.R. 25 All. 407 (P.C.).

realty and personalty both with regard to the infant's power of disposal thereof by will and with regard to the line of succession. No such distinction applies to a Hindu family in India as it is now well settled. The reference in the Charter of 1800 to the order and course followed in England is primarily with regard to matters of jurisdiction and not to the entire body of the law applicable such as the distinction with regard to conversion of real property belonging to the minor into personal property. There is no direct case decided by this Court on the question of inherent jurisdiction of the High Court under clause 17 of the Letters Patent in a matter like this except for an obiter reference contained in the judgment of Venkataramana Rao, J., in *Raja of Vizianagaram* v. *Secretary of State for India*[1]. There the question was whether under this clause the High Court had jurisdiction with regard to minors outside the limits of the Presidency Town and whether its jurisdiction to act under that clause was not affected by the Guardians and Wards Act. Venkatasubba Rao and Venkataramana Rao, JJ., held that the jurisdiction of the Supreme Court was not limited to the City of Madras, that that jurisdiction was not in the exercise of its ordinary original jurisdiction and that it is saved by section 3 of the Guardians and Wards Act. What is the effect of the decision of the Privy Council in *Ryots of Garabandho* v. *Zamindar of Parlakimedi*[2] will be upon that ruling is a matter which does not arise here, but the only material portion of the judgment in the Madras case that is relevant for the purpose of this case is the dictum of Venkataramana Rao, J., at page 459 of the report. After referring to a number of Bombay, Calcutta and Allahabad decisions the learned Judge concluded that the High Court has jurisdiction to appoint a guardian for a minor apart from the Guardians and Wards Act and then observed :

> "The practice in this Court, so far as my experience goes, has been consistent with the view taken by the other High Courts."

This observation is relied on by Mr. Panchapakesa Sastri to show that although there are no reported cases bearing upon the question at issue there has been an invariable practice here following the line of the various decisions of the Bombay, Calcutta and Allahabad High Courts. I shall refer to a few of those cases. In In re *Jairam Luxmon*[3] and In re *Jagannath Ramji*[4], this question had arisen, but in those cases no directions for alienation of the property were given. Guardians were appointed and the responsibility with regard to the alienation was thrown upon them. In In re *Manilal Hurgoven*[5], the proposed alienation by the guardian was duly sanctioned by the Court after considering the various objections raised against it. The facts of that case were very similar to those of the present case. Jenkins, C.J., raised the question whether the manager of the family, the father, had not the right to deal with the family property and whether by granting sanction the Court would not be depriving the minor of the right to object to the alienation after attaining majority if he thought proper to do so. Eventually sanction was given holding that the High Court had power in such cases to appoint a guardian of the property of the minor apart from the Guardians and Wards Act. This case was followed by the same Court in *Narsi Tokersey* v. *Sachindranath Gajanan*[6]. The correctness of this view was however doubted by Kania, J., as he then was in In re *Dattatraya Govind Haldanker*[7]. The learned Judge raised two important doubts (1) Why should the purchaser demand an order of sanction from the Court before purchasing the property ? (2) In spite of the Court passing the order of sanction, the purchaser would not be absolved from the duty of making the necessary enquiries and in the event of the minor challenging the transaction the purchaser would still have to prove that he made independent enquiries and satisfied himself as to the power of the manager of the joint family to enter into that transaction. In *Mahadev Krishna*, In re[8], the question again arose for consideration and Sir John Beaumont, C.J. and Rangnekar, J., reaffirmed the principle of the earlier decisions

1. (1936) 71 M.L.J. 873 : I.L.R. 1937 Mad. 383.
2. (1943) 2 M.L.J. 254 : L.R. 70 I.A. 129 : I.L.R. 1944 Mad. 457 (P.C.).
3. (1892) I.L.R. 16 Bom. 634.
4. (1893) I.L.R. 19 Bom. 96.
5. (1900) I.L.R. 25 Bom. 353 (F.B.).
6. (1929) I.L.R. 54 Bom. 75.
7. (1932) I.L.R. 56 Bom. 519.
8. I.L.R. (1937) Bom. 432.

in In re *Manilal Hurgoven*[1] and in *Narsi Tokersey* v. *Sachindranath Gajanan*[2], and referring to Kania, J.'s decision in In re *Dattatraya Govind Haldanker*[3], dissented from it and answered both of his doubts. With regard to the first of his doubts it was said that the purchaser does not seek to cast any burden on the Court. He merely says that he is not going on with the transaction unless he gets a good title. It was pointed out that it was difficult for a purchaser to satisfy himself as to the existence of legal necessity or benefit to the estate and that evidence with regard to legal necessity might not be available when the transaction may be attacked in years to come by a minor son of the manager. The youngest minor in the present case, it may be noted here, is one year old and the transaction may be questioned 20 years later. With regard to the second doubt Rangnekar, J., further pointed out that although the legal position is correct that the purchaser should satisfy himself that a legal necessity exists or that moneys are required for the benefit of the estate many transactions take place which are not challenged and the burden placed upon the purchaser or the mortgagee in such cases is completely discharged without the parties coming to the Court. The latest pronouncement of the Bombay High Court is contained in Full Bench decision in *Ratanji Ramji*, In re[4]. The entire case-law was fully reviewed and the jurisdiction of the Court to appoint a guardian of the minor was affirmed both on the ground of the power conferred under clause 17 of the Letters Patent and by virtue of the long standing practice in that Court. This view has been acted upon by the Calcutta High Court in *Hari Narain Das*, In re[5] and In re *Bijaykumar Singh Budar*[6] and by the Allahabad High Court in In the matter of *Govind Prasad*[7]. The Allahabad High Court has jurisdiction by virtue of clause 12 of the Letters Patent in respect of the persons and property of the minors. That Court, however, refused to exercise that jurisdiction in that particular case on the ground of inexpediency and want of precedent. The result of this foregoing survey is that in the other Chartered High Courts the consensus of opinion has been that in the exercise of its inherent jurisdiction vested in it under the Letters Patent, which jurisdiction is preserved by section 3 of the Guardians and Wards Act, the High Court has power to appoint a guardian in respect of the person and property of the minors covering even their undivided interest. Although there is no direct decision of this Court with regard to this matter there is the statement of Venkataramana Rao, J., that the practice in this Court has been on the same lines as indicated in the Bombay and Calcutta decisions. That practice is warranted by clause 17 of the Letters Patent.

The next question is whether, the Court having the power, the proposed transfer is beneficial to the interests of the five minor sons of the petitioner. The facts set out in the application and the supporting affidavit are these. Both the pieces of land are dry lands. This property fell in the partition which took place in 1942 between the petitioner and his brother to the petitioner's share. It was in that year valued in the deed of partition as being worth Rs. 15,000. On the date of partition there was a mortgage subsisting over this property for Rs. 11,000. The petitioner from his own earnings discharged the entire debt. The land has no irrigation facilities for the purpose of cultivation and hence no wet crops were ever raised except in a small area. The petitioner was therefore constrained to lease out the palmyra trees in both the pieces of land for the purpose of toddy extraction. He entered into an arrangement on 12th April, 1947, whereby the lessee was to take a lease of the property for one year which will expire on 30th September, 1948, the rent reserved for that period being Rs. 1,600. On that date this source of revenue will completely disappear owing to the introduction of prohibition in the city from 1st October, 1948. With regard to the rest of the land the petitioner arranged for raising casuarina plantations with two persons who were to raise plantations at their expense over a period of nine years commencing from 3rd July, 1943. At the expiry of the period after the plantation is cut it would be

1. (1900) I.L.R. 25 Bom. 353 (F.B.).
2. (1929) I.L.R. 54 Bom. 75.
3. (1932) I.L.R. 56 Bom. 519.
4. I.L.R. (1942) Bom. 39 (F.B.).
5. (1922) I.L.R. 50 Cal. 141.
6. (1931) I.L.R. 59 Cal. 570.
7. (1928) I.L.R. 50 All. 709.

sold and half the sale proceeds would be paid over to the petitioners. The plantation is very tender still and the lease has to run its course. In the meantime by reason of the general rise in prices and also the special rise occasioned by the inclusion of those villages within the limits of the City of Madras, the petitioner has been in a position to secure an offer of Rs. 1,95,000 for both the plots of land measuring 52 acres from one Mr. M. V. Venkataraman who proposes to build a factory on the land. An agreement was entered into with him embodying the terms ; but since the purchaser is offering such a high price he has stipulated that the sanction of the Court should be previously obtained. It would appear that an adjoining plot of land with similar facilities measuring 35 acres was sold a little over a year ago for a sum of Rs. 34,000. It is perfectly clear that the offer of Rs. 1,95,000 is a very handsome offer which, if not accepted and implemented, might be withdrawn and no similar offer may be forthcoming for a long time to come. In order to effectuate this transaction the petitioner has entered into an arrangement with the lessees of the casuarina plantation by which they have agreed to relinquish all their rights under the lease on being paid a sum of Rs. 9,001 on or before the 14th April, 1948. The net amount available by the sale of the property would then be Rs. 1,86,000 which undoubtedly is an exceedingly good price for the land, almost in the nature of a windfall. There can be no doubt in these circumstances that the proposed sale of these lands is highly advantageous and beneficial to the interest of the entire family including the minor coparceners.

The next question is whether a sale by the manager of a joint family property is competent when it is only for the benefit of the estate, since there is no case of there being any legal necessity. Whatever the ancient texts might have said about this matter the trend of decisions for a long time has been definitely to hold that a joint family property can be sold by a manager if it is shown that it is clearly beneficial to the interests of the family even though there is no legal necessity justifying the transaction. It will be sufficient to refer to some of the most recent cases reported and unreported. In *Sellappa* v. *Suppan*[1], Venkatasubba Rao and Cornish, JJ., held that the power of the manager of a joint Hindu family to alienate property can be exercised not only in a case of need but for the benefit of the estate. At one time in view of certain observations of the Judicial Committee in *Hanoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonwaree*[2] and *Palaniappa Chetti* v. *Sreemath Devasikamony Pandarasannadhi*[3], it was thought that there should be actual pressure on the estate ; but in *Sellappa* v. *Suppan*[1], it was pointed out that " pressure and danger " in those two cases were referred to by their Lordships as examples of benefit and that the pronouncement of the Judicial Committee did not justify a narrower view being taken of the expression " for the benefit of the estate." In a number of recent unreported cases this view has been uniformly adopted (*vide* App. No. 206 of 1942 decided by King and Shahabuddin, JJ., on 3rd March, 1944, App. No. 101 of 1945 decided by Wadsworth and Govindarajachari, JJ., on 15th April, 1947 and Appeals Nos. 261 and 418 of 1945 decided on 5th February, 1948, by Rajamannar, O.C.J. and Satyanarayana Rao, J.). I find that the proposed transaction is clearly beneficial to the estate and to the interests of the minors and I have no hesitation in sanctioning it.

The only other question is as to the safeguards that should be provided in the interests of the minors as to the disposal of their shares of the net proceeds of the sale. The petitioner undertakes to purchase National Savings certificates for the maximum amount permissible, *viz.*, Rs. 15,000 in the names of each of his minor sons and also in the names of himself and his wife. As the family is now composed, the five minor sons will be entitled to 5/8ths of the consideration which comes to Rs. 1,16,250. Nobody can predicate the precise share of an undivided coparcener but proceeding upon the existing basis it is essential that a sum equal to the share of the minors with some further margin is put in their names. National Savings

1. (1937) 1 M.L.J. 422 : I.L.R. 1937 Mad. 906.
2. (1856) 6 M.I.A. 393.
3. (1917) 33 M.L.J. 1 : L.R. 44 I.A. 147 : I.L.R. 40 Mad. 709 (P.C.).

certificates of the value of Rs. 15,000 may be purchased in the name of each of the minor sons and deposited in Court immediately on receipt of consideration. A further sum of Rs. 50,000 should be invested in Government securities. The petitioner is empowered to purchase them out of the consideration of the proposed transaction and deposit the securities with the Registrar to the credit of this original petition. The certificates and the securities will remain in the custody of the Court subject to such orders as may from time to time be passed.

The result is that the petitioner is appointed guardian of the joint family property belonging to the five minor sons and that the sale of the two items of property mentioned in the schedule attached to the petition is sanctioned in favour of Mr. M. V. Venkataraman or his nominee for a sum of Rs. 1,95,000. The guardian is empowered to convey the minor sons' interest in the said property to the purchaser subject to the conditions enumerated above. As the entire share of the minor sons will be under *custodia legis*, there is no further necessity to ask the guardian to furnish security. It is sufficient if under Order 32, rule 8 of the Original Side Rules he gives an undertaking to furnish the statement mentioned in that rule and to keep full and correct account of all moneys and properties of the minors received and expended by the guardian on their behalf and file and prove the same in Court whenever so required. The undertaking should be furnished in three days.

As the father of the five minors is himself the petitioner, following the course of action adopted in *Ratanji Ramji*, In re[1], I appointed Mr. A. V. Viswanatha Sastri, Advocate, as guardian *ad litem* of these five minors in this case. I have received very valuable assistance from him. He will get a remuneration of Rs. 500. The petitioner will pay that amount to Mr. A. V. Viswanatha Sastri within two days.

The costs of this petition including the remuneration to be paid to Mr. A. V. Viswanatha Sastri will come out of the estate.

V.S. *Petition ordered.*

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Madras.)

PRESENT:—LORD DU PARCQ, LORD NORMAND AND SIR MADHAVAN NAIR.

Raja Inuganti Venkata Rajagopala Rama Suryaprakasa Rao Garu .. *Appellant**

v.

Maharaja of Pithapuram and another .. *Respondent.*

Limitation Act (IX of 1908), Article 109 and Madras Estates Land Act (I of 1908), section 3 (5)—Person recognised as "landholder" under section 3 (5)—Position and rights of—Receipt of rents and profits by him—If wrongful—Suit to recover such rents and profits by person ultimately found to be entitled to them—Limitation—Starting point—Applicability of Article 109.

Where pending the ultimate decision by the Civil Courts of a litigation relating to an estate, one of the parties is recognised by the Collector under section 3 (5) of the Madras Estates Land Act as a "landholder" he becomes clothed with full statutory authority to collect the rents and profits during the whole period of his possession and as such his receipt of rents and profits cannot be said to be wrongful. Hence, Article 109 of the Limitation Act would be in applicable to a suit to recover the rents and profits so received by the statutory landholder by the person who is ultimately found to be entitled to the estate. The latter's right of action to recover such rents and profits would accrue only after the order of the Collector under section 3 (5) of the Estates Land Act is cancelled as a result of the ultimate decision of the Civil Courts. He could not competently have sued the statutory landholder for an account of rents and profits each time that rents or profits were received.

C. S. Rewcastle, K.C. and *J. Chinna Durai* for Appellant.

Sir Herbert Cunliffe, K.C., P.V. Subba Rao and *B. Sen* for Respondents.

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1. I.L.R. (1942) Bom. 39 (F.B.).

* 20th January, 1948.

Their Lordships' Judgment was delivered by

LORD NORMAND.—These are consolidated appeals from a judgment of the High Court of Judicature at Madras modifying a preliminary and a final decree of the Subordinate Court of Cocanada. The question for determination is whether or to what extent the Indian Limitation Act affects the plaintiffs' claim against the Maharaja of Pithapuram for payments of sums amounting to Rs. 7,38,000 received by him as rents from the Zamindari estate known as Gollaprolu during the period from 12th January, 1924 to 7th September, 1935.

The facts so far as material to the issues are as follows. In 1923 there was pending a litigation between the Maharaja and the plaintiffs in the present suit in which the Maharaja claimed that he was the nearest reversioner entitled to succeed to the estate of Gollaprolu. The Maharaja held a decree pronounced in his favour by the District Judge of Rajahmundry but the present plaintiffs had appealed against it to the Madras High Court. While that appeal was pending the Maharaja on 10th November, 1923, applied to the Collector of Godavari to be recognised as the landholder of the estate for the purpose of the Madras Estates Land Act subject to the ultimate result of the litigation then pending. After sundry procedure not germane to the present issue the Collector on 12th January, 1924, made an order under section 3 (5) of the Madras Estates Land Act by which he recognised the Maharaja as the landholder for the purposes of the Act. The Maharaja accordingly entered into possession of the estate and collected the rents and profits. The litigation pending between him and the present plaintiffs was protracted and was not finally brought to an end till the Order in Council of 15th July, 1935, the effect of which was to find that the present plaintiffs were entitled to the estate. On 7th September, 1935, the Collector of Godavari cancelled his previous order of 12th January, 1924, and recognised the present plaintiffs as the landholders of the estate.

The plaintiffs brought the present suit in October, 1935, for recovery of the rents and profits received by the Maharaja during the period of his possession and management of the estate. The Maharaja pleaded that he had been in wrongful possession of the estate during the whole period and that the suit for mesne profits for more than three years from the date when the profits were received was barred by the Indian Limitation Act, Sch. I, Article 109. The trial Judge held that the Maharaja's possession of the estate under the order of 12th January, 1924, had not been wrongful, and that he had collected the rents and profits as a quasi trustee for the benefit of the plaintiffs and was bound to account to them for the rents and profits received in the full period of his possession. By a preliminary decree he directed the Maharaja to render accounts; and after the accounts were taken he granted a final decree on 25th March, 1938. Appeals were preferred to the High Court which agreeing with the trial Judge, held that the Maharaja's possession had not been wrongful and consequently that Article 109 of the First Schedule of the Limitation Act did not apply. But, differing from the trial Judge, the High Court held that a right to sue the Maharaja had accrued to the plaintiffs each time he had received the rents and profits. Accordingly the High Court disallowed the plaintiffs' claim to recover rents and profits received more than six years before the commencement of the suit, as being barred by Article 120 of the First Schedule of the Limitation Act. In the argument addressed to their Lordships the plaintiffs supported the finding of the trial Judge and the High Court that the Maharaja's possession and his collection of rents and profits had not been wrongful, and therefore, that the present suit was not within the terms of Article 109 of the Limitation Act a suit " for the profits of immoveable property belonging to the plaintiff which have been wrongfully received by the defendant." They also maintained that no right to sue accrued while the order of 12th January, 1924, was in force, and therefore that the six years limitation provided by Article 120 of the First Schedule of the Limitation Act barred no part of their claim. The Maharaja cross-appealed and relied on Article 109 and the three years limitation therein

provided. Alternatively he maintained that the judgment of the High Court should be affirmed.

Their Lordships are of opinion that the decision of these appeals depends on the meaning and effect of the provisions of the Madras Estates Land Act and of the rules made thereunder, which are set out in the judgment of the High Court, and they desire to adopt the comment of the High Court on these provisions. The learned judges say:

> "It is manifest that the object underlying these provisions is to provide machinery for the smooth management of an estate pending settlement of disputes relating thereto by a competent Civil Court, so as, on the one hand, to enable the rents falling due during the pendency of the disputes to be duly collected without being allowed to get time-barred and, on the other, to enable the tenants to obtain a valid discharge on payment of the rent, whichever party may ultimately succeed in establishing his claim in the Civil Courts. For this purpose the Collector is empowered to make a summary enquiry under the rules made in that behalf and recognize as landholder the person who is *prima facie* entitled to the present possession of the estate, and the person so recognized is authorised to demand and collect the rent giving a valid discharge therefor. In other words, the person who is 'recognised' by the Collector as 'landholder' for all or any of the purposes of the Act becomes thereby clothed with full authority to do all acts required to be done for such purpose or purposes, and such acts are made binding upon whichever party is ultimately held by a Civil Court to be entitled to the possession of the estate."

Their Lordships agree with the learned trial Judge and with the High Court that, as the Maharaja had statutory authority for collecting the rents and profits during the whole period of his possession, it is impossible to hold that his receipt of them was wrongful. It follows that Article 109 of the First Schedule of the Limitation Act is inapplicable.

But their Lordships are further of opinion that the plaintiffs could not competently have sued the Maharaja for an account of rents and profits each time that rents or profits were received. What was said by counsel for the Maharaja was that the plaintiffs would have been entitled to sue as beneficiaries under a quasi trust. This is, however, not consistent with the Maharaja's right under section 3 (5) of the Estates Land Act to receive the rents and profits as statutory landholder. His interest as such landholder was adverse to the claims of the plaintiffs, and he did not collect the rents and profits as trustee for them. The High Court held that the proviso to section 67 of the Estates Land Act was in itself sufficient to support the contenton that the plaintiffs might have sued the Maharaja as often as he collected the rents or profits. Section 67 makes the receipt for rents granted by a person recognized as the landholder under section 3 a valid discharge in the hands of the person paying them. The proviso that nothing in the section shall affect any remedy which a third person may have against the landholder cannot preserve or restore to third parties remedies which are inconsistent with the landholder's rights and powers under section 3 (5) of the Act. Their Lordships are therefore of opinion that the plaintiffs had no right of suit for the rents or profits while the possession was under the order of 12th January, 1924. It was only after that order was cancelled in consequence of the decision of this Board that a right of action to recover rents and profits accrued to the plaintiffs, and that right is preserved to them by the proviso to section 67. The High Court's judgment recognizes that if suits had been brought each time that rents or profits were received they could have made no progress, but must have been stayed till the final determination of the question of title. In their Lordships' opinion one of the purposes of section 3 of the Estates Land Act is to regulate possession *pendente lite* and to prevent the multiplication of unnecessary suits. They will therefore humbly advise His Majesty that the appeal should be allowed to the effect that the paragraph numbered 1 of the decree of the High Court dated 11th December, 1941, be deleted. The defendant in the suit must pay the costs of these consolidated appeals.

V.S. *Appeal allowed.*

[PRIVY COUNCIL.]

(On appeal from the Federal Court of India[1]).

PRESENT:—LORD THANKERTON, LORD DU PARCQ, LORD OAKSEY, LORD MORTON OF HENRYTON AND MR. M. R. JAYAKAR.

The High Commissioner for India and the High Commissioner for Pakistan .. *Appellants**

v.

I. M. Lall .. *Respondent.*

Government of India Act (1935), *section* 240—*Scope of the power of dismissal of Government servants—"Action proposed to be taken"—Meaning—Opportunity to show cause—Stage—Salary—Right to sue for.*

The provisions of sub-section (3) of section 240 of the Government of India Act, are prohibitory in form which is inconsistent with their being merely permissive. They are mandatory and necessarily qualifies, the right of the Crown recognised by sub-section (1) and provide a condition precedent to His Majesty's exercise of his power of dismissal provided by that sub-section.

No action is proposed within the meaning of sub-section (3) of section 240 until a definite conclusion has been come to on the charges against a Government servant, and the actual punishment to follow is provisionally determined on. Prior to that stage, the charges are unproved and the suggested punishments are merely hypothetical. It is on that stage being reached that the statute gives the civil servant the opportunity for which sub-section (3) makes provision. The statutory opportunity could be afforded at more than one stage. If the civil servant has been through an enquiry under rule 55 of the Civil Services (Classification, Control and Appeal) Rules, it would not be reasonable that he should ask for a repetition of that stage, if duly carried out, but that would not exhaust his statutory right, and he would still be entitled to represent against the punishment proposed as the result of the findings of the enquiry.

No action in tort can lie against the Crown and therefore any right of action against the Crown must either be based on contract or conferred by statute.

In the case of a servant of the Indian Civil Service there is no covenant under which the Civil servant is given a right to his pay. Nor has he any statutory right to recover arrears of pay by action in the Civil Court.

Andrew Clarke, K.C. and *B. Mc Kenna* for Appellant.

Sir David Maxwell-Fyfe, K.C. and *T. B. W. Ramsay* for Respondent.

Their Lordships' judgment was delivered by

LORD THANKERTON.—This is an appeal by special leave from an order of the Federal Court of India[1] dated the 4th day of May, 1945, which varied a decree of the High Court of Judicature at Lahore dated the 27th March, 1944.

The respondent, who had been a member of the Indian Civil Service since 1922, instituted the present suit on the 20th July, 1942, against the Secretary of State for India, challenging the validity of an order by the latter dated the 10th August, 1940, which purported to remove the respondent from the Indian Civil Service.

The Secretary of State for India was the original appellant in this appeal, but after the hearing before this Board in July last, the Indian Independence Act, 1947, came into operation on the 15th August, 1947. By section 15 (1) of the Act, the present appeal by the Secretaty of State was abated, and by section 15 (2) the appeal was continued by the High Commissioner. By sub-section (3) of that section, the expression "the High Commissioner" is defined for the purposes of the section. The High Commissioner for India and the High Commissioner for Pakistan have accepted that they should be treated as appellants in place of the Secretary of State for India by virtue of section 15. Their Lordships find it convenient, however, for the purposes of their opinion, to continue to refer to the Secretary of State as the defendant in the suit and appellant in the Federal Court and before the Board.

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1. (1945) F.L.J. 129 : (1945) 2 M.L.J. 270 (F.C.).

* 18th March, 1948.

In the plaint, the respondent claimed (1) a declaration that the order of removal was *ultra vires* of the defendant, (2) that the order was not passed in due process of law and was wrongful, illegal and of no consequence whatever, (3) that he was still a member of the Indian Civil Service, and had a right to continue in it, and to hold office from which he was removed by the illegal order of the defendant, and (4) that as a member of the Indian Civil Service he was entitled to all rights secured to him by the covenant and rules and regulations issued from time to time by the appropriate authority..

The suit was originally instituted in the Court of the Subordinate Judge, 1st Class, Lahore, but it was transferred to the High Court, and was ordered to be heard by a Division Bench as a Court of first instance. After trial, the High Court, on the 27th March, 1944, granted the present respondent a decree to the extent of granting a declaration that the order removing him from office was wrongful, void, illegal and inoperative and that he was still a member of the Indian Civil Service; the High Court also gave a certificate under section 205 (1) of the Government of India Act, 1935, that the case involved substantial questions of law as to the interpretation of the Act of 1935. On an appeal by the present respondent, the Federal Court, by a majority, on the 4th May, 1945, varied the decree of the High Court by ordering that,

"In place of the declaration that the order removing the plaintiff from office was wrongful, void, illegal and inoperative and that the plaintiff is still a member of the Indian Civil Service there shall be substituted a declaration that the plaintiff Mr. M. Lall was wrongfully dismissed from the Indian Civil Service on the 4th June, 1940."

The Federal Court remitted the suit to the High Court to take such action in regard to any application by the respondent for leave to amend to claim damages and to the assessment of such damages as to the High Court should seem right.

The main questions raised in this appeal relate to the proper construction of section 240 of the Government of India Act, 1935, and their Lordships propose to deal with these in the first instance. Some further narrative of the facts in the case is necessary for this purpose. The respondent was appointed to the Indian Civil Service in 1922, and on the 1st September, 1922, he entered into a covenant with the Secretary of State in Council. Two observations only occur on this document, *viz.*, that the respondent's service was

"to continue during the pleasure of His Majesty, His Heirs and Successors, to be signified under the hand of the Secretary of State for India,"

and that there is no covenant under which the respondent was given a right to his pay. The covenant is mainly concerned with the respondent's discharge of his duties.

In 1935, the respondent was stationed in Hoshiarpur, where he enlisted one Sundar Das, a nephew of his wife, in the subordinate staff of one of the Courts under his control. Soon thereafter the respondent took over charge as District and Sessions Judge at Multan. Early in April, 1937, the respondent was transferred to be employed in the North-West Frontier Province. In September, 1937, the respondent received a letter from the Judicial Commissioner, enclosing a letter from the Chief Secretary to the North-West Frontier Government, informing the Judicial Commissioner that the Punjab Government had decided to hold a departmental enquiry under rule 55 of the Civil Services (Classification, Control and Appeal) Rules into the conduct of the respondent while stationed at Multan during 1935-36, and that eight charges had been framed against the respondent of which copies were enclosed. The letter proceeded to ask that steps should be taken to serve the charges on the respondent and that he should be asked to furnish within a reasonable time a written statement of his defence and to state whether he wished to be heard in person or not. The eight charges were divided into two categories, the first of which alleged improper favouritism or nepotism in connection with Sundar Das; the second category alleged improper victimization of certain of the junior officials who had protested against the attempted promotion of Sundar Das by an order of the respondent in December, 1936. At the end of each charge were indicated the witnesses or documents whereby it was proposed to attempt to prove

the charge. Near the end there were two paragraphs interposed, which clearly related to all the charges and were as follows :

"That the above facts and his failure to offer any sufficient explanation up to the present are sufficient to prove that he had abused his position as an officer entrusted with the power of appointment on behalf of the Crown to show favour to a relation of his to the detriment of other officials serving under him, in contravention both of the recognised principles governing the conduct of Government servants as well as of the express orders of Government, and that he further abused his position as an officer entrusted with powers of discipline over other officers of the Crown to persecute various persons who sought to protect their own interests in a legitimate manner.

That he should show cause why he should not be dismissed, removed or reduced or subjected to such other disciplinary action as the competent authority may think fit to enforce for breach of Government rules and conduct unbecoming to a member of the Indian Civil Service."

The respondent put in his written statement in answer to the charges, and thereafter Mr. J. D. Anderson, Commissioner, Rawalpindi division, was appointed to hold the deparmental enquiry. Mr. Anderson examined the respondent on the 10th June, 1938, in course of which the respondent pleaded guilty to the first two charges, and, without any further examination of witnesses, he made his report on the 9th August, 1938. As regarded the remaining six charges, he found them unproven, but he indicated that he had not been able to make a full enquiry, and that a longer investigation, including a fortnight at Multan, and a further examination of documents were desirable before coming to final conclusions. Mr. Anderson's report was not disclosed to the respondent, and the Government appointed Mr. F. L. Brayne, Commissioner, Rural Reconstruction, Punjab, to complete Mr. Anderson's preliminary enquiry. Mr. Brayne took the matter up and wrote to the respondent on the 17th November, 1938, relative thereto. After various procedure, in which the respondent took part, and in the course of which the Government refused to disclose Mr. Anderson's report to him, Mr. Brayne made his report on the 24th January, 1939, in course of which he examined in detail all the eight charges, and found that the nepotism was "complete and deliberate," and that the charges of victimization were all fully proved.

In view of the opinion which their Lordships have formed as to the proper construction of section 240 of the Act of 1935, it is unnecessary to consider in further detail the validity of the enquiries held by Mr. Anderson and Mr. Brayne, and whether the respondent was afforded a reasonable opportunity thereat of answering the charges.

On the 21st June, 1939, the Government of the Punjab sent the records of the enquiry, including Mr. Anderson's and Mr. Brayne's reports, to the Federal Public Service Commission, and expressed their opinion that the respondent should be removed from the Indian Civil Service but should be grantd a compassionate allowance This Commission, in terms of section 266 (3) (*c*) of the Government of India Act of 1935, is consulted on all disciplinary matters affecting a person serving His Majsty in a civil capacity in India. The respondent made representations to the Commission, protesting against the procedure of the enquiry and submitting arguments on the merits. The Commission, in a letter dated the 31st August, 1939, agreed with Mr. Brayne and the Government of the Punjab that no other conclusion was possible than that the respondent had acted deliberately both in the matter of nepotism and the matter of victimization, and agreed that the respondent should be removed from the service but should be granted a compassionate allowance, which should be equal to a two-thirds pension.

By Gazette Notification dated the 10th August, 1940, the appellant directed the removal of the respondent from the Indian Civil Service, and the respondent was so informed by a letter of the same date from the appellant.

It is not disputed that the learned Chief Justice has correctly stated the respondent's position at this time as follows :

"Whatever representations were made it is clear that at no time before his removal from the service was Mr. Lall allowed to see the reports of either Mr. Anderson or Mr. Brayne, nor was he informed that either the Punjab Government or the Federal Public Service Commission or the Government of India or the Secretary of State were definitely proposing on the basis of these reports to remove

him from the service. He had received the general invitation to show cause against possible dismissal (amongst other possible punishments) included at the end of the charges originally served on him. But no opportunity to show cause against dismissal was given to him, after dismissal had passed from being a possible punishment to the punishment proposed and recommended. At no time was he given an opportunity, before dismissal of making representations against the accuracy of facts found by Mr. Anderson or Mr. Brayne in their reports or against the adverse deduction drawn against him, particularly by Mr. Brayne."

Section 240 of the Government of India Act, 1935, provides as follows :

240.—(1) Except as expressly provided by this Act, every person who is a member of a civil service of the Crown in India, or holds any civil post under the Crown in India, holds office during His Majesty's pleasure.

(2) No such person as aforesaid shall be dismissed from the service of His Majesty by any authority subordinate to that by which he was appointed.

(3) No such person as aforesaid shall be dismissed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him.

Provided that this sub-section shall not apply—

(*a*) where a person is dismissed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge ; or

(*b*) where an authority empowered to dismiss a person or reduce him in rank is satisfied that for some reason, to be recorded by the authority in writing, it is not reasonably practicable to give to that person an opportunity of showing cause.

(4) Notwithstanding that a person holding a civil post under the Crown in India holds office during His Majesty's pleasure, any contract under which a person, not being a member of a civil service of the Crown in India, is appointed under this Act to hold such a post may, if the Governor-General, or, as the case may be, the Governor, deems it necessary in order to secure the service of a person having special qualifications, provide for the payment to him of compensation if before the expiration of an agreed period that post is abolished or he is, for reasons not connected with any misconduct on his part, required to vacate that post."

Before dealing with the important questions of construction their Lordships may note that the terms "dismissal" and "removal from the service" were accepted as synonymous, and that the respondent did not maintain before the Board, as he had unsuccessfully maintained in the High Court and the Federal Court, that the appellant had not authority under the Constitution to remove a member of the Indian Civil Service from the service. Their Lordships may add that, in their opinion the question is concluded by the terms of the respondent's covenant, already quoted, under which he agrees to accept the signification of His Majesty's pleasure under the hand of the appellant. Their Lordships have no doubt that the purported removal of the respondent was intended to operate by virtue of sub-section (1) of section 240.

Three important questions of construction arise for decision, *viz.*, 1st : Is sub-section (1) of section 240 qualified by sub-section (3) ? 2ndly : Is sub-section (3) mandatory, or permissive ? and 3rdly : What is the proper construction of the words in sub-section (3) " the action proposed to be taken in regard to him" ?

On the first question the appellant laid stress on the words " except as expressly provided by this Act " in sub-section (1) of section 240 as excluding any exception not expressly provided for, and referred to section 200 (2) and 220 (2) as illustrations of such express provision in the case of Judges of the Federal Court and the High Courts. It will, however, be noted that neither of these sections states its provisions to be an exception, but makes an express provision which is necessarily inconsistent with sub-section (1) of section 240. On the other hand, sub-section (4) of section 240 begins,

" Notwithstanding that a person holding a civil post under the Crown in India holds office during His Majesty's pleasure . . . ."

which is clearly expressed as an exception, but the statutory provision which follows does not affect the terminability of the office. It provides for a payment of compensation in certain events, but does not curtail His Majesty's power to terminate at His pleasure. The appellant maintains that sub-section (3) does not in terms make express provision such as is contemplated by sub-section (1) ; but the opening words of sub-sections (2) and (3)—" No such person as aforesaid "—clearly indicate a qualification of, or exception to, an anteceden provision, which is plainly

sub-section (1). Their Lordships find it difficult to deal with this contention irrespective of the decision of the next question. If sub-section (3) is merely permissive, and not mandatory, there will be no substance in the first question; but, if sub-section (3) is mandatory, their Lordships are of opinion that it would constitute an express provision of the Act, which would qualify the provisions of sub-section (1) and provide a condition precedent to His Majesty's exercise of His power of dismissal provided by sub-section (1).

In considering the second question of construction, it will be necessary to refer to the position prior to the Act of 1935, when the relevant statutory provision was made by section 96-B of the Government of India Act, 1919, and in particular, by sub-section (1), which provided as follows :

" 96B.—(1) Subject to the provisions of this Act and of rules made thereunder, every person in the civil service of the Crown in India holds office during His Majesty's pleasure, and may be employed in any manner required by a proper authority within the scope of his duty, but no person in that service may be dismissed by any authority subordinate to that by which he was appointed, and the Secretary of State in Council may (except so far as he may provide by rules to the contrary) reinstate any person in that service who has been dismissed . . . ."

The latter part of the sub-section gives a limited right of appeal, which is not relevant to the present purpose. Under sub-section (2) of section 96-B, the Secretary of State in Council is empowered to make rules for regulating the classification of the civil services in India, the methods of their recruitment, their conditions of service, pay and allowances, and discipline and conduct. As already mentioned the enquiry in the present case was conducted under rule 55 of the Civil Services (Classification, Control and Appeal) Rules, which were authorised by this sub-section. Rule 55 provides :

" Without prejudice to the provisions of the Public Service Inquiries Act, 1850, no order of dismissal, removal or reduction shall be passed on a member of a Service (other than an order based on facts which have led to his conviction in a criminal Court) unless he has been informed in writing of the grounds on which it is proposed to take action, and has been afforded an adequate opportunity of defending himself. The grounds on which it is proposed to take action shall be reduced to the form of a definite charge or charges, which shall be communicated to the person charged together with a statement of the allegations on which each charge is based and of any other circumstances which it is proposed to take into consideration in passing orders on the case. He shall be required, within a reasonable time, to put in a written statment of his defence and to state whether he desires to be heard in person. If he so desires, or if the authority so direct, an oral enquiry shall be held. At that enquiry oral evidence shall be heard as to such of the allegations as are not admitted, and the person charged shall be entitled to cross-examine the witnesses called, as he may wish, provided that the officer conducting the enquiry may, for special and sufficient reason to be recorded in writing, refuse to call a witness. The proceedings shall contain a sufficient record of the evidence and a statement of the findings and the grounds thereof.

This rule shall not apply where the person concerned has absconded, or where it is for other reasons impracticable to communicate with him. All or any of the provisions of the rule may, in exceptional cases, for special and sufficient reasons to be recorded in writing, be waived, where there is a difficulty in observing exactly the requirements of the rule and those requirements can be waived without injustice to the person charged."

It is to be observed that the provisions of sub-section (1) of section 96-B of the Act of 1919 are made " subject to the provisions of this Act and of rules made thereunder ", that it makes express provision corresponding to sub-sections (1) and (2) of section 240 of 1935, but no express provision corresponding to sub-section (3) of section 240; that matter was left to rule 55. It is interesting to contrast two decisions of this Board, delivered on the same day in 1936. In *Rangachari* v. *Secretary of State for India*[1], it was held that dismissal of a civil servant by an authority subordinate to that by which he was appointed was contrary to the provisions of section 96-B, sub-section (1) of the Act of 1919, and was bad and inoperative. Lord Roche, in delivering the judgment of the Board said (at p. 53),

" It is manifest that the stipulation or proviso as to dismissal is itself of statutory force and stands on a footing quite other than any matters of rule which are of infinite variety and can be changed from time to time."

In the other case, *R. Venkata Rao* v. *Secretary of State for India*[2], it was held by the same Board that failure to comply with the rules made under sub-section (2)

1. (1937) 1 M.L.J. 515 : L.R. 64 I.A. 40 : I.L.R. 1937 Mad. 517 (P.C.).

2. (1937) 1 M.L.J. 529 : L.R. 64 I.A. 55 : I.L.R. 1937 Mad. 532 (P.C.).

of section 96-B of 1919 did not give any right of action. Lord Roche, in delivering the judgment of the Board, said (at p. 64),

"Section 96-B and the rules make careful provision for redress of grievances by administrative process, and it is to be observed that sub-section (5) in conclusion reaffirms the supreme authority of the Secretary of State in Council over the civil service. These considerations have irresistably led their Lordships to the conclusion that no such right of action as is contended for by the appellant exists. . . . . . . .They regard the terms of the section as containing a statutory and solemn assurance that the tenure of office, though at pleasure, will not be subject to capricious or arbitrary action, but will be regulated by rule."

Contrasting the provisions of section 96-B of 1919 with the provisions section 240 of 1935, their Lordships have no difficulty in holding—in agreement with both the High Court and the Federal Court—that the provision as to a reasonable opportunity of showing cause against the action proposed is now put on the same footing as the provision now in sub-section (2) of section 240, which was the subject of decision in *Rangachari's case*, and that it is no longer resting on rules alterable from time to time, but is mandatory, and necessarily qualifies the right of the Crown recognized in sub-section (1) of section 240 of 1935. The provisions of section 96-B (1), now reproduced as sub-section (2) of section 240 of 1935, and of sub-sections (2) and (3) of section 240 are prohibitory in form, which is inconsistent with their being merely permissive.

The third question seeks the proper construction of the phrase,

"A reasonable opportunity of showing cause against the action proposed to be taken in regard to him."

It might be stated more narrowly as the meaning of "the action proposed to be taken". In their judgment, the High Court said,

"The plaintiff's contention is that this opportunity should have been afforded to him after the finding of the enquiring officer had been considered and the punishment decided upon. With this contention we are unable to agree. Eight charges were served on the plaintiff and at the end he was asked to show cause why he should not be dismissed, removed or reduced or subjected to such other disciplinary action as the competent authority may think fit to enforce for breach of Government Rules, and conduct unbecoming to the Indian Civil Service. He was aware from the very start of the enquiry against him that removal from service was one of the various actions that could have been taken against him in the event of some or all the charges against him being established, and in this sense he was showing cause during the course of the enquiry against the action proposed. The plaintiff's contention that there should be two enquiries, the first to establish that he had been guilty and the second to determine what should be the appropriate punishment, and that in each stage he should have reasonable and independent opportunities to defend and show cause does not appear to be correct or intended by the Legislature."

In the Federal Court, Varadachariar, J., agreed with the conclusion of the High Court on this question, but the majority of the Court held a contrary view which is expressed by the learned Chief Justice as follows:

"It does however seem to us that the sub-section requires that as and when an authority is definitely proposing to dismiss or reduce in rank a member of the Civil Service he shall be so told and he shall be given an opportunity of putting his case against the proposed action and as that opportunity, has to be a reasonable opportunity it seems to us that the section requires, not only notification of the action proposed but of the grounds on which the authority is proposing that the action should be taken and that the person concerned must then be given a reasonable time to make his representations against the proposed action and the grounds on which it is proposed to be taken. It is suggested that in some cases it will be sufficient to indicate the charges, the evidence on which those charges are put forward and to make it clear that unless the person can on that information show good cause against being dismissed or reduced if all or any of the charges are proved, dismissal or reduction in rank will follow. This may indeed be sufficient in some cases. In our judgment each case will have to turn on its own facts but the real point of the sub-section is in our judgment that the person who is to be dismissed or reduced must know that that punishment is proposed as the punishment for certain acts or omission on his part and must be told the grounds on which it is proposed to take such action and must be given a reasonable opportunity of showing cause why such punishment should not be imposed."

Their Lordships agree with the view taken by the majority of the Federal Court. In their opinion, sub-section (3) of section 240 was not intended to be, and was not, a reproduction of rule 55 which was left unaffected as an adminis-

trative rule. Rule 55 is concerned that the civil servant shall be informed " of the grounds on which it is proposed to take action," and to afford him an adequate opportunity of defending himself against charges which have to be reduced to writing ; this is in marked contrast to the statutory provision of " a reasonable opportunity of showing cause against the action proposed to be taken in regard to him." In the opinion of their Lordships, no action is proposed within the meaning of the sub-section until a definite conclusion has been come to on the charges, and the actual punishment to follow is provisionally determined on. Prior to that stage, the charges are unproved and the suggested punishments are merely hypothetical. It is on that stage being reached that the statute gives the civil servant the opportunity for which sub-section (3) makes provision. Their Lordships would only add that they see no difficulty in the statutory opportunity being reasonably afforded at more than one stage. If the civil servant has been through an enquiry under rule 55, it would not be reasonable that he should ask for a repetition of that stage, if duly carried out, but that would not exhaust his statutory right, and he would still be entitled to represent against the punishment proposed as the result of the findings of the enquiry.

On this view of the proper construction of sub-section (3) of section 240, it is not disputed that the respondent has not been given the opportunity to which he is entitled thereunder, and the purported removal of the respondent on the 10th August, 1940, did not conform to the mandatory requirements of sub-section (3) of section 240, and was void and inoperative. It therefore becomes unnecess ary to consider the respondent's challenge of the proceedings under rule 55, and the questions of fact relative thereto.

The Federal Court altered the finding of the High Court, and made a declaration

" that the plaintiff Mr. I. M. Lall was wrongly dismissed from the Indian Civil Service on the 4th June, 1940, and it is further ordered that the High Court aforesaid do take such action in regard to any application duly made by or on behalf of Mr. I. M. Lall for leave to amend to claim damages as to the High Court shall seem right,"

and they remitted the case to the High Court. In the opinion of their Lordships, the declaration should be varied so as to declare that the purported dismissal of the respondent on the 10th August, 1940, was void and inoperative, and that that the respondent remained a member of the Indian Civil Service at the date of the institution of the present suit on the 20th July, 1942. Any further action by the Crown that may have occurred since the raising of the action is not covered by the present suit.

The appellant appealed against the order of remit to the High Court for the assessment of damages, and the order of remit by the Federal Court was not maintained by the respondent before this Board, but, on the other hand, he maintained that he was entitled to recover by this action his arrears of pay from the date of the purported order of dismissal up to the date of action. It is unnecessary to cite authority to establish that no action in tort can lie against the Crown and therefore any right of action must either be based on contract or conferred by statute. It is sufficient to refer to the judgment of Lord Blackburn in the Scottish case of *Mulvenna* v. *The Admiralty*[1], in which the learned Judge, after reviewing the various authorities, states,

" These authorities deal only with the power of the Crown to dismiss a public servant, but they appear to me to establish conclusively certain important points. The first is that the terms of service of a public servant are subject to certain qualifications dictated by public policy, no matter to what service the servant may belong, whether it be naval, military or civil, and no matter what position he holds in the service, whether exalted or humble. It is enough that the servant is a public servant, and that public policy, no matter on what ground it is based, demands the qualification. The next is that these qualifications are to be implied in the engagement of a public servant no matter whether they have been referred to in the engagement or not. If these conclusions are justified by the authorities to which I have referred, then it would seem to follow that the rule based on public policy which has been enforced against military servants of the Crown, and which prevents such servants suing the Crown for their pay on the assumption that their only claim is on the bounty of the Crown and not for a contractual debt, must equally apply to every public servant—See *Leaman* v.

1. (1926) S.C. 842.

King[1], *Smith* v. *Lord Advocate*[2], and other cases there referred to. It also follows that this qualification must be read, as an implied condition, into every contract between the Crown and a public servant, with the effect that, in terms of their contract, they have no right to their remuneration which can be enforced in a Civil Court of Justice, and that their only remedy under their contract lies in an appeal of an official or political kind."

Their Lordships are of opinion that this is a correct statement of the law. In the present case there is no obligation as to pay in the respondent's covenant, as already mentioned. The respondent sought to establish a statutory right to recover arrears of pay by action in the civil Court; he made reference to certain sections of the Government of India Act, 1935, *viz.*, sections 179 (9), 247 (4), 249 and 250, but it is enough to state that their Lordships are unable to derive from them any statutory right to recover arrears of pay by action. He also referred to section 32 of the Government of India Act of 1919, which, by sub-section (2), provides the same remedies against the Secretary of State in Council as might have been had against the East India Company if the Government of India Act, 1858, and the Act of 1919 had not been passed, but it has been settled ever since *Gibson* v. *East India Company*[3], that pay could not be recovered by action against the Company, but only by petition, memorial or remonstrance. It follows that the respondent fails in his claim to arrears of pay.

Their Lordships will humbly advise His Majesty that the judgment and order appealed from should be varied by substituting, in place of the declaration made therein, a declaration that the order of the 10th August, 1940, purporting to dismiss the respondent from the Indian Civil Service was void and inoperative, and that the respondent remained a member of the Indian Civil Service at the date of the institution of the present action on the 20th July, 1942 ; that the order for a remit to the High Court should be set aside, and that otherwise the judgment and order should be affirmed. As prescribed by the Order in Council granting special leave, the costs of the respondent will be paid by the appellant as between solicitor and client. Their Lordships are not disposed to accede to the application made by the respondent during the hearing, at which he was represented by counsel, to be allowed the costs of his coming over to this country from India.

V.S. ——— *Order of the Federal Court varied.*

[PRIVY COUNCIL.]

(On appeal from the Federal Court of India.[4])

PRESENT :—LORD UTHWATT, LORD DU PARCQ, LORD NORMAND, LORD OAKSEY AND SIR MADHAVAN NAIR.

Wallace Brothers & Co. Ltd. ... *Appellant**

v.

Commissioner of Income-tax, Bombay ... *Respondent.*

Income-tax Act (XI of 1922), sections 4 (1) (b) (ii), 4-A (c) and 64 and Government of India Act (1935), sections 99 (1) and 100—Extra-territorial legislation—Competency—Test—Foreign company a partner in a firm in British India—Liability to tax in respect of British Indian income—Test of territorial connection—Carrying on business—Sleeping partner—Position of.

There is no rule of law that the territorial limits of a subordinate Legislature define the possible scope of its legislative enactments or mark the field open to its vision. The ambit of the powers possessed by a subordinate Legislature depends upon the proper construction of the statute conferring those powers. The enabling statute has to be read against the background that only a defined territory has been committed to the charge of the Legislature and has to be fairly construed.

Provisions of section 4-A (*c*) and 4 (1) (*b*) (*ii*) of the Income-tax Act are not *ultra vires* the Indian Legislature.

The general conception underlying the income-tax legislation in the United Kingdom as to the scope of income-tax is that, given a territorial connection between the person sought to be charged and the country seeking to tax him, income-tax may properly extend to that person in respect of his foreign income.

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1. (1920) 3 K.B. 663.
2. (1897) 25 R. 112.
3. (1839) Bing. 5 (N.C.) 262.
4. (1945) F.L.J. 34: 1945 F.C.R. 65: (1945) 1 M.L.J. 359 (F.C.).

* Privy Council Appeal No. 65 of 1945. 17th February, 1948.

The above general conception finds a place in the phrase "taxes on income" as used in the relevant sections of the Government of India Act, 1935.

The derivation from British India of the major part of its income for a year gives to a company as respects that year a territorial connection sufficient to justify the company being treated as at home in British India for all purposes relating to taxation on its income for that year from whatever source that income may be derived. If it is at home in British India it is a person properly subject to the jurisdiction of the Central Indian Legislature. A company which in substance lives in a country may rationally be treated as living in it.

The essence of partnership is that each of the partners is the agent of the others for the purpose of carrying on the partnership business. Failure by any one partner to take part in the management of the business would not therefore have the result that he is not carrying on business at the partnership place of business as a partner.

Sir David Maxwell Fyfe, K.C., Joseph Nissim and *J. H. Barrington* for Appellant.

J. Millard Tucker, K.C. and *B. Mackenna* for Respondent.

Their Lordships' Judgment was delivered by

LORD UTHWATT.—This is an appeal by leave of the Federal Court of India from a judgment of that Court[1] dismissing an appeal by the appellant Wallace Brothers & Co., Ltd., from a judgment of the High Court of Bombay answering in favour of the respondent. The Commissioner of Income-tax, Bombay District, had certain questions of law referred to the High Court by the Income-tax Appellate Tribunal.

Two questions are in issue : first the validity of certain provisions of the Indian Income-tax Act, 1922-1939, by virtue of which there was made on the appellant company an assessment to income-tax on income which included income arising without British India, and second, the jurisdiction of a particular income-tax officer to make that assessment.

The directly relevant provisions of the Income-tax Act, 1922-1939, are contained in sections 3, 4, 4-A and 63. These so far as it is necessary to state them are as follows :

"3. Where any Act of the General Legislature enacts that income-tax shall be charged for any year at any rate or rates tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions of, this Act, in respect of the total income of the previous year of every individual, Hindu undivided family, company and local authority, and of every firm and other association of persons or the partners of the firm or members of the association individually.

4. (1) Subject to the provisions of this Act, the total income of any previous year of any person includes all income, profits and gains from whatever source derived which—

(*a*) are received or are deemed to be received in British India in such year by or on behalf of such person, or

(*b*) if such person is resident in British India during such year—

(*i*) accrue or arise or are deemed to accrue or arise to him in British India during such year, or

(*ii*) accrue or arise to him without British India during such year, or. . . . .

4-A. For the purposes of this Act—

(*c*) a company is resident in British India in any year (*a*) if the control or management of it affairs is situated wholly in British India in that year, or (*b*) if its income arising in British India in that year exceeds its income arising without British India in that year.

64.—(1) Where an assessee carries on a business, profession or vocation at any place, he shall be assessed by the Income-tax officer of the area in which that place is situate or, where the business, profession or vocation is carried on in more places than one, by the Incometax officer of the area in which the principal place of his business, profession or vocation is situate."

The material facts are that the appellant company was incorporated in the United Kingdom and that the control and management of its affairs are situate exclusively in that country. It is a member of the firm of Wallace & Co. which carries on business in Bombay. The Income-tax Appellate Tribunal found as a fact that the appellant company was a "sleeping partner" in that firm. Their Lordships understand this finding to mean that the appellant company took no part in the management of the firm's affairs. In the year 1938-39—"the previous year", for the purposes of this case—the income of the appellant company arising in British India was Rs. 17,85,831 and its income arising without British

1. (1945) F.L.J. 34 : 1945 F.C.R. 67 : (1945) 1 M.L.J. 359 (F.C.).

India was Rs. 7,48,427. On 12th February 1941, the appellant company was assessed to tax for the assessment year 1939-40 on the whole of its income. That assessment was made by the Additional Income-tax officer within whose district the firm's place of business was situate.

Upon these facts, which are to be found in the case by them, the Tribunal referred the following questions of law to the High Court :—

(*i*) Whether in the circumstances found by the Tribunal in its Order under section 33, the assessee company was taxable to income-tax and super-tax for the assessment year 1939-40 in respect of the income (Rs. 7,48,427 less Rs. 4,500) which accrued or arose to it without British India in the previous year?

(*ii*) Are the provisions of sections 4-A (*c*) and 4 (1) (*b*) (*ii*), Income-tax Act *ultra vires* the Indian Legislature?

(*iii*) Is sub-clause (*b*) of clause (*c*) of section 4-A of the Amended Act applicable to the assessment of the assessee company for the year 1939-40?

(*iv*) Whether on the facts found by the Tribunal the additional Income-tax officer, Companies Circle, Bombay, had jurisdiction under section 64 (1) or section 64 (2) to make the assessment?

The High Court and the Federal Court answered all four questions in favour of the respondent. In the appeal before their Lordships the appellant company did not challenge the answer to the third question.

Their Lordships will deal first with the subject-matter raised by the first two questions.

The sub-sections referred to in the second question contain only definitions of " total income " and " residence of a company ". By themselves these definitions do nothing. Taken in isolation they raise no question of *vires*. But the use of the defined terms in the charging section of the Act (section 3) may result in *ultra vires* legislation. The question at issue here is but one question only, namely, the effectiveness in law of the charging section in its application to companies which satisfy the test set forth in the definition of residence, as respects their total income computed as including income arising without British India.

The general nature of the charging section is clear. First the charge for tax at the rate fixed for the year of assessment is a charge in respect of the income of the " previous year", not a charge in respect of the income of the year of assessment as measured by the income of the previous year. That has been decided and the decision was not questioned in this appeal.

Second the rate of tax for the year of assessment may be fixed after the close of the previous year and the assessment will necessarily be made after the close of that year. But the liability to tax arises by virtue of the charging section alone, and it arises not later than the close of the previous year though quantification of the amount payable is postponed. The fact of residence or non-residence of a company as gathered from the application of the statutory test has become established, though not formally ascertained, at the close of the previous year. The legislation therefore purports to tax a company which when the liability arose satisfied one or other of the conditions set forth in the definition of residence.

The precise question at issue can now be stated. The particular circumstances affecting the appellant company—namely, that it was a member of a partnership carrying on business in British India and the size of the excess of its British India income over its other income are of course irrelevant in considering the validity of the legislation. Further it is not disputed that it is competent to the Central Indian Legislature to subject to income-tax all income arising in British India : the relevant definition of residence does not apply to individuals : and the legislation does not affect to impose a lien on income arising without British India but to tax companies in respect of income which includes such income. The second limb of the definition of residence is alone in issue. It is to be assumed that there is no connexion between the companies and British India except the derivation from British India of the major part of their income during the previous year. Are such companies in respect of their total income for that

year persons subject to the power of the Central Indian Legislature to legislate as respects taxes on income?

The contentions of the appellant company were that legislation in regard to income-tax having an extra-territorial operation was *ultra vires* the Central Indian Legislature and that the impugned legislation had that operation. Both contentions were disputed by the respondent.

Their Lordships do not approach the matter on the formal lines embodied in these contentions. There is no rule of law that the territorial limits of a subordinate Legislature define the possible scope of its legislative enactments or mark the field open to its vision. The ambit of the powers possessed by a subordinate Legislature depends upon the proper construction of the statute conferring those powers. No doubt the enabling statute has to be read against the background that only a defined territory has been committed to the charge of the Legislature. Concern by a subordinate Legislature with affairs or persons outside its own territory may therefore suggest a query whether the Legislature is in truth minding its own business. It does not compel the conclusion that it is not. The enabling statute has to be fairly construed.

The relevant power (section 99 (1) and section 100, Government of India Act, 1935) is a power to make laws for the whole or part of British India or any Federated State with respect to " taxes on income other than agricultural income." The power to tax agricultural income is given to the Provincial Legislatures and the exception throws no light on the construction of the phrase " taxes on income." None of the other provisions of the Act affords any guidance as to the income or persons who may be subjected to tax. Only sub-section (2) of section 99 need be particularly referred to. That sub-section provides that

> " without prejudice to the generality of the powers conferred by the preceding sub-section no Federal law shall, on the ground that it would have an extra-territorial operation, be invalid so far as it applied to ".

certain persons and things. In their Lordships' view this sub-section does no more than assume that there may be some laws having an extra-territorial operation validly made pursuant to sub-section (1). It is no help one way or another in determining the authorized area of taxes on income.

Where Parliament has conferred a power to legislate on a particular topic it is permissible and important in determining the scope and meaning of the power to have regard to what is ordinarily treated as embraced within that topic in the legislative practice of the United Kingdom (see *Croft* v. *Dunphy*[1]). The point of the reference is emphatically not to seek a pattern to which a due exercise of the power must conform. The object is to ascertain the general conception involved in the words used in the enabling Act.

Income-tax legislation in the United Kingdom has—putting matter broadly—proceeded on the lines that there is subjected to income-tax all income arising within the United Kingdom and (independently of remittance to the United Kingdom) some, but not all income arising abroad belonging to a person resident in the United Kingdom.

The resulting general conception as to the scope of income-tax is that, given a sufficient territorial connection between the person sought to be charged and the country seeking to tax him, income-tax may properly extend to that person in respect of his foreign income.

In their Lordships' view that general conception finds a place in the phrase " taxes on income " as used in the Government of India Act, 1935. That conclusion marches with the construction which their Lordships would, without the aid of a consideration of the British legislation, have placed on the Government of India Act, 1935.

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1. (1933) A.C. 156 at 165.

The provisions of the British Income-tax Acts do not in their Lordships' view give any further definition of the scope of the power to impose taxes on income. The distinction drawn in British legislation between those foreign incomes which are, and those foreign incomes which are not, taxable in the hands of a " resident " does not mark any matter of principle which can be considered as imported into the phrase " taxes on income." In their Lordships' opinion—they confine their attention to companies—the necessity that the territorial connection should be residence as understood for the purpose of the British Income-tax Acts, is not embedded in the terms of the power. It is artificial in any event to attribute residence to a company. No less artificial is the selection, as a matter of judicial construction of the British Income-tax Acts, of the place at which central control is exercised as the residence of a company. The principle—sufficient territorial connection—not the rule giving effect to that principle—residence—is implicit in the power conferred by the Government of India Act, 1935.

The result is that the validity of the legislation in question depends on the sufficiency for the purpose for which it is used of the territorial connection set forth in the impugned portion of the statutory test. Their Lordships propose to confine themselves to that short point and do not propose to lay down any general formula defining what territorial connection is necessary. In their view the derivation from British India of the major part of its income for a year gives to a company as respects that year a territorial connection sufficient to justify the company being treated as at home in British India for all purposes relating to taxation on its income for that year from whatever source that income may be derived. If it is so at home in British India it is a person properly subject to the jurisdiction of the Central Indian Legislature.

Unlike an individual, a company has an economic existence only. No activities other than the making and spending of money are open to it. When a company in any particular year derives the major portion of its income from a country, it is a legitimate conclusion that the company has rooted itself there for that year. The connection that results is at least as solid as the connection given by the place of central control ; and in a search for a home for income-tax purposes as respects that year that connection might well be thought more pertinent than the connection, readily changeable and often changed, given by the place of central control. In such a search the place where commercial activities yield the result is at least as relevant as the place where they are conceived. A company which in substance lives on a country may rationally be treated as living in it. It is unnecessary to consider whether the statutory test is a satisfactory definition of residence. That is an abstract question. It is sufficient to come to the conclusion that a company satisfying the statutory test is a person within the territory of British India so far as concerns taxes on its income accruing during the period when the test is satisfied.

The remaining question relates to procedure. The submission of the appellant is that, assuming the challenged provisions not to be *ultra vires*, the assessment was not made by the proper officer. The relevant provision is section 64, and the facts have already been stated. The contention of the appellant company was that by reason that it took no active part in the partnership business it did not carry on business at the partnership place of business. There is no substance in this contention. There is no particular provision in the partnership articles which needs consideration. The essence of partnership is that each of the partners is the agent of the others for the purpose of carrying on the partnership business. Failure by any one partner to take part in the management of the business does not therefore have the result that he is not carrying on business as a partner.

Their Lordships will humbly advise His Majesty that this appeal be dismissed. The appellant company will pay the costs of the appeal.

Solicitors for Appellant : *Johnson, Jecks and Colclough.*

Solicitor for Respondent : *Solicitor, High Commissioner for India.*

V.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL AND MR. JUSTICE GOVINDA MENON.

In re P. Venkatachala Thevar—a detenu in the Central Jail, Trichinopoly.

M. V. Sivasankara Thevar .. *Petitioner.**

Madras Maintenance of Public Order Act (I of 1947), *section* 2 (1) (*a*) *and Criminal Procedure Code (V of* 1898), *section* 491—*Detenu detained under the Act—Delay in furnishing reasons for detention—Application for direction in the nature of* habeas corpus—*Duties of the executive—Powers of Court to go behind the reasons of the executive.*

The detenu was arrested by the police and detained in jail in pursuance of a detention order passed by the District Magistrate under section 2 (1) (*a*) of the Act. The Provincial Government was also informed at once by the District Magistrate of what he had done and the grounds for his action. A petition was filed under section 491 of the Criminal Procedure Code, praying that the High Court might issue directions in the nature of *habeas corpus*. After the filing of the petition and 22 days after the date of his detention, the detenu was furnished with the reasons for his detention. In considering the powers of a Court in an application of this kind and the duties of the executive to place material before the Court,

Held, that all that it is necessary for the Government to prove is that the order was one made in the exercise of the powers conferred under the Act, *i.e.*, that the police officer had acted with reasonable cause for suspicion or that the Government had been satisfied, as the case may be, that detention was necessary ; so that if the District Magistrate has given reasonable grounds for the detention, the Court cannot question them, unless there is material before the Court to show that the District Magistrate could not have been satisfied. The very magnitude of the powers given to the Government under the Act adds to this responsibility to see that no man is incarcerated a day longer than is necessary without giving good reasons for it.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue directions in the nature of a *habeas corpus* directing the Superintendent, Central Jail, Trichinopoly, to cause the production of the body of P. Venkatachala Thevar, before the High Court for being dealt with according to law and to set him at liberty as being illegally and unlawfully detained in custody.

K. Bhashyam and *S. Gopalaratnam* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Order of the Court was made by

Horwill, J.—On the 22nd February, 1948, the District Magistrate of Tanjore passed a detention order, purporting to be under section 2 (1) (*a*) of the Madras Maintenance of Public Order Act, 1947, stating that he was satisfied that the detenu was acting in a manner prejudicial to the maintenance of public order and that with a view to preventing him from so doing, it was necessary to pass an order for his detention. He therefore directed that the detenu be arrested by the police and detained in the Central Jail at Trichinopoly. As required under section 2 (2) of the Act, he informed the Provincial Government at once of what he had done and the grounds for his action. On the 8th March, the petitioner filed this application under section 491 of the Criminal Procedure Code, praying that the High Court might issue directions in the nature of *habeas corpus*, as the detenu had been wrongfully detained without any reasons for his detention being given, because of some misunderstanding that had arisen between him and the local police officials.

Under section 3 (1) of the Act, the Provincial Government were bound to inform the detenu of the grounds for his detention ; but unlike the report under section 2 (2), the grounds had not to be given " forthwith ". In the absence of any mention of a period within which the grounds should be given, it must be understood that they should be furnished within a reasonable time. When the petition was filed, no information had been given to him ; and it was only after notice had gone to the Public Prosecutor and he had requested further time for instructions—which he had not received upto the date to which it was adjourned—that this Court was informed that the Government had furnished the information required under section 3 (1) on the 17th March, which presumably reached the detenu the following day. It is reasonable to conclude that if the petitioner had

* Cr.M.P. No. 439 of 1948. 25th March, 1948.

not filed this petition, the detenu would not have been furnished with the ground for his arrest and detention as early as he was. From the point of view of one deprived of his liberty, 22 days seems a very long time for the furnishing of reasons for his detention; but it is argued by the learned Public Prosecutor that it has to be borne in mind that about 600 persons were arrested on or about the same day as the detenu and that it necessarily took an appreciable time for the Government to consider the grounds furnished by District Magistrates for the arrest of the various persons incarcerated. It is not the duty of this Court to sit in judgment over the executive in this matter, nor indeed have we the material to enable us to do so. It is sufficient to point out that the very magnitude of the powers given to the Government under this Act adds to their responsibility to see that no man is incarcerated a day longer than is necessary without giving good reasons for it. However, even if in the absence of an order furnishing reasons under section 3 (1) within a reasonable time, we might have held that the detenu had been unlawfully detained, we would not order his release after reasons had been furnished and the detention became lawful.

In considering the powers of a Court in an application of this kind and the duties of the executive to place material before the Court, Mr. Bhashyam for the petitioner relies on certain expressions of opinion of Sir John Beaumont in a judgment of their Lordships of the Privy Council in *King-Emperor* v. *Vimlabai Deshpande*[1], which would seem at first sight to go somewhat further than the other cases relied on. That was a case in which a police officer made an arrest under sub-rule (1) of rule 129 of the Defence of India Rules, under which a police officer could arrest without a warrant any person whom he reasonably suspected of having acted in a manner prejudicial to the public safety or to the efficient prosecution of the war. Their Lordships held that the Court had to be satisfied, not merely that the police officer thought that he entertained reasonable suspicions; but that, in fact, in the opinion of the Court, his suspicions were reasonable. The Court there held that it was clear from the evidence that his suspicions were not reasonable.

Although in other cases cited by the learned advocate for the petitioner the release of the persons detained was eventually ordered, yet with the exception of the decision in *Dilbagh Singh* v. *Emperor*[2], where persons were arrested for cheating the Government, which cheating was clearly not prejudicial to the public safety or to the efficient prosecution of the war, these decisions indicate that it is not open to the Court to go behind the reasons given by the executive. The Defence of India Act, like the present Act, contains a clause to the effect that no order made in the exercise of any power conferred by or under the Act shall be called in question in any Court. So all that it is necessary for the Government to prove is that the order was one made in the exercise of the powers conferred under the Act, *i.e.*, that the police officer had acted with reasonable cause for suspicion or that the Government had been satisfied, as the case may be, that detention was necessary; so that if the District Magistrate has given reasonable grounds for the detention, the Court cannot question them, unless there is material before the Court to show that the District Magistrate could not have been satisfied. In *Bajirao Yamunappa* v. *Emperor*[3], Chagla, J., in delivering the judgment of the Court said:

> "The original order was made on the 23rd May, 1944, and it purports to order the detention of the applicant because the Government of Bombay was satisfied that it was necessary to do so with a view to preventing the applicant from acting in a manner prejudicial to the public safety and the maintenance of public order; and the order of the 6th November, 1944, directs that the original order should continue in force. . . . . . It is, therefore, for the applicant to satisfy us that it was not validly made on any of the grounds which I have indicated above."

and again,

> "It is not competent to the Court to inquire into the sufficiency of the materials and the reasonableness of the grounds on which the detaining authority was satisfied that it was necessary to make the order. But if any reasons which influenced the detaining authority in making the order appear on the record, then the Court can scrutinise them in order to see what was the condition of the mind of the detaining authority when it made the order."

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1. I.L.R. 1946 Nag. 651.
2. A.I.R. 1944 Lah. 373.
3. A.I.R. 1946 Bom. 32.

The learned Judges, after examining the grounds given, found that they formed a wholly inadequate basis for the order passed. In *Kamala Kant Azad* v. *King-Emperor*[1] persons were detained for months without any order justifying their detention, and then an order was issued authorising their detention for a further period. The learned Judges came to the conclusion that far from the Governor's being satisfied that detention was necessary, he had clearly not given his mind to the matter at all.

Of the cases cited in reply, it was argued in Ex parte *Budd*[2] on behalf of the petitioner for a writ of *habeas corpus*, that since the British Union of which he had been a member had been suppressed, there could be no longer any danger of the Union being utilised for any prejudicial purpose. It was however held that the question whether there was any reason for the detention of the appellant after the suppression of the British Union was really one whether the Secretary of State had acted in good faith ; and since there was no evidence that the Secretary of State had not acted in good faith, no enquiry into the facts by the Court was permissible. In re *Krishnaji Gopal Brahme*[3] has been cited by the learned Public Prosecutor, because it is a decision under a Bombay Act which is identical, or almost so, with the Madras Act I of 1947. It lays down the principle that where the authority making an order under section 2 of the Bombay Public Security Measures Act, 1947, asserts the existence of a state of mind and belief which satisfies the requirements of the section, the Court cannot go beyond it and consider the adequacy or otherwise of the reasons which go to establish the state of mind.

The gravamen of the charge against the detenu is that because of his prominent position in the village as a Mirasidar, he was bullying and intimidating people in the neighbourhood, indulging in smuggling, and ruthlessly doing away with anybody who dared to oppose him. He was able to suppress evidence and even went so far as to kidnap potential witnesses. There can be no doubt that if these allegations were true—and we have no reason to believe that the District Magistrate did not think so—then it is impossible for us to say that the District Magistrate could not have been satisfied that the petitioner was acting in a manner prejudicial to the maintenance of public order, or, in view of the circumstances then existing, that he could not have thought it necessary to detain the detenu.

The affidavits furnished by the petitioner do however give cause for suspicion that the primary purpose of the order was to circumvent the orders issued by the High Court, the Sessions Judge, and other authorities releasing the petitioner on bail in connection with the various cases pending against him on charges similar to those set out in the grounds for detention. He was arrested on 6th August, 1947, for robbery. Four days later, he was released on bail by the Sessions Judge subject to certain restrictions. These were automatically removed on 25th August, 1947, The charge-sheet was filed several months later. An application for cancellation of the order releasing the petitioner on bail was made on 28th November, 1947. The order passed by the Sessions Judge of East Tanjore on 22nd January, 1948, on this application was that he should report daily at 11 A.M. to the police until C.C. No. 348 of 1947 had been disposed of. On that very day he was arrested by the police at 3 P.M. An application for bail was then made to the Additional First Class Magistrate, who supplemented the original order that he should report to the police at 11 A.M. every day by directing him to report to the police at Negapatam every day at 6 P.M. also. On his application, he was permitted to visit his own village on the 22nd and 23rd February, and on the 23rd, while there, he was arrested under the Act. We have however no reason to think that the order of arrest under the Act was passed for any petty reasons or out of spite, merely because the petitioner had succeeded in retaining his liberty and avoiding his remand to jail pending the trial of the cases against him.

Mr. Bhashyam represents that since the detenu is detained at Trichinopoly, with very restricted rights of interview and correspondence, it is unlikely that the

1. (1944) I.L.R. 23 Pat. 252.
2. (1942) All.E.R. 373.
3. (1947) 50 Bom.L.R. 175.

detenu will be able to defend himself properly at Negapatam. We are however reluctant to believe that the authorities will not afford the detenu every opportunity of raising funds and instructing his counsel.

The petition is dismissed.

V.P.S. *Petition dismissed.*

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Fort William in Bengal.)

PRESENT:—LORD MACMILLAN, SIR MADHAVAN NAIR AND SIR JOHN BEAUMONT.

Hafiz Mohammed Fateh Nasib .. *Appellant**

v.

Sir Swarup Chand Hukum Chand, a firm and another .. *Respondents.*

Limitation Act (IX of 1908), section 28 and Articles 142 and 144—Nature of possession required under—Difference between a trespasser and a person put into possession by an order of Court—Acts of possession—Test to be applied—Trustee for charity—Change in character of his possession—Permissibility.

Possession necessary to found a title by adverse possession under section 28 of the Limitation Act is not different in character (though it may be in duration) from the possession required to prevent limitation from running under Article 142 or 144.

The principle that the claim of a trespasser to title by adverse possession will be confined strictly to the property of which he has been in actual possession has no application to a case where the claimant is not a mere trespasser but a purchaser from one who was put into possession by an order of Court.

What has to be considered in such cases is whether the acts of possession which had been proved would legitimately show that the plaintiff and his predecessors-in-title had enjoyed dominion over the property in the manner in which such dominion is normally exercised.

Though a title by adverse possession can be established against trust property, a trustee entering into possession of property belonging to the trust cannot, whilst remaining a trustee, change the character of his possession and assert that he is in possession as a beneficial owner. Ordinarily, when a person comes into possession under orders of Court, the presumption would be that he took possession in his own right. If it is desired to show that the person's possession was that of a trustee and not of a beneficial owner the burden is upon the person so desiring to prove this fact.

Charles Bagram for Appellant.

Sir Thomas Strangman, W. W. K. Page and *J. M. R. Jayakar* for Respondents.

Their Lordships' Judgment was delivered by

SIR JOHN BEAUMONT.—This is an appeal from a judgment and decree of the High Court of Judicature at Fort William in Bengal, dated 28th May, 1941, confirming a decree of the First Class Subordinate Judge, 24-Parganas, Alipore, dated 31st May, 1934.

Respondent No. 1 (hereafter referred to as "the plaintiff") instituted this suit on the 18th July, 1931, claiming a declaration of title to the property in suit Nos. 2, 2/1, 2/2, and 3, Rowland Road, Calcutta, and possession of the premises other than No. 2/2, Rowland Road, of which the plaintiff was already in possession. The present appellant was the first defendant, and he claimed that the property in suit was *wakf* property, and that he was the *Mutwalli* of the *wakf* estates having been appointed to that position by the will of Abdul Alim Abed (who will be referred to hereafter as "Abed") the alleged former *Mutwalli*. The second respondent was the second defendant, and claimed to be in possession under a lease granted by the first defendant of the premises of which the plaintiff sought possession.

The facts giving rise to this appeal are these: On the 28th January, 1876, Juman Mistry, a Mohammedan inhabitant of Calcutta, executed a *Towliatnama* (deed of trust) by which he purported to create a *wakf* of certain pieces of land and appointed *Mutwallis* of the *wakf*. The properties in suit which Juman owned were not included in the *wakf*. On the 21st June, 1880, Juman executed a fresh

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*P.C. Appeal No. 71 of 1945. 2nd December, 1947.

Towliatnama by which he varied the deed of 1876. In the year 1884, Juman died intestate leaving as his heirs his son Umar Ali and his daughter, Aberjan, and Umar Ali thereupon acted as *Mutwalli* of the *wakf* properties. On the 5th April, 1888, Umar Ali and Aberjan executed a deed of partition dividing between them the properties left by Juman other than those the subject of the two deeds. The properties allotted to the share of Umar Ali included the property in suit. On the 11th November, 1908, Umar Ali executed a *wakfnama* by which he purported to make *wakf*, for the purposes and as part of the *wakf* created by Juman by the deed of 1880 abovementioned, of certain properties including the property in suit. He appointed Aberjan and Samiruddin, son of his cousin Karim Bux, to be *Mutwallis*, on his death, of the entire properties. He also purported to provide that on the death of either of the said *Mutwallis*, Abed, son of his daughter, should be appointed *Mutwalli* in his or her place. On either the 7th September or the 7th November, 1911, Umar died intestate leaving as his heirs Aberjan and Karim Bux. Both dates are given in the record, but nothing turns on the exact date of Umar Ali's death.

In the year 1912, Aberjan instituted Title Suit No. 36 of 1912 in the Court of the First Subordinate Judge at Alipore. The defendants were Karim Bux, his sons, Samiruddin and Aminuddin, the minor sons of Samiruddin, Abed the minor grandson of Umar Ali, and Muhammed Buksh. The minor defendants were represented by their guardian Karim Bux. The relief sought was a declaration that Aberjan, as co-heir with Karim Bux of Umar Ali, was entitled to a share of the properties purported to have been made *wakf* by Juman and Umar Ali, and a declaration that the said *wakfs* were invalid and did not affect the title of Aberjan to the properties, and for partition. The final decree in the suit, passed on the 5th October, 1912, declared the *wakfs* of 1876, 1880 and 1908 to be invalid, set them aside, and partitioned the property of Umar Ali between Aberjan and Karim Bux, the property in Rowland Road now in suit being allotted to the share of Aberjan. On the 2nd March, 1913, in execution of this decree Aberjan was put in possession of the properties decreed to her including the property in suit. On the 22nd June, 1913, by a *Heba-bil-ewaj*, or deed of gift, Aberjan gave the property in suit to Badruddin, grandson of her husband's brother.

In the year 1915, Samiruddin, his minor three sons and four Mohammedan members of the public, instituted Title Suit No. 190 of 1915 in the Court of First Subordinate Judge of Alipore against Aberjan, Karim Bux, his son Aminuddin, Badruddin, Samchun Nehar Bibi and Abed, then a minor who was represented in the suit by the *sheristadar* of the Court as guardian *ad litem*. The relief sought was recovery of possession of the properties purported to be declared by Juman and Umar Ali and the setting aside of the decree in Suit No. 36 of 1912 as having been obtained by fraud. On the 27th November, 1916, the Subordinate Judge delivered judgment. He held that so far as the suit was for possession and vesting of the properties in the plaintiff jointly with Aberjan it was not maintainable since it had not been instituted in accordance with the provisions of section 92 of the Code of Civil Procedure and that the Court had no jurisdiction to try the claim, but that the suit was maintainable by Samiruddin and his sons in so far as it sought to set aside the decree in Suit No. 36 of 1912. He then held the *wakfs* of 1880 and 1908 to be invalid and thought no fraud had been perpetrated in obtaining the decree in Suit No. 36 of 1912. From this decision Samiruddin and his minor sons filed an appeal to the High Court, but by consent the High Court passed a decree allowing the appeal to be withdrawn on terms, such withdrawal being in the opinion of the Court for the benefit of the minors concerned.

On the 9th December, 1919, Badruddin conveyed the property in suit to one Anadi, for the sum of Rs. 1,36,975. On the 16th December, 1919, Anadi, who had bought the property as benamidar for Mohananda Nandi, executed a deed of release of the property in favour of the latter.

On 28th May, 1921, Abed, who had attained majority on the 30th May, 1918, instituted Title Suit No. 150 of 1921, subsequently renumbered as No. 153 of

1922 in the Court of the Third Subordinate Judge, Alipore. The defendants were Aberjan, Samiruddin, Karim Bux, Aminuddin, three minor sons of Samiruddin. Badruddin and a number of transferees including Mohananda Nandi and Anadi. The relief sought was a declaration that the *wakfnama* of 1880 and 1908 were valid and operative and a declaration that the decree in Title Suit No. 36 of 1912 was a nullity. On the 27th June, 1927, the Subordinate Judge delivered judgment. He found that Suit No. 36 of 1912 was a collusive suit and that the decree was fraudulently and collusively obtained, and that it was a nullity as against Abed who was entitled to a declaration as to its nullity. He held that the decree in Suit No. 190 of 1915 did not operate as *res judicata* in the suit. He also held that the three *wakfs* of 1876, 1880 and 1908 were valid and that the appointment of Abed to act as *Mutwalli* after Aberjan and Samiruddin were valid. He accordingly passed a decree declaring that the *wakfnamas* of 1880 and 1908 were valid and operative and created a valid *wakf* of the properties mentioned in them, and that the decree obtained by Aberjan in Suit No. 36 of 1912 was a nullity as against the plaintiff, Abed. From this decision two appeals were filed in the High Court, one by Mohananda Nandi and other defendant transferees, and the other by Aberjan. The High Court agreed with the Subordinate Judge that Abed was entitled to relief in respect of the decree in Suit No. 36 of 1912 and that it was not binding on him. The Court, however, held, for the reasons specified in the judgment of the Chief Justice, that the appeals must be allowed so far as regarded the declaration that the *wakfs* of 1880 and 1908 were valid and operative, which declaration was set aside.

On the 29th January, 1927, the firm of Nalinakshya Tah and Company, through Mohananda Nandi who was a partner in the firm, borrowed from the plaintiff a sum of Rs. 1,30,000 upon the security of a promissory note payable on demand and of the deposit by way of equitable mortgage of the title deeds of the property in suit and another property.

On the 15th May, 1928, Abed executed a will by which, *inter alia*, he purported to appoint the present appellant *Mutwalli* upon his death of the properties made *wakf* by Juman and Umar Ali. On the 17th May, 1928, Abed died. On the 14th June, 1928, on the petition of a creditor the firm of Nalinakshya Tah and Company was adjudicated insolvent by order of the High Court at Calcutta, the estate and effects of the firm and its members being thereby vested in the Official Assignee. On the 12th February, 1929, an order was made in the insolvency proceedings holding the plaintiff to be a secured creditor of the insolvent firm by virtue of the equitable mortgage abovementioned which was declared to be valid and subsisting first mortgage of the property so charged, and directing the Official Assignee to sell such property with liberty to the plaintiff to buy at such sale. On the 22nd January, 1931, the property in suit was put up for sale by public auction by the Official Assignee and was bought by the plaintiff for the sum of Rs. 42,000, and on the 26th March, 1931, the property was conveyed to the plaintiff by the Official Assignee. The plaintiff thereupon sought to obtain possession of the property in suit but, apart from obtaining possession of No. 2/2, Rowland Road, from a tenant who attorned, was prevented from doing so by respondent No. 2 which claimed to be in possession of the rest of the properties in suit by virtue of a lease for 25 years dated 30th July, 1929, granted to it by the present appellant.

On the 18th July, 1931, the plaintiff filed the present suit in the First Court of the Subordinate Judge, 24-Parganas, Alipore, claiming a declaration of title to the property in suit and an order for possession of the properties in possession of the defendants. In the plaint his case was based on continuous, open, exclusive and undisturbed possession by the said Mohananda Nandi and his predecessors-in-interest Badruddin and Aberjan whereby Mohananda Nandi had acquired an indefeasible title to the property in suit by adverse possession against the whole world. It was further alleged that in the year 1928 the present appellant, taking advantage of the unsettled state of the affairs of Mohananda Nandi, had surreptitiously taken unlawful possession of the property in suit which was then only a vacan

piece of land. The appellant as the first defendant in his written statement denied the possession of the plaintiff and his predecessors-in-interest. He claimed that Abed had been in possession of the suit property as *Mutwalli* of the *wakf* for many years prior to the suit and that he, the appellant, had acquired the property on the death of Abed as *Mutwalli* appointed by his last will.

On the 31st May, 1934, the learned Subordinate Judge gave judgment. His relevant findings were that the gift by Aberjan to Badruddin on the 22nd June, 1913, was not fraudulent; that the purchase by Mohananda Nandi from Badruddin was a *bona fide* transaction and for consideration; that Mohananda Nandi and his firm created a valid charge on the properties in suit in favour of the plaintiff; that the will executed by Abed in favour of the appellant was a genuine document; that Abed was never a *Mutwalli* of the *wakf* property and had no authority to appoint the appellant as *Mutwalli* after his death; that the *wakfs* created by Juman Mistry and Umar Ali were valid; that the decisions in Suit Nos. 36 of 1912 and 190 of 1915 did not operate as *res judicata* as to the secular character of the property; that the predecessors of the plaintiff were in possession of the suit property up to June 1928, and that the suit was not barred by limitation, but that the plaintiff was in the position of a mere trespasser or wrongdoer, that his possession was in part constructive and non-continuous and was not such as to found a title by adverse possession. He held, however, that it had not been proved that Abed was ever in possession of the disputed property as *Mutwalli*. Notwithstanding these findings, he decreed the plaintiff's suit on the ground that he was a purchaser for value without notice, which was not the case alleged in the plaint.

From this decision an appeal was brought to the High Court at Calcutta, which dismissed the appeal though for reasons somewhat different from those which had commended themselves to the learned Subordinate Judge. The leading judgment was given by Mr. Justice Edgley. The learned Judge was not prepared to hold that the *wakf* of 1908, which alone of the said *wakfs* affected the property in suit, was invalid, if that question was open, but he held that as between the parties to the appeal the secular character of the property in suit had been established by Suit No. 190 of 1915, the decree in which operated as *res judicata*. The view he took was that in that suit Abed was litigating in a representative capacity on behalf of the *wakf*, and that in the present suit the appellant, though not validly appointed *Mutwalli* by the will of Abed, was also litigating in a representative capacity on behalf of the *wakf* and must be deemed to be claiming under Abed within Explanation 6 of section 11 of the Code of Civil Procedure. In the view their Lordships take of this appeal it is not necessary to consider the question of *res judicata*, and they express no opinion upon it. Sir Thomas Strangman for the plaintiff (first respondent) argued the appeal upon the assumption that the *wakf* of 1908 was valid, and that it was open to the appellant so to assert, and their Lordships will deal with the appeal on the same footing. On that basis the first question to be determined is whether the plaintiff proved continuous, open, exclusive and undisturbed possession of the property in suit for 12 years and upwards before 1928 when he was dispossessed, that being the relevant date under Article 142 of the Limitation Act. If that question is answered in the affirmative then the further question arises whether such possession was adverse to the *wakf*.

Upon the first question the learned trial Judge held, as already noted, that the plaintiff and the predecessors-in-interest had been in possession of the suit property within 12 years prior to the commencement of the suit, so as to prevent limitation from running, but he thought that the possession was in part constructive and had been interrupted for a short period as shown by certain criminal cases, to which he referred, and that he could not hold that the plaintiff who claimed as a mere trespasser had established a title under section 28 of the Limitation Act. The High Court took a different view upon this question. They stated the rule to be applied in these terms:

"The proper test to be applied in a case of this nature is whether the predecessors of the plaintiffs for a period of 12 years or more exercised such dominion over the property in suit as to justify

the inference of fact that they were in possession of the whole. It was not necessary that they should prove affirmatively that their predecessors had actually been in possession of every square inch of this land, but it should have been considered whether the acts of possession which had been proved, would legitimately show that the predecessors of the plaintiff had enjoyed dominion over the property in the manner in which such dominion is normally exercised."

Their Lordships agree that this is the correct test to apply and, having examined the evidence, oral and documentary, they agree with the finding of the High Court that the plaintiff and his predecessors-in-interest had been in possession of the suit property for more than 12 years prior to 1928 so as to acquire a title under section 28 of the Limitation Act. It is no doubt true, as the learned Subordinate Judge held, that the claim of a mere trespasser to title by adverse possession will be confined strictly to the property of which he has been in actual possession. But that principle has no application in the present case. The plaintiff is not a mere trespasser ; he himself purchased the property for a large sum and Aberjan, upon whose possession the claim ultimately rests, was put into possession by an order of the Court, whether or not such order was rightly made. Apart from this, their Lordships think that the character of the possession established by the plaintiff was adequate to found title even in the trespasser. The view of the learned Subordinate Judge involves some inconsistency, since the possession necessary to found a title by adverse possession under section 28 of the Limitation Act is not different in character (though it may be in duration) from the possession required to prevent limitation from running under Article 142 or 144.

The evidence as to possession by Aberjan from the 2nd March, 1913, when the Court gave her possession until the gift to Badruddin, and by Badruddin down to the 9th December, 1919, when he conveyed the property to Anadi was not, as the High Court noted, seriously challenged. It was the possession by Mohananda Nandi between December, 1919 and June 1928, which was challenged. It was, in their Lordships' opinion, proved that on his purchase from Badruddin the tenants of the property attorned to Mohananda Nandi ; that Mohananda Nandi fenced the land with corrugated iron sheets, though the actual date of such fencing is not given ; that he took the fruit of the trees on the land ; that he gave a permit for training horses on the land ; and that he was registered as the owner with the Municipality. It is true that after 1921 Abed endeavoured to interfere with the possession of Mohananda Nandi, and induced some of the tenants to attorn to him. But proceedings were instituted against such tenants by Mohananda Nandi and they were ejected under orders of the Court. Mohananda Nandi's action in taking proceedings against recalcitrant tenants in strong evidence of the assertion of his claim to possession. Reliance has been placed on behalf of the appellant on the criminal proceedings on which the learned Subordinate Judge relied. There were two such proceedings. On the 11th October, 1919, Badruddin filed a complaint against Abed and others for criminal trespass under section 447 of the Indian Penal Code in respect of the suit property. The learned Judge dismissed the complaint on the ground that the nature of the trespass, if any such was committed, did not constitute a criminal trespass under the Penal Code. This decision is of no value at all for the present purpose. There is rather more substance in the second case. In 1928 Mohananda Nandi filed a complaint against Abed and the present appellant, under section 426 of the Indian Penal Code alleging that the accused had removed a bamboo fencing raised by the complainant. The Magistrate dismissed the complaint on the ground that the prosecution had not been able to prove that the land on which the fence was erected belonged to and was in possession of the complainant. The fact that Mohananda Nandi failed on this occasion to prove that he was in possession of a fence on the property is a small matter to weigh against the mass of evidence in favour of his possession. Their Lordships feel no hesitation in agreeing with the High Court that adverse possession by the plaintiff and his predecessors-in-interest has been proved for the requisite period.

The only question which then remains is whether such possession was adverse to the *wakf*. It is not disputed that in law a title by adverse possession can be established against *wakf* property, but it is clear that a trustee for a charity entering

into possession of property belonging to the Charity cannot, whilst remaining a trustee, change the character of his possession, and assert that he is in possession as a beneficial owner. If, upon the death of Umar Ali, Aberjan accepted the position of *Mutwalli* of the *wakf*, her subsequent possession of the *wakf* property would be as *Mutwalli*, and Badruddin, who claimed under her as a volunteer, would be in no better position. The question whether Aberjan ever became *Mutwalli* of the *wakf* arises, therefore, for decision. Unfortunately, the written statement did not allege that Aberjan became *Mutwalli* of the *wakf*. No issue was raised as to this ; and the question was not discussed by the trial Judge. The relevance of the question was, however, appreciated by the Judges in the High Court, who held that Aberjan never accepted the position of *Mutwalli*. Their Lordships agree with this conclusion. There is no direct evidence that Aberjan ever acted as *Mutwalli*, but reliance is placed by the appellant on two documents. The first is Ex. Z-18, an entry in the Assessment Book of the Corporation of Calcutta on the 29th November, 1911, of the names of Samiruddin and Aberjan as joint *Mutwallis* of the properties 2, 2/ 1, 2/2, 3 and 4, Rowland Road. This would be strong evidence that Aberjan accepted the position of *Mutwalli* if it were shown that she was a party to the application on which the entry in the Assessment Book was made, or that she knew about the entry ; but there is no evidence whatever as to this. The application was made by Samiruddin and there is nothing to show that Aberjan knew anything about it. The other document on which the appellant relies is Ex. 51, a deed of release executed by Karim Bux in favour of Aberjan on the 4th April, 1913. The document recites that the property of Juman and Umar Ali had been inherited by Aberjan and Karim Bux and that Aberjan was to get the properties in Schedule " A " and Karim Bux the properties in Schedule " B" It then recites that Aberjan had been managing the property in Schedule " B." and that as Karim Bux had demanded the title deeds from Aberjan and she had handed them over he granted her a release in respect of the properties left by Juman and Umar Ali. The appellant suggests that as Aberjan had been managing the property it must be inferred that she had done so in her capacity as *Mutwalli* ; but as the document recites that Aberjan had a title as heir by inheritance, the natural inference is that she managed the property in that capacity, the existence of the *waqfs* not being referred to in the document. The conduct of Aberjan in filing Suit No. 36 of 1912 within a few months of the death of Umar Ali and in that suit challenging the validity of the *wakfs* and asserting her own title to the property in suit makes it very improbable that she accepted the position of *Mutwalli* on the death of Umar Ali. Reliance was also placed by the appellant on the omission of Aberjan to give evidence that she had not accepted the office of *Mutwalli*. Aberjan, who was referred to in the *wakf* of 1876 as the eldest of the three daughters of Juman and as already married, must have been a very old woman when this suit was heard, and it may be that she was incompetent to give evidence. Be this as it may, it was not for the plaintiff to prove the character in which Aberjan took possession. He proved the fact of her possession by the order of the Court putting her into possession and, if the evidence rested there, the presumption should be that she took possession in her own right. If the appellant desired to prove that her possession was that of a trustee and not of a beneficial owner the burden was upon him to prove this fact. No doubt Aberjan might have been a dangerous witness for the appellant to call, and no inference against him can be drawn from his omission to call her, but the reluctance of the defendant to call her as a witness did not impose an obligation on the plaintiff to do so. She might have been a dangerous witness for the plaintiff also.

For these reasons their Lordships will humbly advise His Majesty that this appeal be dismissed with costs.

Solicitors for Appellant: *W. W. Box & Co.*

Solicitors for Respondents: *Morgan, Price, Marley and Rugg.*

V.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL AND MR. JUSTICE GOVINDA MENON.

In re P. Venkatachala Thevar, a detenu in the Central Jail, Trichinopoly.

M. V. Sivasankara Thevar .. *Petitioner*.*

Federal Court (Enlargement of Jurisdiction) Act (I of 1948), sections 2 and 3—Dismissal of application under section 491, Criminal Procedure Code—Appeal to Federal Court—Competency.

An order passed by the High Court under section 491, Criminal Procedure Code, is not an order passed in its civil jurisdiction but one passed in the exercise of its criminal jurisdiction and as no appeal lies to the Federal Court unless the judgment decree or final order was made in the exercise of its civil jurisdiction an appeal against such an order is incompetent.

Petition praying that in the circumstances stated therein the High Court will be pleased to grant a certificate to enable the petitioner to appeal to the Federal Court of India against the order of the High Court, dated 25th March, 1948, in Crl. M. P. No. 439 of 1948.

K. Bhashyam and *S. Gopalaratnam* for Petitioner.

The Order of the Court was made by

Horwill, J.—By an order, dated the 25th March, 1948, this Court dismissed an application on behalf of the petitioner under section 491, Criminal Procedure Code. The petitioner has now filed this civil miscellaneous petition on the civil side praying for grant of a certificate for filing an appeal to the Federal Court of India.

Section 3 of the Federal Court (Enlargement of Jurisdiction) Act, 1947 (Act I of 1948) gives a right of appeal to the Federal Court from any judgment to which this Act applies ; and section 2 (*b*) defines the expression "judgment to which this Act applies" as meaning "any judgment, decree or final order of the High Court in a civil case . . . . ."

The preliminary question arises whether the order passed by us was in a civil case.

Section 491 empowers any High Court whenever it thinks fit, to direct,

"(*a*) that a person within the limits of its appellate criminal jurisdiction be brought up before the Court to be dealt with according to law ; and (*b*) that a person illegally or improperly detained in public or private custody, *within such limits* be set at liberty ; . . . . . ."

The words "within such limits" clearly apply to the limits of its appellate criminal jurisdiction, as set out in section 491 (1) (*a*). Despite the wording of section 491, which indicates that the powers of this Court are limited to its appellate criminal jurisdiction, it is argued on the authority of certain decisions to which we have been referred that the order passed by this Court was an order in a civil case. In *Mahomedalli Allabux* v. *Ismailji Abdulla*[1], the question that arose was whether an appeal lay from an order directing the issue of a writ of *Habeas Corpus* ; and the learned Judges held that an appeal did lie under section 15 of the Charter. The learned Chief Justice who delivered the leading judgment, did not think that an order directing the issue of a writ of *Habeas Corpus* was in the exercise of its criminal jurisdiction ; but he expressed no opinion with regard to an order under section 491 of the Criminal Procedure Code. The learned Chief Justice, after setting out the facts, said :

"By the Charter of 1823 there was given to the Chief Justice and the Puisne Justices of the Supreme Court such jurisdiction and authority as Justices of the Court of King's Bench had, and might lawfully exercise, within that part of Great Britain called England as far as circumstances would permit. The High Court still retains such powers as were granted by the Supreme Court Charter of 1823, as were not inconsistent with the Charter of 1865 or have not been taken away by subsequent legislation."

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* C.M.P. No. 2849 of 1948. 23rd April, 1948.

1. (1926) I.L.R. 50 Bom. 616.

The learned Chief Justice then went on to say that section 491 of the Criminal Procedure Code did not take away the powers that the High Court had as the successor of the old Supreme Court. The learned Judges based their decision on the assumption that they had this inherent power beyond any jurisdiction conferred under section 491, Criminal Procedure Code. It is conceded that in view of the Privy Council decision in *Ryots of Garabando* v. *Zamindar of Parlakimedi*[1], the High Court had no such inherent jurisdiction. We are unable, therefore, to find in this decision any authority for the position that the order passed by this Court in Crl. M. P. No. 439 of 1948 is a civil order. For the position that an order passed under section 491, Criminal Procedure Code, is a civil order, the learned advocate for the petitioner relies on a dictum of Mitter, J., in a case decided by a Full Bench of the Calcutta High Court in *Niharendu Dutt Majumdar* v. *A. E. Porter*[2]. At page 520, Mitter, J., said :

> "A *Habeas Corpus* proceeding (and a proceeding under section 491, Criminal Procedure Code, is of the same nature) is in essence a civil proceeding, for it is concerned with the private right of a citizen, namely, the right of personal liberty. The true nature of a proceeding by *Habeas Corpus* should be determined by its object, which is not to punish, but to give relief from a civil wrong."

We would, however, like with due respect to point out that the unlawful detention of a citizen is not merely a civil wrong, but a criminal wrong, punishable under the Penal Code ; and the fact that the prayer in an application under section 491 is not for some punishment is not an indication that the application is of a civil nature. Although under the Penal Code punishments are awarded, it is not in every criminal proceeding that a punishment is sought ; for many of the provisions in the Criminal Procedure Code for example are for the purpose of maintaining order and for ensuring the public safety. It is pertinent in this connection to point out that Madras Act I of 1947, under which the petitioner has been detained, is for the maintenance of public safety and the putting down of disorders involving a menace to the peace and tranquillity of the Province ; and the Provincial Government, or the authority to whom the Government has delegated its power is authorised under section 2 (1) :

> "If satisfied with respect to any particular person that he is acting or about to act in any manner prejudicial to the public safety or the maintenance of public order,"

to make an order directing that he be detained. We are therefore of opinion that the order passed by us was in the exercise of our criminal jurisdiction. Their Lordships of the Privy Council assumed this to be so in the *King-Emperor* v. *Sibnath Banerji*[3]. It is not however even necessary to go so far as to say that it was passed in the exercise of our criminal jurisdiction; for no appeal lies to the Federal Court unless it was in the exercise of our civil jurisdiction ; and we are firmly of opinion that it was not in our civil jurisdiction that we passed the order we did.

The petition is dismissed.

V.S. ——— *Petition dismissed*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR FREDERICK WILLIAM GENTLE, *Chief Justice*, MR. JUSTICE RAJAMANNAR AND MR. JUSTICE YAHYA ALI.

G. Ammanna .. *Petitioner**

v.

Mrs. Epsey Gidion Ammanna .. *Counter-Petitioner.*

Indian Divorce Act (IV of 1869), *sections* 17 *and* 3 (1) (*b*)—*Decree* nisi *for dissolution of marriage on ground of adultery—Absence of evidence of adultery—Long delay in persenting petition—Duty of Court.*

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1. (1943) 2 M.L.J. 254 : L.R. 70 I.A. 129 : I.L.R. 1944 Mad. 457 (P.C.).
2. I.L.R. (1944) 1 Cal. 489.
3. (1945) 2 M.L.J. 325 : 1945 F.L.J. 222.

* Case Referred No. 86 of 1946. 15th December, 1947.

A decree *nisi* for dissolution of marriage on the ground of adultery can in no circumstances be granted save where there is evidence which the Court can accept of the adultery, alleged in the petition, upon which relief is sought. Where there is a long delay between the date of the wife leaving the husband to live with another and the date of the presentation of the petition, it must be the subject of investigation along with any evidence acceptable to the Court of the commission of adultery.

Case referred for the orders of the High Court under section 17 of Act IV of 1869 by the District Judge, Coorg, in C. M. P. No. 42 of 1946.

Parties not represented.

The Judgment of the Court was delivered by

The Chief Justice.—This matter comes before the Court pursuant to section 17, read with section 3 (1) (*b*) of the Indian Divorce Act. It is a petition by a husband seeking dissolution of his marriage from his wife on the ground of her adultery with an unmarried man. The adultery is said to have commenced in the year 1933 or 1934 and no proceedings were taken until the institution of the petition, out of which this reference arises, on September 20, 1946. The name of the adulterer is not mentioned in the petition and there is a prayer, for which no reason is manifested, that the petitioner may be excused from making the adulterer a counter-petitioner.

The only evidence which was given was that of the petitioner, who stated very little. Summarised it is the following. The wife left the petitioner 12 years before he gave evidence in 1946. She ran away with another Christian named G. S. Maben and the petitioner did not know where they were living. In 1936 he found in a copy of the South India Observer dated 5th March, 1936, an advertisement inserted by the wife that she had separated from the petitioner and a copy of the advertisement was exhibited. The petitioner concludes, in his evidence, that he wished for a formal separation from his wife and he did not wish her to be known as his wife ; nor did he wish her to come back to him.

The advertisement states that Mrs. Epsey Gidion Ammanna then at the Nilgiris gave notice that she had separated with her child from the petitioner ; she would not be responsible for any debts he had incurred and had decided her own course for the future.

There was no evidence whatever of adultery. The petitioner states merely that his wife ran away with another man whose name is not disclosed in the petition and who is not a party to the proceedings. Further there was no reason given for the delay of 12 years between the time the wife left the husband and his institution of the petition for the dissolution of marriage. The learned District Judge of Coorg expressed himself as satisfied on the evidence and declared the marriage between the parties to be null and void subject to confirmation by this Court.

There was no warrant whatever for the order of the District Judge and in the absence of any evidence, as there was not in this case, the petition should not have been successful. For it to be dismissed by this Court would, perhaps, cause hardship and for that reason it will be remanded back to the Court of the District Judge of Coorg for proper and correct disposal, which it has not yet received. A decree *nisi* for dissolution of marriage on the ground of adultery can in no circumstances be granted save when there is evidence which the Court can accept of the adultery alleged in the petition, upon which relief is sought. Further, in this case, the petitioner should have given evidence to explain the delay of 12 years intervening from the time when the wife left him until he presented his petition for dissolution. On remand that delay must also be the subject of investigation as well as the consideration of any evidence acceptable to the Court of the commission of adultery.

V.S. ——— *Case remanded.*

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Calcutta.)

PRESENT :—LORD NORMAND, LORD MACDERMOTT AND SIR JOHN BEAUMONT.

Gouri Dutt Maharaj .. *Appellant**

v.

Sheikh Sukur Mohammed and others .. *Respondents.*

Transfer of Property Act (IV of 1882), section 52—Scope and applicability.

The broad purpose of section 52, Transfer of Property Act, is to maintain the *status quo* unaffected by the act of any party to the litigation pending its determination. The applicability of the section cannot depend on matters of proof or the strength or weakness of the case on one side or the other in *bona fide* proceedings. To apply any such test is to misconceive the object of the enactment.

Though section 52 may not contemplate a decree or order which is entirely alien to the issues raised between the parties, it applies to a compromise decree and such a decree cannot by reason of its very nature, be expected invariably to reflect the precise relief claimed.

The next day after the filing of a suit claiming specific performance of an agreement to sell and, alternatively, a decree for the advances made with a declaration that it and costs were a first charge on the properties, which included a leasehold, the defendant mortgaged the properties to a third person. The suit was ultimately compromised and the decree provided for the payment of a particular sum to the plaintiff and that the decretal dues were to be a first charge on the properties. When the mortgagee sued subsequently on his mortgage it was pleaded in defence that his claim was not maintainable by reason of the provisions of section 52, Transfer of Property Act.

Held: Section 52 of the Transfer of Property Act affected the suit mortgage.

C. S. Rewcastle, K.C. and *P. V. Subba Row* for Appellant.

Respondents not represented.

Their Lordships' Judgment was delivered by

LORD MACDERMOTT.—This appeal is from a judgment and decree of the High Court at Fort William in Bengal (Mukherjea and Pal, JJ.), dated the 27th August, 1942, which substantially varied the judgment and decree, dated the 24th November, 1939, of the Court of the Subordinate Judge at Asansol in a mortgage suit brought by the present appellant as mortgagee.

The facts material to the issues now calling for determination may be stated as follows.

On the 15th November, 1931, Sheikh Sukur Mohammed, the first named respondent (hereinafter called the mortgagor), obtained a lease of some three-fifths of an acre in the town of Asansol for three years at a rent of Rs. 12 per month and with a right of renewal. The mortgagor proceeded to construct a cinema on this plot and, falling short of funds, took into partnership Oscar Gerald Birt and Pramatha Nath Mukerjee (hereinafter called the new partners) who were, it appears, the predecessors-in-title of the respondents other than the mortgagor. This transaction was effected by an unregistered agreement in writing of the 8th June, 1932, which provided (*a*) for the carrying on of the cinema business in partnership by the mortgagor and the new partners, with the former having an eight annas interest and each of the new partners a four annas interest, and (*b*) for the sale by the mortgagor to the new partners of the mortgagor's eight annas interest, or half share, in the cinema business and its assets, which included the leasehold already mentioned, for the sum of Rs. 15,000 " free from all encumbrances." The parties to this agreement fell out and on the 20th September, 1932, the new partners commenced a suit—No. 229 of 1932—against the mortgagor. In this suit the new partners pleaded the agreement of the 8th June, 1932, alleged that they had advanced thereunder a sum of Rs. 17,375 and claimed, *inter alia*, specific performance of the said agreement for sale and, alternatively, a decree for the said advance of Rs. 17,375 with a declaration that it and costs were a first charge on the premises

* 6th April, 1948.

described which included the said leasehold. On the next day, the 21st September, 1932, the mortgagor executed a mortgage deed of the said leasehold, with fittings and equipment, in favour of the appellant to secure an advance of Rs. 6,000 with interest. This was a simple mortgage, duly registered, and the present suit is founded upon it.

Suit No. 229 (to which the appellant was throughout a stranger) ended in a compromise between the mortgagor and the new partners which was reduced to writing and was framed on the basis that the new partners should drop out of the cinema business and relinquish their rights under the agreement of the 8th June in consideration of the mortgagor paying them a sum of Rs. 18,500 in respect of moneys advanced and costs of suit. It is unnecessary to explore the full detail of this document, but the following stipulations therein are material and must be set out :

Clause 2. "That a final decree for the aforesaid sum of Rs. 18,500 will be passed in favour of the plaintiffs and that the defendant will make payment of the said decretal sum by monthly payment as described below."

Clause 6. "That the decretal dues of the plaintiffs as stated above are a first charge on the cinema house, lands, machineries, plants, tools, furniture, equipment, etc., mentioned in the Schedule below and shall continue a first charge till full satisfaction of this decree."

Clause 12. "That the defendant assures the plaintiffs that there is no charge or mortgage on the properties mentioned in the Schedule below save and except one mortgage in favour of Gouri Dutt Maharaj of Asansol for Rs. 6,000 (six thousand) subsequent to the aforesaid agreement, dated 8th June, 1932."

The Schedule referred to specified the leasehold in question. The compromise was accepted by the Subordinate Judge at Asansol on the 17th November, 1932, as appears from the final decree in Suit No. 229 which ordered that "the suit be decreed in terms of petition of compromise" and directed that the compromise be made part of the decree.

On the 8th July, 1938, the appellant instituted the present suit for enforcement of his mortgage and recovery of Rs. 12,000 claimed as then due on foot thereof. The mortgagor did not contest the suit. Of the various defences raised by the other defendants the only one now material is the plea of those representing or claiming through the new partners, both of whom are dead, that the mortgage was effected during the pendency of Suit No. 229 and that, in consequence, the appellant's claim was not maintainable by reason of the provisions of section 52 of the Transfer of Property Act, 1882. That section, as amended, reads thus :

"During the pendency in any Court having authority in British India, or established beyond the limits of British India by the Governor-General in Council, of any suit or proceeding which is not collusive and in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.

Explanation.—For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force."

The Subordinate Judge held against the defence based on section 52 and found in favour of the appellant, the principal ground of his decision being that the agreement of the 8th June, 1932, should have been registered and that, as this had not been done, it was inadmissible in evidence and could not create a valid charge. On appeal, the High Court upheld the defence in question and set aside the decree appealed from save as respects the mortgagor.

The only question for determination by the Board is whether, in these circumstances, section 52 of the Transfer of Property Act affected the appellant's mortgage. It was conceded, and rightly in the opinion of their Lordships that this mortgage was executed during the pendency of Suit No. 229, that it "transferred or otherwise dealt with" the land in question within the meaning of the

section, and that the expression " decree or order " therein includes a decree or order, made pursuant to agreed terms of compromise. Collusion was not suggested and it was admitted that the mortgage had not been made with the authority of the Court. It may, indeed, be that the mortgagor had no chance to seek such authorisation for it does not appear that he was aware of the suit when he mortgaged on the day following its commencement.

In the opinion of their Lordships there can be doubt that in Suit No. 229 a right to immoveable property—the leasehold on which the cinema was erected —was, in the words of the section, " directly and specifically in question " both on the claim for specific performance and the alternative claim for the declaration of a charge in respect of the sum advanced. The broad purpose of section 52 is to maintain the *status quo* unaffected by the act of any party to the litigation pending its determination. The applicability of the section cannot depend on matters of proof or the strength or weakness of the case on one side or the other in *bona fide* proceedings. To apply any such test is to misconceive the object of the enactment and, in the view of the Board, the learned Subordinate Judge was in error in this respect in laying stress, as he did, on the fact that the agreement of the 8th June, 1932, had not been registered. Had the question now under consideration fallen to be determined before the compromise and final decree in Suit No. 229 the appellant's mortgage would clearly have been subject to the provisions of the section as, whatever course the suit might ultimately have taken, no one could then have said, without prejudging the issue, that the mortgage would not affect the decretal rights which the plaintiffs might yet obtain in the proceedings.

It was, however, contended on behalf of the appellant that in the circumstances of the present case the position had to be regarded in the light of the compromise decree. The argument raised two distinct points. First, it was said that this decree accorded rights which were not claimed in the plaint and was, so to speak, outside the scope of the litigation. Their Lordships are unable to accede to this submission. It may well be that section 52 does not contemplate a decree or order which is entirely alien to the issues raised between the parties. The wording is " any decree or order which may be made therein," that is, in the suit or proceeding. But it applies to a compromise decree and such a decree cannot, by a reason of its very nature, be expected invariably to reflect the precise relief claimed. Here the plaint sought, as an alternative to specific performance, a charge on the property in question. In substance the compromise decree provided for that relief and the fact that the plaintiffs by the terms of the compromise, relinquished their rights under the agreement of the 8th June, 1932, cannot, in the view of the Board, lead to a different conclusion.

The second point turned on the construction of the compromise and was to the effect that the parties thereto had agreed that the appellant's mortgage should have priority and that it, accordingly, did not conflict in any way with the rights flowing from the compromise decree. This point was rested on clause 12 of the compromise which stated that, subsequent to the agreement of the 8th June, 1932, there was no mortgage on the property in question save the appellant's. Had it mentioned the date of the mortgage and used language apt to indicate that the parties regarded it as entitled to priority, the case for implying a modification of the terms of clause 6, which expressly provided that the decretal dues should be a first charge, would be appreciably stronger. As clause 12 stands, however, their Lordships cannot agree that it suffices to qualify the clear and emphatic provisions of clause 6 or to preclude those now representing the plaintiffs in Suit No. 229 from taking advantage of such infirmities as have attached to the appellant's security.

For these reasons their Lordships are of opinion that the decision of the High Court was right and should be affirmed. They will therefore humbly advise His Majesty that the appeal be dismissed. The respondents did not appear and there will be no order as to the costs of the appeal.

V.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Officiating Chief Justice* AND MR. JUSTICE SATYANARAYANA RAO.

B. Rangaswami Naidu .. *Petitioner**

v.

Vummidi Bangaru Chetty and Sons and another .. *Respondents.*

Madras Buildings (Lease and Rent Control) Act (XV of 1946), *section* 7 (2)—*Scope—Controller's order for possession—Liability for payment of rent as rent till delivery of possession—Conditions of clause* (2) *of section* 7 *satisfied—Controller if has any discretion to reject application.*

When the Controller has made an order directing the tenant to put the landlord in possession of the leased premises on a particular date, the tenant is bound to pay the rent as rent for the period, before that date, subject of course to the contingency of surrendering possession before that date. Failure to pay the rent for that period would make him a defaulter.

There is nothing in the provisions of section 7 (2) of the Madras Buildings (Lease and Rent Control) Act which enables the Controller to reject the application of the landlord even when he is satisfied that one or more of the conditions laid down in the clause have been fulfilled. No doubt the tenant is to be given a reasonable opportunity of showing cause against the application, but that can only be on grounds open to him in law.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* and call further records in H. R. C. Appeal No. 852 of 1947 (in L. Dis. 1818 H. R. C. 1947), Chief Judge, Small Cause Court, Madras, and quash the order, dated 18th February, 1948, passed therein.

G. Ramakrishna Aiyar and *C. Loganatha Mudaliar* for Petitioner.

V. Radhakrishnayya for Respondents.

The Order of the Court was made by

The Officiating Chief Justice.—In this application, the petitioner seeks from this Court a writ of *certiorari* to quash the order of the Chief Judge of the Court of Small Causes, passed in House Rent Control Appeal No. 852 of 1947 on the 18th February, 1948. The petitioner is the tenant of a shop in Devaraja Mudali Street, in George Town, Madras, and it is common ground that the respondents should be treated as his landlord for the material period. The respondents applied before the Rent Controller for an order evicting the petitioner on the ground that the shop occupied by him was wanted for their own use. On the 2nd December, 1946, the Rent Controller passed an order directing the petitioner to put the respondents in possession of the premises on or before 1st March, 1947. The petitioner filed an appeal against the order to the Chief Judge of the Court of Small Causes, who allowed the appeal and dismissed the application of the respondents on 12th March, 1947. On the 17th March, 1947, the respondents again applied to the Rent Controller for eviction of the petitioner, but this time on the ground that the petitioner did not pay or tender the rent for January and February, 1947, within the time allowed by law and on the ground that the petitioner had sub-let the premises without their consent. It is not disputed that the latter ground as well as the ground that the petitioner had not paid or tendered the rent for February, 1947, are not tenable grounds. The only ground, therefore, which found acceptance with the Rent Controller as well as the Chief Judge of the Court of Small Causes was that the petitioner did not pay or tender the rent for January, 1947. The petitioner put forward a plea that he had made a valid tender of the rent for January within time, but his case was disbelieved by both the Rent Controller and the appellate tribunal. Both of them concurrently found that the petitioner had committed a default in respect of the rent due for January, 1947.

It is contended by Mr. G. Ramakrishna Aiyar, the learned advocate for the petitioner, that this conclusion is erroneous because the relationship of landlord and tenant ceased as between the respondents and the petitioner on and from the

*Civil Miscellaneous Petition No. 1342 of 1948. 10th March, 1948.

date of the order of the Rent Controller in the prior application, that is, on the 2nd December, 1946, and when the application for eviction was finally dismissed on 12th March, 1947, by the appellate authority, the tenancy must be deemed to have been revived only on and from that date. It was contended that, therefore, during the interval which would also cover January, 1947, no rent as such was due by the petitioner to the respondents. If the Rent Controller had directed eviction of the petitioner on the date of his order in question, namely, on 2nd December, 1946, but nevertheless if the petitioner had continued to remain in possession, it may be argued with some force that there was no obligation in law on the petitioner to pay rent as such to the respondents for the period subsequent to the passing of the order for eviction. We refrain, however, from giving our final opinion on this question because it does not directly arise and because the scheme of the Act is such that something may be said even for a contrary position. In this case, the order of the Controller dated the 2nd December, 1946, did not order immediate eviction. The petitioner was directed to put the respondents in possession on or before the 1st March, 1947. Till that date the petitioner was entitled to be in possession of the premises lawfully and the respondents could not lawfully seek to eject him. In these circumstances it is impossible to hold that merely by the passing of the order on the 2nd December, 1946, the position of the petitioner has ceased to be the position of a tenant within the meaning of the Act and that the amount which the petitioner would have to pay to the respondents in consideration of his occupation of the premises is not rent within the meaning of that word in section 7 (2) (*i*) of the Act. In construing this Act, it is not permissible to import conceptions which belong to the only law of landlord and tenant obtaining either in England or under the provisions of the Transfer of Property Act. The short question in this case is whether when the Controller has made an order directing the tenant to put the landlord in possession of the premises on a particular date, for the period before that date the tenant is not bound to pay the rent as rent. We are of opinion that the petitioner was liable for rent as such for the period before the 1st March, 1947, subject, of course, to the contingency of his surrendering possession before that date. As the case put forward by the petitioner of a tender within time has been disbelieved, it must be held that the petitioner has not paid or tendered the rent due by him for January, 1947, within the time specified in section 7 (2) (*i*) of the Act.

It was next contended by Mr. Ramakrishna Aiyar that in spite of this finding it was within the discretion of the Controller to reject the application of the landlord if the petitioner satisfied him that there was sufficient cause for non-payment or non-tender of the rent due. We do not find anything in section 7 (2) which enables the Controller to reject the application of the landlord even when he is satisfied that one or more of the conditions laid down in section 7 (2) have been fulfilled. No doubt the tenant is to be given a reasonable opportunity of showing cause against the application, but that can only be on grounds open to him in law, namely, in this case, that he has paid or tendered the rent due by him within the time allowed. We cannot accept the contention of the petitioner.

In our opinion, the order of the Chief Judge of the Court of Small Causes is right and this application is therefore dismissed with costs of the respondents.

B.V.V. *Application dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDARAJACHARI.

Kista Pillai and another .. *Petitioners.**

Criminal Procedure Code (*V of* 1898), *section* 182—*Offence of rioting—Different occurrences—Jurisdiction.*

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*Crl.R.C. Nos. 1271 and 1272 of 1946. 6th February, 1948.
(Crl.R.P. Nos. 1211 and 1212 of 1946).

The petitioners were members of an unlawful assembly which pelted stones at a train from about 8 A.M. to 10 A.M. on a particular day. The stone pelting at 8 A.M. was on the Saidapet side within the jurisdiction of the First Class Magistrate, Chingleput. The crowd was temporarily dispersed when there was shooting by the police, but they formed immediately thereafter into smaller groups and continued to be on the spot till about 10 A.M. when there was again stone pelting which was from the City side. On a question of jurisdiction,

Held, that both the occurrences, if they can be so described, were really parts of one continuous rioting and under clause 3 of section 182 of the Criminal Procedure Code the Additional First Class Magistrate, Chingleput, had jurisdiction to try the offence of rioting which is a continuing one.

Petitions under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order of the Court of Sessions, Chingleput Division, dated 11th November, 1946, in C. A. No. 50 of 1946 (C. C. No. 42 of 1946, Additional First Class Magistrate, Chingleput).

M. C. Rajagopalan for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—The petitioners in these two revision cases were respectively the 2nd and the 3rd accused in C. C. No. 42 of 1946 on the file of the Additional First Class Magistrate, Chingleput. It is unnecessary for the purpose of these cases to refer at any length to the details of the convictions and the sentences. I have listened to a long argument on behalf of the petitioners but the only point that need be dealt with is the one as to jurisdiction.

It has been found by both the lower Courts that the two petitioners were members of an unlawful assembly which pelted stones at the Indo-Ceylon Express on the 26th of February, 1946, and that the assembly continued from about 8 A.M. till about 10 A.M. As to what happened at about 8 A.M., there is no dispute that the occurrence was on the Saidapet side and therefore within the local limits of the jurisdiction of the Additional First Class Magistrate, Chingleput. The case for the prosecution was that about 10 A.M., stones were thrown from the City side towards Saidapet side of the railway line. It is in regard to this latter part of the occurrence that the point as to jurisdiction is raised. It is said that the Additional First Class Magistrate, Chingleput, had no jurisdiction to deal with what was alleged to have happened at about 10 A.M., and that the Magistrates' Courts in the city could alone have dealt with it. There is a concurrent finding by both the Courts below that there were not two separate offences but it was a continuous offence throughout the whole time. The crowd which had assembled at about 8 A.M., and which did considerable damage by way of injury to persons and damage to properties temporarily dispersed when there was shooting by the Police but they formed immediately thereafter into smaller groups and continued to be on the spot till about 10 A.M., when the train started and there was again pelting of stones at the train. Mr. Rajagopalan, advocate for the petitioners, has invited me to say that they were two totally unconnected transactions but having gone through the material evidence and the findings of the Courts below I have no hesitation whatever in saying that the Courts below have arrived at the correct conclusion. Both the occurrences, if they may be so described are really parts of one continuous rioting and there can be no doubt that the third clause of section 182 of the Code of Criminal Procedure will apply. It runs as follows :

"..................Where an offence is a continuing one, and continues to be committed in more local areas than one...............it may be inquired into or tried by a Court having jurisdiction over any of such local areas."

The offence of rioting is a continuing one. There is, therefore, no absence of jurisdiction in the Additional First Class Magistrate, Chingleput. The learned counsel for the petitioners has also been unable to point out how, assuming that there was an absence of jurisdiction in the trying Magistrate, that error has occasioned a failure of justice.

Mr. Rajagopalan attempted to argue several other points which in my opinion are concluded by the concurrent findings of the Courts below. I am not only not persuaded that those findings are perverse but I consider that they are reasonable and proper conclusions to arrive at on the evidence on record.

I do not consider the sentences excessive having regard to the circumstances in which the offences were committed.

The revision cases are therefore dismissed.

V.P.S. *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Officiating Chief Justice* AND MR. JUSTICE SATYANARAYANA RAO.

Nallai Chakravarthulu Andalamma .. *Appellant**

v.

P. Natesam Pillai and another .. *Respondents.*

Civil Procedure Code (V of 1908), *Order* 21, *rule* 63—*Suit to set aside an order on claim petition—Claimant's title based upon a sham and fictitious transaction—No question of adverse possession arises—Limitation—Article* 11 (1) *of the Limitation Act applicable.*

The first respondent filed a suit to set aside an order passed in an execution application upholding the claim of the appellant to the suit property which had been attached by the 1st respondent in execution of a decree obtained in an original suit against the husband of the appellant. The appellant based her claim on a sale deed executed in her favour by the husband the judgment-debtor, which sale was found to be a sham and fictitious transaction not supported by consideration.

Held, (*i*) as the sale was a sham transaction and the so-called possession of the appellant was really possession not on her account, but possession of the husband, no question of adverse possession or acquisition of title by prescription arises.

(*ii*) The suit was one under Order 21, rule 63 of the Code and the only Article applicable was Article 11 (1) of the Limitation Act and no question of the applicability of Article 120 could arise.

Appeal under clause 15 of the Letters Patent against the judgment of the High Court dated 19th September, 1946, and passed in S. A. No. 1233 of 1945, preferred to the High Court against the decree of the Court of the Subordinate Judge of Ellore in A. S. No. 304 of 1944, preferred against the decree of the Court of the District Munsiff of Ellore, in O. S. No. 63 of 1943.

B. V. Ramanarasu for Appellant.

K. Bhimasankaram for Respondents.

The Judgment of the Court was delivered by

The Officiating Chief Justice.—This is an appeal against the judgment of Chandrasekhara Aiyar, J., in Second Appeal No. 1233 of 1945. The first respondent before us filed a suit in the Court of the District Munsiff of Ellore to set aside an order passed in E. A. No. 445 of 1941 upholding the claim of the appellant to the suit property which had been attached by the 1st respondent in execution of a decree obtained by him in O. S. No. 469 of 1928 against the husband of the appellant. The appellant based her claim on a sale deed, dated 24th August, 1928 (Ex. D-2) executed in her favour by her husband, the judgment-debtor. The first respondent alleged that the sale in favour of the appellant was a sham and nominal transaction not supported by consideration and executed to screen the property from the reach of creditors. The District Munsiff of Ellore who tried the suit held that the sale deed in favour of the appellant was not supported by consideration but that the appellant was in possession and enjoyment of the property in her own

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*L.P.A. No. 92 of 1945. 19th February, 1948.

right ever since the execution of the sale deed and she had acquired title to the property by adverse possession. He therefore dismissed the suit. On appeal the learned Subordinate Judge of Ellore concurred with the District Munsiff in holding that the sale was not supported by consideration. He further held that the sale was a sham and fictitious transaction not intended to transfer any property to the appellant. Having regard to that finding he thought it was unnecessary to go into the question of adverse possession because if the transaction was sham and fictitious, the possession of the appellant would in no sense be adverse to her ostensible vendor, *viz*., her husband. He allowed the appeal and decreed the suit.

There was a second appeal by the present appellant which came on for hearing before Chandrasekhara Aiyar, J. The learned Judge was evidently inclined to agree with the finding of fact arrived at by the learned Subordinate Judge that the sale in favour of the appellant was sham, collusive and nominal and did not pass any property to the appellant. In fact it does not seem to have been pressed before him that the finding was wrong. Two points were however argued before him. One was that it was incumbent on the learned Subordinate Judge to go into the question of adverse possession set up by the second defendant. The learned Judge rightly rejected this contention on the ground that as the finding of the lower appellate Court was that the sale was a sham transaction, and the so-called possession of the second defendant was really possession not on her own account but possession of the husband. There was therefore no question of adverse possession or acquisition of title by prescription. The other question raised before the learned Judge was that the suit was barred by limitation as Article 120 applied to the case and as the suit had been filed more than six years from the date of the knowledge obtained by the plaintiff about the sham and nominal character of the sale deed. The learned Judge discussed the question of the applicability of the third column of Article 120 to the facts of the case and he held that it was only when the alienee put forward a case on the basis of the transaction that a cause of action arose in the creditor's favour. That was the date when the right to sue accrued and therefore the suit was in time. With respect to the learned Judge, in our opinion no question of the applicability of Article 120 arises in this case. The suit was what it purported to be, a suit to set aside an order passed on a claim petition. It was a suit under Order 21, rule 63 of the Civil Procedure Code and was well within time having been instituted within a year from the order on the claim petition. It may be that in a suit under Order 21, rule 63, in determining the question whether the property in suit belongs to the judgment-debtor, the Court may have to go into the question whether the title of the judgment-debtor is subsisting or has been extinguished by any of the provisions of the Limitation Act. Such a contingency would not arise in a case of this kind where the finding is that the transaction on which the appellant relied was sham and nominal and it was not necessary to set it aside. The title of the judgment-debtor was not therefore extinguished by lapse of time. The only Article applicable to the case was Article 11 (1) and as we have already mentioned the suit was in time according to that Article.

The learned advocate for the appellant attempted to attack the finding of fact arrived at by the learned Subordinate Judge on the nature of the transaction. The finding is one of fact and we cannot say that there is no legal evidence to support that finding. It was therefore binding in second appeal on the learned Judge who heard it and it is binding on us.

The appeal therefore fails and is dismissed with costs of the first respondent.

V.P.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Officiating Chief Justice* AND MR. JUSTICE SATYANARAYANA RAO.

Mohamed Ismail Sait .. *Petitioner**

v.

Abdul Hameed Sait and others .. *Respondents.*

Caste Disabilities Removal Act (XXI of 1850)—Applicability—Hindu lady converted to Mahomedanism and marrying Mahomedan—Inheritance of husband's estate—Death of widow issueless—Her Hindu relations whether her legal representatives.

A Hindu lady became converted to Islam and married a Muslim who predeceased her. She inherited a share of her husband's estate on his death and died issueless leaving her uterine brother, her step-brother and the children of her sister. It was conceded that the Muslim relations of the deceased through her husband were not her legal representatives so as to be impleaded in her place in the testamentary proceeding to which she was a party. The question was raised that her Hindu relations were enabled to inherit to and represent her by virtue of the Caste Disabilities Removal Act.

Held, that the Caste Disabilities Removal Act accorded protection only to the person who had renounced or had been excluded from the communion of his former religion and that it did not enable the Hindu relations of the deceased to be brought on record as her legal representatives.

Vaithilinga v. *Ayyathurai*, (1917) I.L.R. 40 Mad. 1118, relied on.

Petition praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to bring on record Abdul Hamid Sait the brother of the husband of the deceased Mrs. Halima Bai, M. Yoonus, the respondent in O. S. A. No. 33 of 1946, High Court (T. O. S. No. 6 of 1945, High Court in its original testamentary and intestate jurisdiction) or such other person or persons as may after enquiry be brought on record in C. M. P. No. 3385 of 1944 on the file of the High Court (O. S. A. No. 35 of 1942, High Court, O. S. Nos. 280 and 286 of 1939, High Court, Original Side) as the legal representative of the said deceased respondent in O. S. A. No. 33 of 1946 and to direct the costs of the application to be made costs in the said original side appeal.

A. Sundaresa Aiyar and *S. Krishnamachari* for Petitioner.

D. Narasaraju, J. Lakshmayya, P. K. Janakiram, D. R. Krishna Rao, S. Azizuddin, A. Sundaresan and *A. N. Rangaswami* for Respondents.

The Government Pleader (*K. Kuttikrishna Menon*) for the Government.

The Court made the following

ORDER : *The Chief Justice.*—In the appeal before His Majesty in Council the question has arisen as to the legal representatives of the deceased 11th respondent—fifth defendant in the suit. It is necessary that her interests should be represented in the appeal and her legal representatives brought on record in respect of her interest in the subject-matter of the litigation.

The matter was referred to the learned Master who has reported to this Court the result of his investigation, his conclusion being that, for the reasons given, the estate of the 11th respondent will escheat to the Province of Madras, the Province of West Bengal and to His Highness the Maharajah of Mysore, in regard to properties forming part of the interest of the 11th respondent situated in those territories.

The 11th respondent was formerly a Hindu lady. She was converted to Islam and married a Mr. Yunus, a Muslim who predeceased her. She inherited one-fourth of her husband's estate, pursuant to the provisions of the Muhammadan law. There was no issue of the marriage of the 11th respondent with her husband. The only relations who survived the 11th respondent are her uterine brother, her step-mother and the children of her sister. They are all Hindus. It is common ground that the Muslim relations of the 11th respondent through her husband, are not the legal representatives of the lady and they are not entitled to inherit her estate upon her death.

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* C. M. Ps. Nos. 2731 and 2878 of 1947. 19th January, 1948.

At this juncture the sole question for decision is whether her natural or Hindu relations can inherit the estate of the 11th respondent and as such are her legal representatives. It is beyond doubt that, according to Muhammadan law, the surviving relations of the 11th respondent do not inherit her estate and are not her legal representatives. The only question for decision is whether the Caste Disabilities Removal Act, 1850, enables those relations to inherit and to represent the 11th respondent as her legal representatives.

That question is no longer in doubt. Any doubt there might have been has been set at rest by authority. In *Vaithilinga* v. *Ayyathurai*[1], it was held that the above statute accords protection only to a person who has renounced or has been excluded from the communion of his former religion or has been deprived of his caste. That decision was referred with approval by their Lordships of the Judicial Committee in *Mitar Sen* v. *Maqbul Hasan*[2]. In those circumstances, it is unnecessary. to consider other authorities as it is manifest that the Hindu relations of the deceased 11th respondent have no benefit conferred upon them by the provisions of the statute.

Since there are no relations to inherit the estate of the 11th respondent it will escheat to the Governments concerned and those Governments, it would seem, are the legal representatives for the purposes of being brought on record, of the deceased lady, in so far as any property lies within their territorial limits which form part of the estate of the 11th respondent.

Learned counsel for the appellant has informed us that part of the estate represented by immoveable property, is in Mysore State a portion being situat within the State itself and the remainder within what formerly was, the cantonmen area. The latter area has now become part of the State of His Highness the Maharajah of Mysore but that was not the position prior to the recent changes in this country. What the effect of the change may be upon the cantonment property has not been ascertained but had there been no alternation then the escheat in respect of the cantonment property would have been to the Central Government representing His Majesty.

Before coming to a final conclusion in this matter it is necessary to obtain the views and instructions of the several Governments concerned and the learned Government Pleader, appearing for the Province of Madras, has stated that he will communicate with his own Government, the Government of West Bengal, the Government of His Highness the Maharajah of Mysore and the Central Government. In order for him to have full instructions so that the matter can finally be placed before us, this application is adjourned to the 17th November.

C. M. P. No. 2731 of 1947 is adjourned to the 17th November along with C. M. P. No. 2878 of 1947.

Govinda Menon, J.—I agree.

(This petition coming on for final hearing this day, the Court made the following)

ORDER.—The learned Government Pleader has been instructed to state that the Central Government do not claim any interest in any of the properties of the deceased 11th respondent. Therefore the Province of Madras, the Province of West Bengal and the Government of His Highness the Maharajah of Mysore will be brought on record as the legal representatives of the deceased 11th respondent in P. C. C. M. P. No. 3385 of 1944 and of the respondent in O. S. A. No. 33 of 1946 on the file of the High Court.

B.V.V. *Petition ordered.*

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1. (1917) I.L.R. 40 Mad. 1118.
2. (1930) L.R. 57 I.A. 313 : 52 C.L.J. 551 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR FREDERICK WILLIAM GENTLE, *Chief Justice* AND MR. JUSTICE YAHYA ALI.

The Commissioner of Income-tax, Madras .. *Applicant**

v.

Sri T.M.M. Dharmaraja Nadar and others .. *Respondents.*

Income-tax Act (XI of 1922), sections 10 and 12—Bad debt—Debt due by third person to trading firm—Reconstitution of firm—Debt due being treated as asset portion of debt subsequently written off—Deduction for income-tax.

In assessing the amount of the profits and gains of a year account must be taken of all losses incurred but they should relate to the business. The loss of income or of capital or acceptance of a smaller sum in settlement of a larger amount, for example, of mortgage interest, when arising from investments and not in connection with business assets is not a bad debt falling within clause (*xi*) of sub-section (2) of section 10 of the Income-tax Act. It cannot be said merely because the accounts of an owner of investments have been kept on a mercantile basis that it can either make his ownership a business or affect in any way a loss arising from the extinction or depreciation of investment capital or income. Where the indebtedness to a joint family firm was converted upon the family becoming divided and the members entering into partnership business, into a capital asset and subsequently the partners received only a moiety of the debt in discharge thereof,

Held, that the amount given up was not a bad debt of the business and was not deductible from the profit of the year for purposes of income-tax.

Cases referred to the High Court by the Income-tax Appellate Tribunal, Madras Bench, under section 66 (1) of the Indian Income-tax Act, 1922 (Act XI of 1922) amended by section 92 of the Income-tax (Amendment) Act, 1939 (Act VII of 1939) in 66 R.A. Nos. 45, 41 and 43 (Madras) 1944-45 on its file for decision on the following questions of law, *viz.*, in Referred Cases Nos. 19 and 27 :—

" Whether on the facts and in the circumstances of the case the claim of the respondent to deduct the sum of Rs. 10,000 was allowable in law ? " and in Ref. Case No. 23 " whether on the facts and in the circumstances of this case the claim to deduct the sum of Rs. 10,000 as a bad debt incurred in the account year made by the respondent was legally sustainable."

C. S. Rama Rao Saheb for Applicant.

M. Subbaraya Aiyar and *T. V. Viswanatha Aiyar* for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—In these three cases, referred to the Court by the Income-tax Appellate Tribunal, the facts and circumstances in many respects are the same ; by agreement of learned counsel for the parties they have been heard together. The questions referred in each case are substantially of like effect but the wording in one of them is slightly different. In Referred Cases Nos. 19 and 27 the question is :—

" Whether on the facts and in the circumstances of this case the claim of the respondent to deduct the sum of Rs. 10,000 was allowable in law."

In Referred Case No. 23 the question is :

" Whether on the facts and in the circumstances of this case the claim to deduct the sum of Rs. 10,000 as a bad debt incurred in the account year made by the respondent was legally sustainable."

The Tribunal, setting aside the order of the Income-tax Officer, which was upheld by the Appellate Assistant Commissioner, decided that by virtue of the provisions of section 10 (2) (*xi*) of the Indian Income-tax Act, the sum of Rs. 10,000 was a bad debt and deductible in each case when calculating the assessable income. These cases have been stated at the instance of the Commissioner of Income-tax, Madras, who challenges the correctness of the findings by the Tribunal.

Formerly, five Nadar brothers (1) Mathalai, (2) Rajakani, (3) Sankaralingam, (4) Kandaswami and (5) Dhanushkodi carried on a joint family business, dealing in coffee and cardamom. Supplies were obtained from an agriculturist named

*Cases Referred Nos. 19, 23 and 27 of 1945. 16th December, 1947.

W. P. A. Marimuthu Nadar, to whom the business advanced money; by 1930 Marimuthu owed Rs. 1,32,500 to the joint family. On February 3, 1930, the brothers effected a partition and, thereupon they carried on the same business in partnership ; the debt due from Marimuthu was treated as due to the firm. Seven months later, on September 11, 1930, the partnership was dissolved ; at that date Marimuthu's indebtedness amounted to Rs. 1,24,000 ; on dissolution, this sum was divided into 5 equal parts and each brother was given Rs. 24,800 of the debt due to the firm. Three separate businesses were then constituted ; there were two partnerships, between (*a*) Mathalai and Rajakani and (*b*) Sankaralinga and Kandaswami ; the other brother, Dhanushkodi, carried on business on his own account. Each business dealt in coffee and cardamom obtaining supplies from Marimuthu by advancing moneys to him against future deliveries and he paid interest on the amount owing by him. In the two partnerships, each partner was separately credited in the books with Rs. 24,800 due from Marimuthu. In addition, some of the brothers, individually carried on a money-lending business utilising that sum as sotck-in-trade ; all accounts were kept on a mercantile basis ; in each of the partner's accounts the amount of interest due on the sum outstanding and any credits were entered and the balance remaining was ascertained every year. Dhanushkodi carried on business with the same goods but, in his case, the sum of Rs. 24,800 was entered in the accounts of his business and was not separately treated ; he may have engaged in money-lending but no point in that connection was made by Mr. Subbaraya Aiyar, who appeared for all the assessees; interest on the sum due to Dhanushkodi, including any amount or the balance of the sum of Rs. 24,800 was added each year to the general accounts. In each of the five accounts, Marimuthu executed a promissory note, payable on demand, for the amount credited in 1930, and each year thereafter, a new promissory note was similarly signed by him in respect of the balance due from him. This continued until Marimuthu's death, about 1934, and thereafter, until 1937, his brother, Rathnaswami signed similar promissory notes. In the assessments for income-tax, in respect of some of the assessees, as will appear hereafter more particularly, the interest upon Marimuthu's debt, was included amongst other items under section 12 of the Indian Income-tax Act and tax thereon was paid although, in some instances and to some extent, it had not actually been received.

In 1937, the amount due from Marimuthu, or rather from his successors, including Rathnaswami was Rs. 1,66,000. That indebtedness was reduced to the sum of Rs. 1 lakh by means of payments totalling Rs. 66,000 by way of sales of property and shares belonging to Marimuthu and a cash payment of Rs. 5,000. On September 24, 1937, a deed of mortgage was executed by Marimuthu's brother and other legal representatives or successors in favour of the five brothers to secure payment of that sum of Rs. 1 lakh at 6 per cent. per annum. Thereafter, until 1940, the brothers' accounts were each debited with Rs. 20,000 but with no interest. In 1941 the mortgagors threatened to cry in aid the provisions of the Madras Agriculturists' Relief Act and claimed that, by virtue of those provisions, the actual indebtedness was much less or was non-existent. On April 1, 1941, the total outstanding of Rs. 1 lakh—Rs. 20,000 in respect of each brother—was settled at a sum of Rs. 50,000 and in each account Rs. 10,000 was credited and the balance of Rs. 10,000 was written off. It is the sum written off, that the assessees claimed should be allowed as a bad debt in the income-tax assessment and which was allowed by the Tribunal.

It is accepted that Marimuthu's debt was rightly considered as good in 1930, when the partition took place and when each separated brother took a one-fifth portion upon the dissolution of the subsequent partnership at the end of 1930 and also, that the debt remained good until the legal representatives or successors of the debtor threatened in 1941, to rely upon the provisions of the Madras Agriculturists' Relief Act. Further, it is not questioned, that the acceptance of Rs. 50,000 in full satisfaction of the aggregated debts amounting to Rs. 1,00,000 and that the writing off of Rs. 10,000 by each brother were correct and that the indebtedness was bad to that extent.

Referred Cases Nos. 19, 23 and 27 respectively relate to the assessment of :— Dharmaraja (son of Dhanushkodi, now deceased), it being convenient to treat Dhanushkodi as the assessee ; Mathalai, who was a partner of his brother Rajakani ; and Kandaswami, a partner of his brother Sankaralinga. The Tribunal held that the sum of Rs. 1,24,000 was a debt due to the joint family business and of the partnership between all the brothers, which existed for a few months in 1930, and it was an asset of each business. It was also held that :—(*a*) Dhanushkodi brought his debt into his coffee and cardamom business, he dealt with the debtor as a customer and the debt became part and parcel of the trading assets of the business and any loss in the trade was an allowable deduction ; (*b*) Mathalai, in partnership with Rajakani, conducted a coffee and cardamom business ; in addition he carried on a money-lending business and the debt of Rs. 24,800 formed part of the floating assets of that business ; (*c*) as regards Kandaswami, who was in partnership with Sankaralinga, he was assessed upto 1934-35 on income from money-lending and, later, interest, if any, on Marimuthu's debt was assessed under section 12, the sum of Rs. 10,000 was a part of the amount on which tax had been paid as interest accrued for which Kandaswami was not entitled at the respective times of such accrual and, as the amount given up was interest over-collected, it was not any part of the capital due and he was entitled to have that sum deducted. In each of the Referred Cases the sum of Rs. 10,000 was allowed against the profits of the year as a bad debt and deductible as such from the total income for the year.

As to Referred Case No. 19.—When Dhanushkodi started his coffee and cardamom business in 1930, as stated previously, his one-fifth portion of the debt of Rs. 1,24,000 was credited as an asset in his business accounts, for which Marimuthu signed a promissory note for Rs. 24,800 payable on demand and, whereby that amount became a debt due to Dhanushkodi. By August, 1934, probably it was earlier, the amounts credited in the accounts for goods supplied by Marimuthu to Dhanushkodi exceeded the amount of the debt and interest. The accounts were kept on a mercantile basis. Whilst advances were made to Marimuthu nevertheless, the sums credited in respect of goods supplied can be treated as payments by him and such payments can be, and they are appropriated by Dhanushkodi towards the earliest debts, in the absence of any appropriation by his debtor. By August, 1934, at the latest, the aggregate of the sums credited to Marimuthu was more than sufficient to liquidate the debt of Rs. 24,800 and interest. Thereafter, any sums reflected by the accounts, due to Dhanushkodi were solely in respect, and arose out, of business transactions with Marimuthu and, after 1934, with his legal representatives or successors ; they increased or decreased, from time to time, according to payments made and goods supplied in the ordinary course of business. Those were trading debts and, in 1937, they aggregated over Rs. 30,000. In that year payments were made by crediting the prices of, or proceeds from, sales of land and shares, and by cash, resulting in a reduction of the indebtedness to Rs. 20,000. In 1941, Rs. 10,000 was accepted in full discharge, leaving a sum of Rs. 10,000, which was written off. That transaction of complete liquidation of the indebtedness is not challenged as being incorrect ; it resulted in the balance of Rs. 10,000 being irrecoverable. That amount was, in my view, a bad debt of the trading business and the order of the Appellate Tribunal for its deduction, as such, from the amount of the profits for the year, was correct.

As to Referred Case No. 23.—Throughout the period from 1930 to 1941 Mathalai carried on a money-lending business, in addition to his partnership business with Rajakani in coffee and cardamom ; the profits derived from money-lending were returned and assessed under section 10 as business profits and they included, until 1937, interest due from Marimuthu on his debt of Rs. 24,800 ; after 1937, interest was not charged against him. The promissory note executed by Marimuthu in 1930, constituted him as Mathalai's debtor for Rs. 24,800. That sum was incorporated as stock in the money-lending business. Mr. Rama Rao Sahib, for the Commissioner, conceded that, if in 1930 Marimuthu became Mathalai's debtor for the above sum of

Rs. 24,800, and, since Mathalai has throughout carried on a money-lending business, the sum of Rs. 10,000 was a bad debt of the business and deductible from the amount of the profit, for the year. It is beyond doubt that Marimuthu became Mathalai's debtor and from 1930 to 1941 the latter carried on a money-lending business. It follows that the sum of Rs. 10,000 is allowable as a bad debt.

As to Referred Case No. 27.—As in the other two cases, and in the same way, Marimuthu became Kandaswami's debtor for Rs. 24,800. Any money-lending business carried on by Kandaswami, which could have been only to a limited extent, was terminated by 1933; in respect of that year, the year of assessment was 1934-35 an assessment last included profit from money-lending. In the assessments of subsequent years there was no item under section 10, of income, profits or gains from money-lending, but under the heading "other sources" section 12 income from Marimuthu's debt, when it was assessed, is included with interest on investments. It is manifest that in these assessments, undoubtedly made upon the assessee's income-tax returns, the debt due from Marimuthu was treated as an investment of capital and not as a business or trading asset.

Mr. Subbaraya Aiyar, for the assessee, contended that, whilst the several allowances, by way of deduction, contained in clauses (*i*) to (*xv*) of sub-section (2) of section 10 are not included in section 12, save to the limited extent as specified therein, nevertheless the principles of those allowances are applicable to the latter section. Section 12 relates to income, profits and gains from other sources not included under, *inter alia*, section 10, business. In support of this contention reference was made to the decision of the Judicial Committee in *Commissioner of Income-tax, Central Provinces* v. *Sir S. M. Chitnavis*[1], which was pronounced before the clauses in sub-section (2) formed part of the section 10. At pages 296 and 297 of the judgment it was observed by their Lordships that:

> "Although the Act nowhere in terms authorises the deduction of bad debts of a business, such a deduction is necessarily allowable. What are chargeable to income-tax in respect of a business are the profits and gains of a year; and in assessing the amounts of the profits and gains of a year, account must necessarily be taken of all losses incurred..............."

Emphasis must be placed upon the word "business" and the effect of the observations of the Board is restricted to bad debts in that connection which, alone, are deductible. The loss of income or of capital or acceptance of a smaller sum in settlement of a larger amount, *e.g.*, of mortgage interest, when arising from investments, and not in connection with business assets, is not a bad debt falling within clause (*xi*) of sub-section (2) of section 10.

Mr. Subbaraya Aiyar also placed reliance upon the method of accounting being on a mercantile basis, as an argument in favour of the deduction of Rs. 10,000, the sum written off against Marimuthu's indebtedness. I am unable to see that, because an owner of investments keeps his accounts on that basis, it can either make his ownership a business or affect, in any way, a loss arising from the extinction or depreciation of investment capital or income.

As pointed out, some of the clauses in sub-section (2) of section 10 are incorporated in section 12 but clause (*xi*) is not one of them. Had it been the intention of the Legislature that a loss, by way of a bad debt, in respect of an item of income falling within section 12, should be deductible, then clause (*xi*) would have been one of the incorporated clauses. The debt due from Marimuthu was clearly converted, if it was not already, into a capital asset and it was not a trading asset or part of the stock in trade of the business at the time when the balance of the indebtedness of Rs. 20,000 was extinguished by a payment of Rs. 10,000. The sum of Rs. 10,000 which was written off, was not a bad debt of a business and was not deductible from the profit of the year.

Mr. Rama Rao Sahib sought to place reliance upon the joining of the five brothers in one mortgage deed and aggregating the amount of their debts, each

1. (1932) 63 M.L.J. 361 : L.R. 59 I.A. 290 (P.C.).

of Rs. 20,000 into a total of Rs. 1,00,000 as extinguishing the separate liability to each brother and creating a new entire debt to all of them. The creation of the mortgage deed, in the form which it took, was merely one of convenience but, thereafter, each brother continued the separate indebtedness of Marimuthu in his books for the amount due to him. There is no significance or inference arising from the creation of the mortgage.

In my opinion the answer to the question in Referred Cases Nos. 19 and 23 should be in the affirmative and to the question in Referred Case No. 27 the answer should be in the negative. The respective assessees are entitled to their costs in the first two Referred Cases and the Commissioner in the third Referred Case, Rs. 250 in each instance.

Yahya Ali, J.—I agree.

Ref. Cases Nos. 19 *and* 23 *answered in favour of assessee.*
B.V.V. *Ref. Case No.* 27 *answered against assessee.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

Narasingamuthu Chettiar .. *Petitioner in both (Accused)**.

Madras General Sales Tax Act (IX of 1939), *section* 15 (*a*) *and* (*c*) *and Madras General Sales Tax (Turnover and Assessment) Rules,* 1939, *rule* 11 (1)—*Proceedings under the Act in Criminal Court for failure to conform to the rules—Nature of—Onus of proof.*

When a Criminal Court is approached by the revenue, local or public authorities for the enforcement of a penalty under a statute for the non-payment of a tax or tithe, the proceedings are not purely of a criminal nature but are *quasi* criminal. In such cases though it is incumbent upon the prosecution to prove affirmatively that the offence is committed, it would be sufficient to shift the onus to the assessee, if *prima facie* proof of the liability of such assessee has been furnished by the prosecution.

A person who was prosecuted for failure to submit the " A " return as required by rule 11 (1) of the Madras General Sales Tax (Turnover and Assessment) Rules, 1939, an offence punishable under section 15 (*a*) and (*c*) of the Madras General Sales Tax Act, pleaded in defence that he was merely a broker and not a " dealer ".

Held : In such a case the question of the burden of proof is a matter of importance. The proceedings under the provisions of the Act for the non-compliance with the provisions of the statute by persons liable to conform to such rules are not entirely criminal and when the prosecution proves *prima facie* that the net turnover of the assessee is beyond the amount prescribed, the burden of proving that it is incorrect is shifted to the accused. Further, the fact of proving the exact amount of the turnover is under section 105 of the Evidence Act a matter which is preculiarly within the knowledge of the accused.

In the circumstances, as the accused had been shown to have acted as a " dealer " in some cases and had not rebutted the *prima facie* evidence that his net turnover was over Rs. 10,000 he was bound under the rules to submit the " A " return and his failure made him liable to be proceeded against under the Act as a defaulter.

Petitions under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order of the Court of Session, Tinnevelly, dated 12th day of July, 1946, and passed in C. A. No. 65 of 1946 (Sales Case No. 7 of 1946 on the file of the Court of the Joint Magistrate, Tuticorin).

R. Ramamurthi Ayyar for Petitioner.

The Special Public Prosecutor (*V. K. Thiruvenkatachari* and *S. Rajagopalan* for the Public Prosecutor *V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—The petitioner in these revision petitions, who is the same, was prosecuted in the Court of the Joint Magistrate of Tuticorin for failure to submit the " A " return, as required by rule 11 (1) of the Madras General Sales Tax

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* Crl. R.C. Nos. 1215 of 1946 and 1021 of 1947. 8th April, 1948.
(Crl. R.P. Nos. 1161 of 1946 and 918 of 1947).

(Turnover and Assessment) Rules, 1939, an offence punishable under section 15 (*a*) and (*c*) of the Madras General Sales Tax Act. The proceedings before the joint Magistrate were summary in nature and except for a tabulated statement no judgment or a reasoned order was pronounced. The petitioner was convicted of the offence complained of and sentenced to pay a fine of Rs. 200, or in default to suffer simple imprisonment for a period of six months. Against this conviction and sentence, Crl. Appeal No. 65 of 1946 was filed by him before the Sessions Judge of Tinnevelly and the learned Judge holding that under section 414, Criminal Procedure Code, no appeal lay from the conviction and sentence of a First Class Magistrate exercising summary powers, rejected the appeal. Against that order of rejection, the petitioner filed Criminal Revision Case No. 1215 of 1946 which came before me on 22nd September, 1947. As the petitioner sought to revise the order of rejection of the appeal by the learned Sessions Judge, which order was perfectly correct, he had perforce to file Criminal Revision Case No. 1021 of 1947, to revise the order of the Joint Magistrate itself under sections 435 and 439 of the Criminal Procedure Code. On both these revisions I passed an order on the 22nd. September, 1947, directing the Sub-Divisional Magistrate of Tuticorin to record evidence and submit the same to this Court on the various points referred to in that order in *extenso* which was in the following terms :

" The question for decision has narrowed down after hearing the arguments to the simple point as to whether the accused is a person who brings together the seller and the purchaser acting as a broker without having any dominion or right over the goods sold. According to the petitioner all that he does is to bring together the owners of the goods and the intending purchasers and receive a percentage of price of the goods as commission ; he does not handle the goods himself, nor can he direct the delivery of possession to the purchasers. It is conceded by the learned Special Public Prosecutor that if these are the only facts, then the accused may not be a dealer as defined in the Madras General Sales Tax Act. But, on the other hand according to him, the accused is a person who effects a sale of the goods as the word " sale " is defined in section 2, clause (*h*). Unfortunately during the progress of the trial which was summary in the Court of First Instance the parties did not seem to have concentrated their attention on the real facts which ought to have been proved ; and, therefore, I think that the provisions of section 428 of the Code of Criminal Procedure should be availed of in this revision. It is necessary in the interests of justice that fresh evidence should be taken as to :—

Firstly : The nature of the transactions entered into by the petitioner and the way in which he earns his commission, *viz*., is he only a person who brings the seller and the purchaser together without in any way concerning himself with the details of the transaction, the delivery of the goods, the prices and various other things ? Secondly : Has he got any dominion over the goods or is his direction or order necessary for the purchaser to get possession of the goods purchased by him ? and Thirdly : What exactly is the role played by the owners of the goods ; do they hand over possession to the accused so that he might find out purchasers, fix the prices with such purchasers, nogotiate with them, and finally sell the goods, receive the payment and after deducting his commission pay only the balance amount to the owners. These are questions which have to be clarified. The Sub-Divisional Magistrate of Tuticorin will record evidence let in by the prosecution as well as by the defence and submit the evidence to this Court before the 31st October, 1947. The Criminal Revision Cases will be posted after the fresh evidence is received. All the other questions raised by Mr. Ramamurthi Aiyar and the Special Public Prosecutor will be reserved."

Accordingly on the side of the prosecution five witnesses were examined and the recorded evidence taken before the Sub-Divisional Magistrate, Tirunelveli, has been submitted to this Court. Lengthy arguments have been addressed to me both by Mr. Ramamurthy Aiyar for the petitioner and by Mr. V. K. T. Chari, the learned Special Public Prosecutor on behalf of the Crown.

On these materials the point for decision is whether the petitioner is a " dealer " as defined in section 2 (*b*) of the Madras General Sales Act, 1939, his contention being that he is a person who brings together the seller and the purchaser acting as a broker without any dominion or right over the goods sold. The role played by him is only to bring together the vendor and the vendee and receive a percentage of the price of the goods sold as commission for his labours ; there is no handling of the goods by him nor does he deliver possession of the same to the purchaser. On the other hand the contention on behalf of the Crown is that it is the petitioner who effects the sales and thereby carries on the business of selling the goods. The exact position has not been very much clarified even after the examination of the witnesses as a result of the order of this Court.

P. W. 1, a dealer in onions and dried chillies deposes that he used to send commodities to Tirunelveli or Turicorin for sale there in the name of the petitioner accompanied by himself or his men usually. On other occasions the goods were being sent to the petitioner without anyone following it. According to this witness, when nobody accompanied the transport of the goods to the town for sale, the responsibility of receiving and storing the goods was on the petitioner who was also responsible for finding out the correct market value and effect sales. In such cases the owner of the goods would not even know the names or identity of the purchasers ; and the petitioner, after the transactions were effected, was bound to render accounts to the owner of the goods by chitta submitted by him to such owner. Exhibit P.7 series, eight in number, were such chittas produced in Court. These were transactions entered into by the petitioner independently regarding the goods sent by P. W. 1. P. W. 2 is a similar producer of onions and chillies, belonging to Surandai, who sells his goods in Tuticorin and Tirunelveli through the petitioner. In essential details his evidence resembles that of the previous witness and the substance of it is that when goods were sent to the petitioner he himself found the purchasers, effected the sales and sent the chittas to the owner. P. W. 3 is an accountant of a merchant in Tuticorin who purchased the goods of P. Ws. 1 and 2 and P. W. 4 is an accountant of one R. S. V. Nallasivan Pillai, a dealer in onions, chillies, etc., in Tuticorin and an exporter to Colombo. According to him, Nallasivan Pillai used to purchase the goods from the petitioner, when Nallasivan would stipulate and settle the price with the petitioner himself; and on such occasions, when the petitioner alone came to dispose of the commodity the purchaser would not know who the owner of the goods was, the price also being paid to the petitioner himself. He further deposed that Nallasivan Pillai did not correspond or find out who the real owners of the goods were. To all intents and purposes, the petitioner was taken to be the seller of the goods. The evidence of P. W. 5 is merely formal indicating that the petitioner used to store his articles in a building owned by one Philip Machado, whose agent the witness was.

It is clear from the evidence outlined above, that the petitioner on various occasions acted as if he alone was selling the goods. There were other occasions when he accompanied the owners of goods to intending purchasers and acted only as a broker. From the documentary evidence it is not possible to find out what exactly the turnover was or the aggregate amount for which the goods were sold by the petitioner when he was playing the role of a seller. Ex. P.7 series and Ex. P.8 together show that a sum of Rs. 9,429 is the turnover regarding those chittas alone. Neither the petitioner's counsel nor the learned Special Public Prosecutor has been able to ascertain exactly the turnover contained in pages 50 and 88 of Ex. P.9. Unless it is proved that the dealer has an annual turnover of over Rs. 10,000 there is no obligation cast upon him to submit the return or to pay the sales tax.

Such being the case, the burden of proof has become a matter of importance. According to the petitioner's counsel as the proceedings before the lower Court were criminal in nature and governed by the Criminal Procedure Code the complaining authority should affirmatively prove beyond reasonable doubt that the petitioner was a dealer liable to submit a return as he had a net turnover of not less than Rs. 10,000 in the year of taxation ; and therefore no duty is cast upon him to show what his turnover is. In effect the argument comes to this ; that the assessing authority has to prove affirmatively the net turnover of the assessee. There are provisions in the Act and Rules by which the Commercial Tax authorities are enabled to inspect the books of a dealer and thereby ascertain the exact amount of the turnover. Either resorting to that method or by giving independent evidence, the prosecution, according to the petitioner's argument, should prove the net turnover to the satisfaction of the Court. What is contended for on behalf of the taxing authority is that under section 105 of the Indian Evidence Act, the assessee should prove the exact amount of his turnover because that is a matter peculiarly within the knowledge of the assessee ; in this case the officers of the Commercial Tax Department have, by the proceedings contemplated by the

Act and rules to ascertain and fix the net turnover under rule 11 (3) and (4) of the Madras General Sales Tax (Turnover and Assessment) Rules, 1939, let in evidence about such ascertainment or fixation, and thereafter it is incumbent upon the assessee, if he disputes the amount of the turnover, as alleged by the prosecution to prove the incorrectness of it by the production of his accounts and through witnesses. Otherwise, the learned Special Public Prosecutor argues, a very onerous and impossible task is assigned to the prosecution to prove a thing which is peculiarly within the knowledge of the other party.

Whether proceedings under the provisions of the General Sales Tax Act for the recovery of the penalties for non-compliance with the provisions of the statute by the assessees or persons liable to conform to such rules are purely criminal in nature necessitating the application of the provisions of the Criminal Procedure Code and the rules of evidence such as proof beyond reasonable doubt incumbent on the prosecution, the giving of a benefit of doubt to the accused, etc., have to be determined in order that a satisfactory conclusion can be arrived at in this case. In *Public Prosecutor* v. *Chakka Kondappa*[1], my learned brother Yahya Ali, J., in dealing with a prosecution under section 228 and schedule IV, rule 31 of the Madras Local Boards Act, after an exhaustive discussion and survey of various authorities has laid down that where a person is prosecuted for non-payment of profession tax due to a District Board he is entitled to question the legality of the assessment even though he had failed to appeal against it at the proper time thereby allowing the assessment to become final. When such legality or quantum of the assessment is objected to, it is for the prosecution to prove affirmatively that the assessee is lawfully bound to pay the tax. My learned brother did not agree with the contention put forward on behalf of the Crown that the finality reached in the taxation by the revenue authorities under the particular statute is ultimate and that in proceedings in a civil or criminal Court the same cannot be questioned, thereby indicating his view that it is the duty of the prosecution to prove by sufficient evidence to the satisfaction of the Court that the person proceeded against is bound to pay the tax. The earlier cases relating to similar taxation powers under the City Municipal Act, District Municipalities Act and the Local Boards Act, were considered and discussed *in extenso* in the decision just mentioned and in particular reference has been made to a judgment of Pandrang Row and Venkataramana Rao, JJ., in *Ramaswami Aiyangar* v. *Sivakasi Municipality*[2]. The observations of Venkataramana Rao, J., in that case are pertinent to the circumstances attendant in the present case. At page 276 the learned Judge observes as follows :—

"Ordinarily where a person is prosecuted for any criminal offence it is incumbent upon the prosecution to affirmatively prove that an offence has been committed and if *prima facie* proof has been let in by the prosecution, it is open to the accused to plead and prove that he has not committed any offence."

I would emphasise the word "*Prima facie* proof" in contra-distinction with "proof beyond reasonable doubt." The standard of proof required from the prosecution in offences under the Indian Penal Code or other enactments of a similar kind is a rigid and a rigorous one quite distinct from what is ordinarily expected from a plaintiff in a civil action where the burden of proof is on the plaintiff. Questions like "reasonable doubt" cannot occur in civil actions. It seems to me therefore that in *Ramaswami Aiyangar* v. *Sivakasi Municipality*[2], the learned Judges did not intend to lay down that in prosecutions launched for the recovery of taxes, tithes, and other similar amounts due to the State or public bodies, there should be the same rigidity and rigour in the matter of onus of proof on the prosecution as in the case of an offence under the Indian Penal Code. Adverting to and interpreting the decision in *Ramaswami Aiyangar* v. *Sivakasi Municipality*[2], Kuppuswami Aiyar, J., in *Public Prosecutor* v. *Khadar Khan*[3], held that in a prosecution for an offence under section 15 (*b*) of the Madras General Sales Tax Act, the burden is upon the prosecution to establish affirmatively that the accused was liable to pay the tax and that he failed to pay the same and if the prosecution has not proved

1. (1947) 1 M.L.J. 317.
2. (1937) 1 M.L.J. 274.
3. (1946) 2 M.L.J. 461.

it satisfactorily, the Magistrate will be justified in acquitting the accused. On the facts of that case the learned Judge came to the conclusion that except the Assistant Commercial Tax Officer who deposed about the liability of the accused to pay the tax, there was no other evidence before the Court. But the learned Judge did not refer to the passage in *Ramaswami Aiyangar* v. *Sivakasi Municipality*[1], where Venkataramana Rao, J., refers to the matter of *prima facie* proof in cases like the one in question there. Probably Kuppuswami Ayyar, J., was not satisfied that the evidence of the Assistant Commercial Tax Officer was *prima facie* proof of the prosecution case. The principle of law deducible from these decisions and especially from *Ramaswami Aiyangar* v. *Sivakasi Municipality*[1], is that though in such *quasi* criminal cases it is incumbent upon the prosecution to prove affirmatively that the offence has been committed, it would be sufficient to shift the onus to the assessee, if *prima facie* proof of the liability of such assessee has been furnished by the prosecution.

A reference to certain observations in Halsbury's Laws of England, Hailsham Edition, (second edition), vol. XXVIII, page 439, may be useful. The nature of such proceedings discussed therein is instructive in deciding this question. In paragraph 947 occurs the following passage :—

" Proceedings for the recovery of fines cannot be strictly classified as either civil or criminal ; they are in form civil and the fine is recovered as a debt due to the Crown, but the liability is incurred as the punishment for an offence. The common law rules as to criminal liability are therefore inapplicable, and a master is liable for fines incurred through the acts of his servants if his knowledge or authority can be inferred, but the measure of his liability is apparently not, as in the case of certain acts prohibited by statute, so absolute as to prevent his proving non-complicity."

In *Attorney-General* v. *Radloff*[2], Martin, B., in an illuminating passage, if I may say so with great respect, considers the nature of such proceedings. That was a case where an information was filed by the Attorney-General for the recovery of penalties for smuggling tobacco under sections 46 and 82 of 8 and 9, Victoria, Chapter 87, and the question was whether the person against whom the information was filed was entitled to give evidence on oath on his behalf as a witness. Alike the law prevalent in India at present, the common law of England at that time was that an accused person was prevented from giving evidence on oath, though that state of the law was altered towards the end of the last century in England. The trial Court disallowed the accused's request for examining himself on oath and on that point, on a new trial application, the question had to be considered whether the proceedings were of a civil or criminal nature. Section 82 of the Statute (8 and 9 Vict., C. 87) enacted that the penalties sought to be recovered by that statute were recoverable by action of debt, bill, plaint, or information in the name of the Attorney-General, or of some other officer or officers of Customs, or by information before two justices of the peace and they were therefore recoverable on a summary conviction. On this, the argument before the Court of Exchequer was that the proceedings were criminal in nature where the defendant was charged with an offence punishable on summary conviction and therefore he could not give evidence on oath. The Court was equally divided in opinion. Martin, B., came to the conclusion that such proceedings are not criminal in nature in the following words :

" But it was argued that this is a criminal proceeding, wherein the defendant is charged with an offence punishable on summary conviction ; and we are all agreed that the only question is, whether the information in the present case is a criminal proceeding within the true meaning of the 3rd section. I think it is not. There are many crimes, properly so called, which are liable to be punished on summary conviction. But there are a vast number of acts which in no sense are crimes, which are also so punishable; such, for instance, as keeping open public houses after certain hours and a variety of breaches of police regulations which will readily occur to the mind of anyone. The bringing tobacco into this kingdom is of itself a perfectly innocent act ; but the requirement of the public revenue, which induce the Legislature to impose a very high duty upon the article, probably render it matter of necessity that the bringing it into the kingdom without payment of the duty should be subjected to a penalty. But this cannot affect or alter the intrinsic and essential nature of the act itself and it seems to me that it cannot be denominated a ' crime ' according to the ordinary and common usage of language and the understanding of mankind. The proper meaning of ' crime

1. (1937) 1 M.L.J. 274.
2. (1854) 10 Ex. 84 : 156 E.R. 366.

is an indictable offence. The question has freuqently arisen, whether an information at the suit of the Attorney-General for penalties for smuggling is a criminal proceeding. I believe it has invariably been considered not to be so."

These observations have been referred to with approval in *Attorney-General* v. *Bradlaugh*[1] by the Court of Appeal. Brett, M.R., observes as follows at page 688 :

"Now comes the question whether an information by the Attorney-General on the revenue side of the Court of Exchequer is or is not a criminal proceeding in any sense. In order to answer this question, we must consider *Attorney-General* v. *Radloff*[2]. It is not binding on this Court; it is a case in the Court of Exchequer, and we are bound to exercise our own judgments upon it. It is a case in which the Judges were equally divided in opinion, and therefore it could not bind any Court, but certainly could not bind this Court. Two of the judges were of opinion that unless there was something very peculiar in the Act of Parliament, such as that in terms enacted that it was to be a criminal matter, the proceeding on the revenue side of the Court of Exchequer for the recovery of a penalty in the name of the Attorney-General was not a criminal proceeding. The other two were of opinion that it was. I will not go into the reasons ; the reasons were given by eminent Judges on both sides, but, to my mind, if I had been a member of the Court at that time, I should have seen no answer to the reasoning of Martin, B., in that case, and I should have been of opinion in that case that an information for a penalty on the revenue side of the Court of Exchequer could not at any time, unless there were special and clear words in an Act of Parliament saying it was so, be considered as a criminal proceeding."

It seems to me that when a criminal Court is approached by the revenue, local or public authorities for the enforcement of a penalty for non-payment of a tax or tithe the proceedings are not purely of a criminal nature but are *quasi* criminal. Even in the Criminal Procedure Code, there are provisions of a *quasi* criminal nature, for example, disputes regarding immoveable property dealt with by section 145 and the subsequent sections. Chapter XXXVI of the Code dealing with the maintenance of wives and children is one such where the proceedings cannot be said to be purely criminal. In such cases, the counter-petitioner is entitled to give evidence and that makes it clear that proceedings under section 488 of the Criminal Procedure Code cannot be termed as purely criminal proceedings. Further illustration on this aspect of the question can be got from certain provisions of the General Sales Tax Act itself. Section 10 of the Act provides for the recovery of the tax as if it were an arrear of land revenue and section 16 provides for composition of the offence where the offence consists of failure to pay the tax, or the evasion of any tax recoverable under the Act. To my mind all these are circircumstances which indicate that such proceedings are not entirely criminal.

As stated already counsel on either side have not been able to analyse and present before the Court the exact amount received by the petitioner as remuneration for acting as an agent, *i.e.*, bringing together the purchaser and the seller and assisting in the disposal of the goods, without any kind of dominion, right or control over the goods dealt with but only acting as a medium to bring about an agreement between the two parties and earn a commission for selling the goods owned by others without disclosing or letting know that the ownership of the goods was in a third party. The learned Special Public Prosecutor has rightly conceded that if by " Agency " is understood the action for bringing together the two parties and thereby getting some remuneration for the service rendered, a person who does that will not be a " dealer " as defined in the Act. But where even though the ownership in the articles did not vest in such a person, he purported to have possession of the same and transferred such possession to the purchaser for consideration, which the purchaser pays only on the basis that the seller was the owner himself, in such cases the transaction will be the selling of goods and the person who effects the same is a dealer. On the facts of this case, it is not necessary to consider the applicability or the correctness of the recent decision of Chandrasekhara Aiyar, J., in Criminal Appeal No. 131 of 1947, because according to the evidence of P.Ws. 1 and 2, when the articles are sent to the petitioner without anyone on behalf of the owner accompanying the transport, the petitioner has full dominion and possession over them and fixes the price himself before they are sold to the customers. Such transactions are those evidenced by Ex. P. 7 series and P. 8. So far as these trans-

1. (1885) L.R. 14 Q.B.D. 667. 2. (1854) 10 Ex. 84 : 156 E.R. 366.

actions are concerned the petitioner is a " dealer " within the meaning of the term as defined in the Act. But the real difficulty arises from the fact that apart from Ex. P. 7 series and P. 8 under which the turnover comes only to Rs. 9,429; the other evidence in the case has not been sufficiently analysed to prove that the turnover amounts to Rs. 10,000 or more. It is possible that if the transactions contained in Ex. P. 9 are properly analysed and separated the turnover might exceed Rs. 10,000. That task has not been attempted by either of the parties, though I would add that under section 105 of the Evidence Act the matter is one which is peculiarly within the knowledge of the assessee. By Ex. P. 1 the prosecution has proved *prima facie* that the turnover of the assessee was Rs. 57,809. Evidently this sum was arrived by the Commercial Tax authorities after examining the account books of the assessee. In the cirdumstances of the case I would hold that Ex. P. 1, P. 7 series and P. 8 are *prima facie* proof of the turnover and the burden is thereafter shifted to the assessee to prove the incorrectness of this account. Moreover under rule 14 (4) of the Turnover and Assessment Rules, the Commercial Tax Officer is empowered to fix the tax to the best of his judgment if the conditions mentioned in the clause have been complied with. On the evidence now let in, of such fixation, it is difficult to say that there is no *prima facie* proof of the amount of net turnover being below Rs. 10,000. Rule 6 (2) of the Madras General Sales Tax (Turnover and Assessment) Rules, 1939, provides that a dealer carrying on business should submit a return for any particular year if the net turnover for the year is not less than Rs. 10,000. As the petitioner has not rebutted the *prima facie* evidence that his net turnover is more than Rs. 10,000 he is bound under the rules to submit the ' A ' return ; and the failure to do so makes him him liable to be proceeded against under the act as a defaulter.

In the circumstances of the case, considering the difficulty of ascertaining the net turnover I would, since the petitioner has already paid the tax, reduce the fine to Rs. 50 or S.I. for 2 weeks.

Otherwise these petitions are dismissed.

V.S. ——— *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HAPPELL.

Arjuna Goundan and others .. *Appellants**

v.

Jayakeerthi Nainar and others .. *Respondents.*

Parties—Suit between villagers of different villages regarding right to take water from an irrigation channel—Government paramount owner of the channel—Government necessary party to the suit.

Where a suit between villagers of two different villages is in regard to a disputed right to take water from an irrigation channel and the Government is admittedly the paramount owner of channel in whom the entire right to it vests and have passed orders adverse to the plaintiffs in regard to their right, the Government is a necessary party to such a suit.

Appeal against the order of the Court of the Subordinate Judge, Vellore, dated 16th November, 1946, and made in A.S. No. 14 of 1946 (O.S. No. 145 of 1943, District Munsiff Court, Arni.)

V. V. Raghavan for Appellants.

T. K. Sundarachari for Respondents.

The Court delivered the following

JUDGMENT.—The appellants were the plaintiffs in O.S. No. 145 of 1943 in the Court of the Principal District Munsiff of Arni. They brought the suit in representative capacity on behalf of the villagers of Uttur for declaration that they were entitled to take water by means of a sluice at a certain point from a supply channel before it reached the tank which it supplied and which belonged to the

*A. A. O. No. 75 of 1947. 19th March, 1948.

villagers of Othalavadi. The learned Principal District Munsiff of Arni decreed the suit but on appeal the Subordinate Judge of Vellore set aside the decree and remanded the suit for the Government to be brought on record as a party defendant. It is not disputed that the Government is the paramount owner of the channel in question in the suit and that the entire right to it vests in the Government. That being so, the learned Subordinate Judge was of the opinion that there could be no complete and effective adjudication in the absence of the Government since any declaration given or injunction granted in favour of the plaintiffs could be rendered inoperative if the Government refused to carry it out.

It is argued for the appellants that the Government was not a necessary party to the suit as no remedy was sought against it and, that being so, it was open to the plaintiffs to make the Government a party or not as they thought fit. In support of this contention the learned Counsel for the appellants cited several decisions but in my opinion they do not really assist him. In *Basavana Gowd* v. *Narayana Reddi*[1], it was no doubt held that the Secretary of State was not a necessary party although the Government was the owner of the irrigation channel in question in the suit. In that case, however, the Secretary of State had in the first instance been made a party and he did not contest the suit, praying only that the paramount right of the Government to do everything necessary in the general interests of the distribution of water might be recognised in the decree. It is true that Wallace, J., gives as a reason for striking the Secretary of State out of the suit that no relief was sought for against him, but at the same time the principal reason seems to have been that the Secretary of State raised no contest and that to keep him on record would merely have complicated the decree by recitals with regard to the rights of the Secretary of State. *Mahanakali Lakshmiah* v. *Karnam Narayanappa*[2] again does not help the appellants. In that case the Secretary of State was the owner of the channel and it was observed that the Court would not be justified in granting a declaratory decree which was discretionary in his absence. In the present case the Government is not only the owner of the channel but by an order dated the 7th of March, 1920, issued by the Government it was plainly stated that the appellants had no right to take water before the channel reached the Othalavadi villagers' tank and that if they had any objection to the ruling they were at liberty to file a suit. The position of the Government is therefore clear. They are the owners of the channel and they have informed the appellants that they have no right to divert water from it before it reaches the supply tank. This distinguishes the case from unreported decision of Horwill, J., in *Muthuswami Goundar* v. *Kumara Pillai*[3], which has been relied on for the appellants. In that case the Government was not made a party but it is clear that this was not essential as the Government supported the plaintiff's case. The present case seems to be on all fours with the case of *Subbaraya Sastri* v. *Sesha Ramaswami*[4], decided by Pakenham Walsh, J., in which it was held that the Municipality was a necessary party in a suit to eject the defendant from a site which the defendant pleaded belonged to the Municipal Council. In my judgment, therefore, the view taken by the learned Subordinate Judge that the Government was a necessary party to the suit is correct and accordingly the order of remand was justified. In his order of remand the learned Subordinate Judge gave the appellants one month's time in which to bring the Government on record. It is pointed out that this may cause hardship to the appellants as two months' notice under section 80 of Civil Procedure Code has to be given. The order of the lower appellate Court will therefore be varied to the extent that three months' time from the date of the pronouncement of this judgment is granted for bringing the Government on record. Subject to this modification the appeal is dismissed with costs.

V.S. *Appeal dismissed.*

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1. (1930) 61 M.L.J. 563 : I.L.R. 54 Mad. 793.
2. (1918) 34 M.L.J. 425.
3. A.A.O. No. 450 of 1946.
4. (1933) 65 M.L.J. 290.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Officiating Chief Justice* AND MR. JUSTICE SATYANARAYANA RAO.

Battepati Parthasarathy Gupta .. *Appellant**

v.

The Calcutta Glass and Silicate Works (1936), Ltd. .. *Respondent.*

Contract—Place of suing—Part of cause of action—Place of delivery and payment—Part payment of price—Passing of title—Place of payment of balance against railway receipt.

In order to sustain a suit for damages for breach of contract a part of the cause of action would arise at the place where performance of the contract is provided. "Performance of the contract" may consist in delivery as well as payment of the price.

The contract for purchase of certain goods was entered into between the plaintiff who was residing at Madras and the defendants who carried on business at Calcutta at the latter place and was confirmed by means of a letter written by the defendants to plaintiff in the following terms : "Acknowledging receipt of your valued order through your agent............ The goods will be despatched by himself. As regards payment your agent informed us that he will pay not less than twenty-five per cent. before the goods were despatched and if possible more, and for the balance we will send the Railway receipt through Nedungadi Bank, Ltd., Madras." The plaintiff having filed a suit in Madras for recovery of damages for breach of contract,

Held, that the suit was not maintainable in Madras as no part of the cause of action arose within the jurisdiction of that Court. By the fact of payment of a part of the price at Calcutta the parties contemplated that the property in the goods should pass to the buyer, their subsequent relationship being that of debtor and creditor, and it could not be said that the defendants could retain ownership in the goods until the balance of the price was paid by the plaintiff clearing the railway receipt through the Bank at Madras.

On appeal from the judgment and order of the Hon'ble Mr. Justice Kunhi Raman dated 25th day of February 1947 in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 279 of 1945. / Application No. 13 of 1947.

C. Vasudevan for Appellant.

T. V. Subramania Aiyar for Respondent.

The Judgment of the Court was delivered by

The Officiating Chief Justice.—This is an appeal from the judgment and order of Kunhi Raman, J., made in the exercise of Ordinary Original Civil Jurisdiction revoking the leave which he had granted to the appellant to institute a suit against the respondents on the Original Side of this Court for the recovery of a sum of Rs. 7,923-4-8 with interest thereon as damages for the breach of two contracts for the supply of glassware. On the 6th December, 1945, that learned Judge made an *ex parte* order granting leave to the appellant to institute the suit. The ground on which the application was made by the appellant for leave was that the breach, *viz.*, the failure of the respondents to supply the goods in accordance with the contracts, took place at Madras. The respondents' application for revocation of the leave was made on the ground that no part of the cause of action arose within the limits of the original jurisdiction of this Court. The learned Judge agreed with the respondents' contention and held that the entire cause of action arose at Calcutta and no part of the cause of action arose at Madras. He therefore revoked the leave to sue which he had granted. Plaintiff is the appellant in this appeal.

The suit was instituted in respect of two contracts dated 8th December, 1942, and 1st March, 1943, in and by which the defendants contracted to supply to the plaintiff certain glassware. It is common ground that the terms of these contracts are substantially to be found in a letter dated 8th December, 1942, written by the defendants to the plaintiff. It runs as follows :

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*O.S.A. No. 38 of 1947. 3rd February, 1948.

"Acknowledging receipt o your valued order through your agent, Mr. B. P. Gupta, for 225 gross 12 oz. Powa bottles at Rs. 16 per gross, F.O.R. Calcutta. The goods will be despatched by himself. As regards payment, your agent informed us that he will pay not less than 25 per cent. before the goods are despatched, and if possible more; and for the balance we will send the railway receipt through Nedungadi Bank, Ltd., Broadway, Madras. The goods will be supplied on or before the 28th of the current month."

There is a postscript which is not material. The contracts were admittedly entered into at Calcutta. The question for decision therefore resolves itself into whether any part of the performance of the contracts is contemplated at Madras. The construction placed by the respondents on the contracts is set out in paragraph 3 of the affidavit filed by them in support of their application for revocation. The respondents therein stated that the agent of the plaintiff-appellant Mr. Gupta should himself take delivery of the goods at Calcutta and despatch the same to his principal, the plaintiff, at Madras, and that this term was specifically fixed in view of the great difficulty then experienced in the securing of railway wagons and that it was accordingly understood and agreed that the plaintiff himself should pay at once 25 per cent. or more of the price of the goods that he may take delivery of the goods at Calcutta, arrange for railway wagons, put them on the rails himself, get the railway receipt for the goods so railed and hand over such receipts to the defendants as security for and to enable the defendants to recover the balance of the price. The appellant in the counter-affidavit filed by him admitted the allegations contained in this paragraph but controverted the legal effect of the terms of the contract. According to him the essence of the contract was that the goods should be in the control and custody of the defendants and the terms of the contract stipulated for the retention of the right of disposal over the goods until money was paid at Madras through the Nedungadi Bank, Ltd., Broadway, Madras.

The learned advocate for the appellant referred us to several decisions in which contracts for the sale of goods were construed for the purpose of determining when, according to their terms, the property in the goods passed from the seller to the buyer. We do not consider that any useful purpose will be served by a detailed examination of all these decisions because ultimately the decision of this case must depend upon the construction of the terms of the contracts in question which have to be gathered from the letter abovementioned.

It cannot be denied and it needs no authority to support the proposition—that a part of the cause of action to sustain a suit for damages for breach of contract would certainly arise at the place where performance of the contract is provided. "Performance of the contract" may consist in delivery as well as payment of the price. It therefore becomes necessary to find out under the terms of the contracts in suit if either delivery of the goods or payment of the price is contemplated to take place at Madras. As we understand the implication of the agreement between the parties contained in the letter above mentioned, the terms which can be deduced from it are as follows :

The price is fixed F.O.R. Calcutta. The delivery of the goods is at Calcutta itself. The goods are to be delivered to the plaintiff or his agent, to be despatched to the plaintiff's place of business at Madras. The right to payment arises simultaneously with the delivery of the goods to the plaintiff through his agent, but the method of payment was provided thus :—An amount not less than 25 per cent. of the price and if possible more had to be paid before the goods were allowed to be despatched and the balance due was allowed to be paid by arranging to send the railway receipt through the Nedungadi Bank, Ltd., Broadway, Madras.

The legal effect of these terms, in our opinion, was to provide for the passing of the property from the seller to the buyer at the time when the goods were delivered to the plaintiff's agent against payment of not less than 25 per cent. of the price. Thereafter the relationship between the parties ceased to be that of vendor and purchaser and became converted into that of creditor and debtor. For such balance as remained due, a pledge as it were was created by the agent delivering the railway receipt to the defendants-vendors who provided for the discharge of the loan by

sending the railway receipt to the Nedungadi Bank, Ltd., Broadway, Madras, to be handed over to the plaintiff on discharge of the loan. It does not appear to us that it was an essential term of the contracts that payment was and had to be made at Madras. If the plaintiff was able to do so, he could pay the entire amount at Calcutta itself at or about the time of the despatch of the goods. As a matter of fact it appears from the affidavit filed on behalf of the respondents that in respect of two consignments in 1943, the entire price was paid in Calcutta itself. There is no term in the contract similar to a term to be found in other contracts specifically providing for payment at a particular place. The view that we take of the contracts in suit is that payment was really to be made at Calcutta but for the convenience of the plaintiff he was allowed to pay as much as he could at Calcutta, but not less than 25 per cent. of the price, and for the balance it was agreed that he would be treated as a debtor on the security of the goods represented by the railway receipt. We therefore hold that it is not a term of the contracts that either delivery or payment of the price was to be at Madras.

We find ourselves unable to accept the contention of the appellant that it was intended by the parties that the respondents should retain the ownership of the goods until the balance of the price was paid by clearing the railway receipt through the Nedungadi Bank, Ltd., Broadway, Madras. It is impossible that after a payment of at least 25 per cent. of the price the seller should still be held to have the power of disposal of the goods. We think it reasonable to hold that by the very fact of payment of part of the price, the parties contemplated that the property in the goods should pass to the buyer who would undoubtedly be liable for the balance.

The decision in *Ford Automobiles* v. *Delhi Motor Co.*[1] was relied upon by the advocate for the appellant but the facts of that case are so entirely different from the facts of the present case that we are unable to derive much assistance from the elaborate judgment of Mulla, J., in that case. There the plaintiffs appointed the defendants as their agents for the sale of their cars and consigned certain cars to the Bombay, Baroda and Central India Railway for carriage from Bombay to Ambala. The consignment was made at owner's risk; the railway receipt was made out in the name of plaintiffs as consignees and endorsed by them in blank. The plaintiffs sent the receipt through their bankers along with a bill for the price of the cars to be recovered from the defendants, against the railway receipt. It was held that the property in the cars did not pass to the defendants on delivery to the railway company. But in the present case as already pointed out there was delivery of the goods at Calcutta itself to the plaintiff's agent and it was the plaintiff's agent that thereafter despatched the goods to the plaintiff's place of business at Madras after payment of a part of the price. On the facts and evidence before him, the learned Judge in the Bombay case[1], held that a seller retained a *jus disponendi* in the goods but it is difficult for us to infer such an intention in the present case. The decision of the Full Bench of this Court in *Venkatachallam Pillai* v. *Sajun*[2] was based on the finding that it was provided in the contract that payment for the goods was to be made at Tuticorin. There was no term in the contract which was the subject-matter of that decision for payment of a part of the price before the despatch of the goods and no provision made for the discharge of the liability for the remainder by sending the railway receipt to a bank. In that case a contention was raised that because the defendant by endorsement of the hundies had obtained payment at Rangoon, the place of the contract, it deprived the Court of Tuticorin of jurisdiction though Tuticorin was the place at which the goods had to be paid for. The learned Judges overruled that contention because the contract specifically provided that the payment was to be made at Tuticorin. The decision of Horwill, J., in *Lakshmipathi Naidu* v. *Mohamed Ghani*[3] does not carry the matter further. All that the learned Judge decided in that case was that a suit on a contract

1. (1922) 24 Bom.L.R. 1140.
2. (1934) 68 M.L.J. 504 (F.B.).
3. (1946) 2 M.L.J. 255.

for sale of goods may be filed at the place where the goods were deliverable or the price payable. *Ram Lal* v. *Bhola Nath*[1] was a case in which goods were sent by value-payable parcel post. Clearly in such a case the ownership of the goods can be presumed to be with the seller till the parcel is accepted by payment.

Having regard to the terms of the contract, explicit and implicit, from the letter of 8th December, 1942, we hold that no part of the performance is contemplated to take place at Madras and therefore even a part of the cause of action did not arise in Madras. We agree with the learned Judge that leave ought not to have been granted and that it was rightly revoked.

It was further contended by the learned advocate for the appellant relying upon the observations of Rankin, C.J., in *Secretary of State for India in Council* v. *Golabrai Paliram*[2], followed in *Hajee Adam Abdul Shakoor* v. *Ali Mohamed Ebrahim Shakoor*[3] that when questions of difficulty arise as to the jurisdiction, they should not be dealt with on an application for revocation of leave to sue but should be determined at the trial by the framing of a preliminary issue. This aspect apparently was not pressed in the Court below. We are unable to find any question of difficulty or importance in this case which cannot be properly dealt with on application for revocation of leave to sue. For the respondents it was urged that even if a part of the cause of action arose at Madras, on the ground of balance of convenience the learned Judge was right in revoking the leave. There is no trace of this ground in the affidavit filed by them in support of their application; nor is it the ground on which the learned Judge revoked the leave to sue. We are unable to accept this contention of the respondents.

As we have held that no part of the cause of action arose within the limits of the original jurisdiction of this Court, the learned Judge was right in revoking the leave granted to the plaintiff *ex parte*. We therefore dismiss the appeal with costs.

B.V.V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Officiating Chief Justice.*

V. Ramaswami Gupta .. *Petitioner**

v.

Pasuparthi Krishnayya .. *Respondent.*

Court-Fees Act (VII of 1870), section 17—Distinct subjects—Promissory note executed by defendant—Assignment to plaintiff—Contract of sale—Consideration to be adjusted in part towards promissory note—Sale not effected—Suit for specific performance—Alternative relief for recovery of amount due under note—Court-fee payable.

The defendant executed a promissory note in favour of a third person who subsequently assigned it in favour of the plaintiff. Subsequently the defendant entered into an oral agreement of sale with plaintiff under which he agreed to sell certain property and it was agreed that the consideration should be adjusted towards part of the amount due under the promissory note. The defendant, however, did not execute a proper sale deed, though the plaintiff was ready and willing to perform his part of the contract. Inasmuch as the defendant finally denied the contract of sale the plaintiff instituted the suit against him and sought a decree granting specific performance of the contract of sale and directing the defendant to pay the balance of the amount due under the promissory note after adjusting the consideration for the sale, and in the alternative for a decree directing the defendant to pay the entire amount due under the promissory note with interest, if for any reason it was found that the contract of sale was unenforceable.

Held, that there were two separate and independent causes of action and two distinct reliefs which did not necessarily arise from the same subject-matter, namely, the relief for recovery of the amount due under the promissory note and the claim for specific performance in respect of the agreement to sell, and that the plaintiff was bound to pay court-fee on the two reliefs as on " distinct subjects " within the meaning of section 17 of the Court-Fees Act.

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1. (1920) I.L.R. 42 All. 619.
2. (1931) I.L.R. 59 Cal. 130.
3. I.L.R. (1940) 1 Cal. 497.

* C.R.P. No. 546 of 1946. 12th March, 1948.

Rangaswami Reddiar v. *Venkataperumal Reddiar*, (1938) 1 M.L.J. 139; *Sitharathamma* v. *Seshamma*, (1939) 1 M.L.J. 456 and *Narasimham*, In re, (1942) 2 M.L.J. 418, distinguished.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge, Chittoor, dated 22nd October, 1945, in unregistered plaint P.R. No. 3073 of 1946.

M. V. Nagaramayya for Petitioner.

The Government Pleader (*K. Kuttikrishna Menon*) and *Messrs. Raman and Raghavan* for Respondent.

The Court delivered the following

JUDGMENT.—This civil revision petition raises a question of court-fee. The plaintiff in O.S. No. 69 of 1945 in the Court of the Subordinate Judge of Chittoor is the petitioner. The allegations in the plaint material for consideration of the question at issue are as follows:

The defendant executed a promissory note bearing date 11th December, 1941, for a sum of Rs. 3,815 in favour of one Padmavathamma. The said promissory note was transferred in favour of the plaintiff on 12th December, 1941. The plaintiff was demanding payment of the amount of principal and interest due under the promissory note but the defendant was postponing payment. Early in December, 1943, the defendant entered into an oral agreement of sale with the plaintiff under which he agreed to sell the house for a sum of Rs. 3,700 which sum had to be adjusted towards part of the amount due under the promissory note. The defendant however did not execute a proper sale deed, though the plaintiff was ready and willing to perform his part of the contract. Finally the defendant denied the contract of sale with the plaintiff and set up an agreement of sale in favour of another. The plaintiff was therefore compelled to the legal proceedings to enforce his rights. He therefore prayed for the following reliefs:

(*a*) a decree granting specific performance of the contract of sale by calling upon the defendant to execute a sale of the property and directing the defendant to pay Rs. 406-7-0 being the balance of the amount due under the promissory note after adjusting the consideration for the sale.

(*b*) in the alternative, for a decree directing the defendant to pay to the plaintiff a sum of Rs. 4,482 being the amount due under the suit promissory note with further interest, if for any reason it be found that the contract of sale was not valid and enforceable.

He paid a court-fee of Rs. 374-15-0 on the following basis. He valued the relief (*a*) at Rs. 3,700 for the prayer for specific performance under section 7 (*x*) (*a*) of the Court-Fees Act and at Rs. 406-7-0 under section 7 (1) of the Act. The total court-fee payable on this basis was Rs. 361. The alternative relief (*b*) was valued at Rs. 4,482 and the *ad valorem* court-fee thereon would be Rs. 374-15-0. So he adopted the high court-fee to be paid for the alternative relief. Objection was taken by the Court that the proper court-fee had not been paid and after notice to the plaintiff, the learned Subordinate Judge of Chittoor held that the suit comprised two distinct subjects and that the plaintiff was therefore bound to pay separate court-fee on each of the reliefs claimed by him under section 17 of the Court-Fees Act.

It is contended by the learned advocate for the petitioner that the learned Judge erred in holding that the suit comprised two distinct subjects within the meaning of that section. In *Parameswara Pattar*, In re[1], which is a decision of a Full Bench of this Court, the learned Judges did not attempt a definition of the word "subject" in section 17 of the Court-Fees Act. The learned Judges merely took notice of two possible views as to the meaning of that word, *viz.*, one that the word "subject" relates back to section 7 where the various subjects of suits are put under different heads; and the other that the word "subject" means a cause of action.

1. (1930) 59 M.L.J. 469 : I.L.R. 54 Mad. 1 (F.B.).

The decision in that case therefore is only authority for the limited position that in a suit for possession of immoveable property and past mesne profits, court-fee is payable on the aggregate value of both the reliefs and the claim for possession of land and for mesne profits are not " distinct subjects " under section 17 of the Court-Fees Act. The ground of the decision was expressly stated to be the " long course of practice."

The learned advocate for the petitioner relied upon certain decisions of this Court in support of his contention but on examination of the facts of the cases in which the decision were given discloses no definite rule or precise definition applicable to all cases. In *Narasimham*, In re[1], Krishnaswami Aiyangar, J., dealt with the question on the footing that if alternative reliefs are claimed based on the same cause of action, the cases could not fall within section 17 of the Court-Fess Act. In that case a purchaser of property sued for possession of the property sold to him or, in the alternative, for the recovery of the consideration money paid by him. It is clear that both the reliefs, though in the alternative, were based on the same cause of action, *viz.*, the sale of the property. The learned Judge refers to an earlier decision of a Division Bench in *Rangaswami Reddiar* v. *Venkataperumal Reddiar*[2], on which the learned advocate placed some reliance. There the plaintiff was the reversioner who sought to set aside a certain deed of settlement executed by one *K* in favour of defendants 1 and 2 on the ground that it had been brought about by fraud and undue influence. He also claimed in the alternative that if the deed was found to be valid he should be given a decree for Rs. 22,000 being the consideration for the deed, as that amount was not paid to *K* as provided in the deed. The plaintiff also claimed specific performance based on an agreement alleged to have been executed by *K* in his favour. He valued the relief claimed at Rs. 22,000 and paid court-fee thereon. The learned Judges held that the cause of action for the alternative relief, *viz.*, the payment of the consideration amount, was also based on the same cause of action for the main relief of setting aside the deed of settlement, and the two reliefs regarding the deed of settlement were not distinct subjects within the meaning of section 17 of the Court-Fees Act. The learned Judges also held that the plaintiff had to pay separate court-fee on the prayer for specific performance. Here again the relief relating to the settlement deed were based on the same cause of action whereas the relief of specific performance was based on a quite different cause of action, *viz.*, the execution of an agreement to sell.

The decision in *Sitharathamma* v. *Seshamma*[3] was also cited. The plaint contained alternative prayer, either for possession of certain property left by a deceased or for maintenance from and out of that property. The lower Court directed that court-fee should be calculated under section 17 of the Court-Fees Act separately on the claim for possession and the claim for maintenance. The learned Judge held that the payment of court-fee for the higher claim for possession was, in the circumstances, sufficient to cover the alternative claim as well. Here again the two reliefs were based on the relationship between the plaintiffs and the deceased. On the footing that the deceased died intestate, the plaintiffs claimed possession and on the footing that the deceased left a valid will, they claimed maintenance.

In the present case, the relief of specific performance is based on the oral agreement of sale on 10th December, 1943, alleged to have been entered into between the defendant and the plaintiff.

It is true that the consideration for the sale was to be adjusted towards part of the amount due under the promissory note, but the cause of action for the relief of recovery of the amount due under the promissory note is distinct and apart from the agreement to sell. Though the fact that separate suits could be brought

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1. (1942) 2 M.L.J. 418.
2. (1938) 1 M.L.J. 139.
3. (1939) 1 M.L.J. 456.

for the two reliefs may not be a conclusive test, I consider that that fact should also be taken into consideration in deciding whether the two reliefs are different subjects within the meaning of section 17 of the Court-Fees Act. The facts of the present case do not materially resemble the facts in the case referred to above. Here there are two separate and independent causes of action and two distinct reliefs which do not necessarily arise from the same subject-matter. I therefore agree with the learned Subordinate Judge in holding that the present case comes within the meaning of section 17 of the Court-Fees Act. The civil revision petition is therefore dismissed with costs of the Government pleader.

B.V.V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

Kotta Veeraiah and others .. *Petitioners.**

Criminal Procedure Code (V of 1898), section 147—Joint trial of number of persons for an offence under section 147, along with an offence resulting from specific acts—Consideration of the evidence against each accused separately—Necessity.

In a case where a number of people have been jointly tried for an offence under section 147, Criminal Procedure Code, along with an offence resulting from specific acts, the Court should consider the evidence against each of the accused, separately and give definite findings as regards the presence and part taken by each.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of Session, Guntur division, dated 17th July, 1947, in C.A. No. 71 of 1947 preferred against the order of the Court of the Additional First Class Magistrate, Bapatla, in C.C. No. 20 of 1947.

N. Somasundaram and *N. Subramaniam* for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—I am not satisfied that the case against the different accused has received separate and sufficient attention at the hands of the learned Judge. The evidence of the prosecution witnesses in certain respects does not make any distinction between the acts attributed to accused 1 who has now been acquitted and to those attributed to the petitioners here. In a case where a number of people have been jointly tried for an offence under section 147 along with an offence resulting from specific acts, the lower Court should have considered the evidence against each of the accused, separately and given definite findings as regards the presence and part taken by each. Moreover, there are inconsistencies and discrepancies even as regards the evidence relating to the part attributed to some. For example as against accused Nos. 6, 7, 9 and 11 the witnesses are not quite uniform in their depositions. In these circumstances, I set aside the order of the lower appellate Court only as regards the present petitioners and direct that the appeal be reheard and disposed of according to law.

V.S. *Petition allowed.*

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*Crl. R.C. No. 726 of 1947. (Crl.R.P. No. 620 of 1947.) 2nd April, 1948.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MACK.

Honna Reddy, minor by guardian and mother, Subbamma .. *Appellant**

v.

The Official Receiver, Anantapur .. *Respondent.*

Insolvency—Adjudication of Hindu father—After born son—Claim to half share of the father's property—Sustainability.

The claim of a son born to a Hindu undischarged insolvent after his adjudication to a half share of the father's property on the ground that the Official Receiver had no power to sell it is not maintainable.

Appeal against the order of the District Court of Anantapur dated 21st March, 1936, in I.A.No. 40 of 1945 in I.P. No. 2 of 1933.

R. Ramalinga Reddi for Appellant.

T. R. Srinivasan for Respondent.

The Court delivered the following

JUDGMENT.—The appellant is a minor son of an undischarged insolvent born to him after his adjudication. On his behalf a novel claim was made before the District Judge, Anantapur, to his half share in the property of his father contending that the Official Receiver had no power to sell it. It is really a remarkable position, born of legalistic ingenuity, from the impact of insolvency on Hindu joint family law. The argument in support of this position by Mr. Ramalinga Reddy is that the Official Receiver is in the position of a trustee for the insolvent. He is far more a trustee for the creditors, in that all the property of the insolvent is vested in him for sale and distribution of the proceeds in the first instance to them. To consider seriously the position of a son born to a Hindu insolvent after the adjudication and before the insolvency is terminated, would be tantamount to encouraging his marrying more than one wife after his adjudication in the hope of getting as many sons as he can who will be able to claim a share in his estate any time, according to Mr. Ramalinga Reddy, up to the termination of the administration of the insolvency. This is, of course, an absurd position, but I am stating it here only to show that this appeal has no substance at all.

Mr. Srinivasan for the respondent has referred me to the decision *Kandasami Pillai* v. *Kandasami Pillai*[1], which he says is the only authority he could find deals at all with the point raised. That case arose out of some sales by the Official Receiver after the adjudication was annulled, and there was an order continuing the vesting of the insolvent's estate in him. It has no bearing whatsoever on the present contention. It is to say the least of it, novel and one made in an excess of optimism.

The appeal is dismissed with costs.

V.S. *Appeal dismissed.*

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* A. A. O. No. 355 of 1946. 2nd April, 1948.

1. (1947) 1 M.L.J. 203.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Officiating Chief Justice*, AND MR. JUSTICE YAHYA ALI.

R. Ramachandra Rao .. *Petitioner**.

v.

T. G. Narayana Rao .. *Respondent.*

Civil Procedure Code (V of 1908), sections 109 (c) and 110—Leave to appeal to Federal Court—Substantial question of law—Meaning—Question of admissibility of a document by Courts below—Not a substantial question of law.

Every question of law is not substantial. "Substantial" in the context in which it is used in section 110 of the Civil Procedure Code means substantial as between the parties and not necessarily of general importance to the public; but it does not make it any the less essential, that the question should be substantial, that is to say, it must have some substance in it.

It cannot be said that whenever a question as to the admissibility of any document is raised in an appeal and that question is decided in one way, it follows *ipso facto* that there is a substantial question of law, which would justify the grant of a certificate under section 110 of the Code.

Where the only question which arose for decision in an appeal was whether a lady, the mother of the plaintiff was one of the daughters of one *T* and the lower Courts answered it in favour of the plaintiff which later on was confirmed by the High Court, in an application for leave to appeal to the Federal Court under sections 109 and 110 of the Civil Procedure Code on the ground of an improper admission of a particular document,

Held, that the decision as to the admissibility of a document pertaining to the said relationship raised no substantial question of law within the meaning of section 110 of the Civil Procedure Code. The fact that there was an objection to the admissibility of a particular document, however important it might be, would not make it any other than a question of fact.

Mahadeva Royal v. *Chikka Royal*, (1942) 1 M.L.J. 309, distinguished.

Petition praying that in the circumstances stated therein, the High Court will be pleased to grant leave to the petitioner herein to appeal to the Federal Court of India against the judgment and decree of the High Court dated 27th January, 1948, and passed in A.S. No. 439 of 1946 preferred against the decree of the Court of the Subordinate Judge of Trichinopoly dated 28th August, 1946, in O.S. No. 149 of 1945.

K. Bhashyam and *T.R. Srinivasan* for Petitioner.

T. V. Muthukrishna Aiyar and *N. R. Govindachari* for *N. Karpagavinayakam* for the Respondent.

The Order of the Court was made by

The Officiating Chief Justice.—This is an application under section 109 (*c*) and section 110 of the Civil Procedure Code for leave to appeal to the Federal Court of India against the judgment and decree of this Court in Appeal No. 439 of 1946 which confirmed the judgment and decree of the Subordinate Judge of Trichinooply in O.S. No. 149 of 1945. The ground on which the petitioner seeks leave to appeal is that though the judgment of this Court affirmed the judgment of the lower Court, it raises a substantial question of law which is also a question of considerable general importance. The latter ground, however, was not pressed before us. It is therefore only necessary to find out if the appeal does involve a substantial question of law. That question, according to the petitioner, arises in respect of the admissibility of the statement of one Ranga Ayyar made in a Criminal case, C.C. No. 30 of 1883 on the file of the Special Second Class Magistrate of Trichinopoly. Ex. P. 2 purports to be a true copy of the proceedings in that case. The objections as regards the admissibility of Ex. P. 2 were mainly twofold and based on section 80 of the Indian Evidence Act. It was contended firstly that Ex. P. 2 really consists of two documents and that the document which contains the statement of Ranga Ayyar does not purport to be a record or memorandum of evidence given by a witness in a judicial proceeding; and secondly it was contended that it does not purport to be signed by any Judge or Magistrate. Both the objections were overruled by

*C. M. P. No. 1988 of 1948. 1st April, 1948.

this Court, because it was held that the alleged two parts of the document, Ex. P. 2 together formed the proceedings of the Second Class Magistrate in C.C. No. 30 of 1883 and it was found that the signature found at the end of the deposition part was the signature of the person who, according to the order part of Ex. P. 2 was the Second Class Magistrate who disposed of the particular case. It is clear that the objections raised by the petitioner who was the appellant were overrruled by findings of fact. Those findings may be right or may be wrong, but they are certainly not findings on questions of law.

Objection was also taken to the admissibility of the statement because according to the appellant, the conditions laid down in section 32 (5) of the Evidence Act were not satisfied. It was contended (1) that there was no statement of Ranga Ayyar within the meaning of that enactment, and (2) that the statement if any, was not made before the question in dispute was raised. The first part of the contention was based on the fact that the statement was contained in the memorandum of evidence made by the Magistrate, and it was argued that the statement was really that of the Magistrate who must be deemed to have stated that the witness made a particular statement. This Court did not accept that contention, and in our opinion, this contention does not raise a substantial question of law. Obviously, every question of law is not substantial. "Substantial" in the context has been held to mean substantial as between the parties and not necessarily of general importance to the public; but that explanation does not make it any the less essential that the question should be substantial, that is to say, it must have some substance in it. We do not consider that in this view it could be said that a substantial question is involved in the contention just mentioned. As regards the other part of the contention, namely, that the statement was not made before the question in dispute was raised, it was found as a fact that the question in dispute in the present case, namely, as to whether Anantalakshmi Ammal was one of the daughters of Thammanna Ayyar did not arise before the statement was made.

The learned advocate for the petitioner relied upon the ruling of a Division Bench of this Court in *Mahadeva Royal* v. *Chikka Royal*[1], in support of his contention that a decision in regard to non-admissibility of documents being of substance to the parties must be held to be a substantial question within the meaning of section 110 of the Civil Procedure Code. We are not aware exactly what sort of objection was raised as regards the admissibility of documents in that case. But we do not understand that decision to lay down that whenever a question as to the admissibility of any document is raised in an appeal and that question is decided in one way, it follows *ipso facto* that there is a substantial question of law which would justify the grant of a certificate under section 110 of the Civil Procecure Code.

The only question which arose for decision in appeal was whether one Anantalakshmi Ammal the mother of the plaintiff, was one of the daughters of Thammanna Ayyar. The lower Court answered the question in favour of the plaintiff, and this Court confirmed the decision of the lower Court. The fact that there was an objection to the admissibility of a particular document, however important it might be, would not make it any other than a question of fact. In our opinion, the case does not involve a substantial question of law. There can be no doubt that the appeal does not raise any question of public importance.

This petition is therefore dismissed with costs.

K.C. *Petition dismissed.*

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1. 1942) 1 M.L.J. 309.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HAPPELL.

Commissioner, Municipal Council, Vizagapatam .. *Appellant**.

v.

Srimathi Siddeswara Devi and others .. *Respondents.*

Madras District Municipalities Act (*V of* 1920), *sections* 81 (3), 85 *and* 354 (1)—*Land appurtenant to house—Assessment of land independently—Error of fact—Not a case of non-compliance with the provisions of the Act—Remedy of assessee—Correctness of assessment—Jurisdiction of Civil Courts.*

Upto 1940 a house and site of about 4 acres had been assessed as if the whole of the 4 acres was adjacent and appurtenant to the house. In 1940, however on the report of a special officer some 3 acres out of the 4 were excluded from the site held to be appurtenant to the house and were separately taxed. A suit to recover the tax in respect of this land was brought by the Municipality and the defendants maintained that they were not liable to pay the tax as the site was appurtenant to the house.

Held, that where there is a mistake of fact the remedy is by way of an appeal to the Municipal Council and the Civil Court has no jurisdiction provided the provisions of the Act have been in substance and effect complied with. Even if the site in question should have been held to be appurtenant to the house that is merely an error of fact in making the assessment. The assessment was one which the Municipality had power to make and there was no contravention of any express provisions of the Act and no mistaken view of any provision of the Act. It was not open to the civil Court to go into the question whether the assessment was correct or not.

Appeal against the decree of the Court of the Subordinate Judge of Vizagapatam in A.S. No. 173 of 1945 preferred against the decree of the Court of the District Munsiff of Vizagapatam in O.S. No. 185 of 1943.

K. Kuttikrishna Menon for Appellant.

H. Prabhakara Rao for Respondents.

The Court delivered the following

JUDGMENT.—This second appeal arises out of a suit brought by the Commissioner of the Municipal Council, Vizagapatam, for the recovery of the land tax alleged to be due for a certain site for the years 1940-41, 1941-42 and 1942-43 and for the first half-year of 1943-44 at Rs. 76-4-0 a year. It appears that up to 1940 a house and site of about 4 acres had been assessed as if the whole of the 4 acres was adjacent and appurtenant to the house. In 1940, however, on the report of a Special Officer some 3 acres out of the 4 were excluded from the site held to be appurtenant to the house and were separately taxed. It was in respect of the tax due on the land held not to be appurtenant to the house that the suit was brought, and the defendants maintained that they were not liable to pay the tax, because this part of the site was appurtenant to the house. On the question of fact both the lower Courts have held that the land in question was appurtenant to the house so that a separate tax should not have been levied and the suit has been dismissed. In the lower appellate Court it was argued for the Municipality that by reason of the provisions of section 354 of the Madras District Municipalities Act it was not open to the defendants to impeach the assessment made, because in making it the provisions of the Act had been in substance and effect complied with, and this is the contention on which the second appeal has been supported. The learned Subordinate Judge repelled that contention on the ground that, as the defendants questioned the liability of the land to be assessed as a separate entity from the building, this went to the root of the assessment so that it was not a mere defect in form or "of conforming to the provisions of the Act." There is clearly a great deal more in the contention than the learned judge has seen.

Section 354 (1) of the Madras District Municipalities Act reads :

"No assessment or demand made, and no charge imposed, under the authority of this Act shall be impeached or affected by reason of any clerical error or by reason of any mistake (*a*) in respect of the name, residence, place of business or occupation of any person, or (*b*) in the description

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* S. A. No. 2049 of 1946. 17th March, 1948.

of any property or thing, or (c) in respect of the amount assessed, demanded or charged : provided that the provisions of this Act have been, in substance and effect complied with. And no proceedings under this Act shall, (merely) for defect in form, be quashed or set aside by any Court of Justice."

For the appellant it is argued that an assessment can only be impeached in a Civil Court where the assessment is based on a mistaken view of the provisions of the Act or some express provision of the Act has been contravened. In the present case, it is said, there can be no question of a misinterpretation of the provisions of the Act or a contravention of its provisions. Under section 81 (3) a Municipal Council can impose a property tax on lands which are not adjacent or appurtenant to buildings, and it is argued that the question whether the particular land on which the tax now in question has been levied is appurtenant to the house or not is a question of fact, so that even if the Municipal Council should have been wrong in holding that this particular site is not appurtenant to the house it would still in substance and effect have complied with the provisions of the Act within the meaning of section 354 and the assessment could not be impeached in a Civil Court. In my opinion, this contention must be accepted. No doubt the question whether the jurisdiction of a Civil Court is ousted by virtue of section 354 will depend on the facts of each case, and some cases will be nearer to the line of division than others.

All the cases, however, cited in support of the defendants' contention that the Civil Court has jurisdiction seem to me to involve something more than a mere mistake of fact on the part of the Municipal authorities. In *Municipal Council, Cocanada* v. *The Standard Life Assurance Co.*[1], there was no dispute about the facts, and it was admitted that on the facts the Assurance company was not doing business within the limits of the Municipality. That being so, to tax the company was to do something which the Act did not permit. In *Municipal Council, Cocanada* v. *Royal Insurance Co. Liverpool*[2], it was held that the tax had been illegally levied. There was no dispute about the facts. Again in *Municipal Council of Mangalore* v. *The Cordial Bail Press*[3], it was held that the plaintiffs were entitled to maintain the suit against the Municipality for recovery of the sum collected under the Act, because the assessment was made on the estimated gross income whereas by the provisions of the Act itself it could only be made on the estimated net income. On the other hand, in *Kamayya* v. *Leman*[4], where a suit was brought to recover profession tax levied by the Municipal Commissioners of Guntur on the plaintiff on the supposition that he carried on business as an agent whereas he carried on no such business it was held that the Court had no jurisdiction to adjudicate on the matter, because, the provisions of the Act had been complied with and, in cases of an error of fact, the only remedy was an appeal under section 85 to the Municipal Commissioners themselves. A similar case was decided by Jackson, J., in *Pattarani Purnachandra Mala Jamna Devi v. President, Taluk Board, Chicacole*[5]. There again, a suit was brought to recover the amount collected on the ground that a person practised a profession within the limits of the Taluk Board whereas, in fact, she had not done so. It was held that a Civil Court had no jurisdiction. Cases could be multiplied, but it seems to me that the two Madras cases are on all fours with the present case. Where there has been or there is alleged to have been a mistake of fact, the remedy is by way of an appeal to the Municipal Council, and the Civil Court has no jurisdiction, provided that the provisions of the Act have been in substance and effect complied with. It is not suggested in the present case that the provisions of the Act have not been in substance and effect complied with, and even if the site in question or some of it should have been held to have been appurtenant to the house, that is merely an error of fact in making the assessment. The assessment was one which the Municipality had the power to make and it seems to me clear that there has been no contravention of any express provisions of the Act and no mistaken view of the provisions of the Act. In this view it was not open to the lower Courts to go into the question whether the assessment was correct or not. The only remedy of the defendants was to appeal to the Municipal Council within one month, and

1. (1900) 10 M.L.J. 401 : I.L.R. 24 Mad. 205.
2. (1897) I.L.R. 21 Mad. 5.
3. (1903) 14 M.L.J. 410 : I.L.R. 27 Mad. 547.
4. (1878) I.L.R. 2 Mad. 37.
5. (1928) 113 I.C. 560.

as that was not done, they have become liable to pay the tax according to the assessment that has been made.

The appeal must therefore be allowed with costs throughout. There will be a decree in favour of the plaintiff on the basis of the findings of the trial Court with regard to the liability of the parties.

Leave to appeal is refused.

V.P.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P.V. RAJAMANNAR, *Officiating Chief Justice*, AND MR. JUSTICE SATYANARAYANA RAO.

K. Gopalan being minor by his mother and guardian Mrs. Jagadambal .. *Appellant**.

v.

Travancore National and Quilon Bank Ltd. (in liquidation) by its Official Liquidators .. *Respondent.*

Limitation Act (IX of 1908), *section* 182 (5)—*Execution application claiming amount in excess of what was rightly due—Application in accordance with law for purposes of limitation.*

Though an execution petition claims an amount in excess of what was rightly due under the decretal order, it cannot be said that the application is not in accordance with law.

Subramanian Chettiar v. *Muthuswami Goundan*, (1941) 1 M.L.J. 267, followed.

Durga Prasad Sahu v. *Mst. Powdharo Kuer*, (1930) I.L.R. 10 Pat. 183, dissented from.

Appeal against the judgment and order of Chandrasekhara Aiyar, J., dated 12th September, 1946, in A.A.O. No. 614 of 1945 preferred against the order of the City Civil Court, Madras, in E.P. No. 935 of 1944 in O.S. No. 325 of 1936.

T. R. Venkataraman for Appellant.

Messrs. John and *Row* for Respondent.

The Judgment of the Court was delivered by

The Officiating Chief Justice.—We agree with Chandrasekhara Aiyar, J., on both the points taken before him, which were also taken before us. The order of Venkataramana Rao, J., in Application No. 1935 of 1941 in O.P. No. 158 of 1938 did not purport to supersede the three decrees under which the appellant was liable. It only gave leave to the Official Liquidators to accept in full discharge a sum of Rs. 2,500 payable in monthly instalments, and in default, they were to be paid a sum of Rs. 2,500, with interest at six per cent from date of default. We do not agree with the appellant that the only remedy which the respondent had was to execute this order as if it had superseded the decrees. The ruling in *Mahiganj Loan Office Ltd.* v. *Biharee Lal Chaki*[1], has no application because in that case there was a scheme under section 153 of the Indian Companies Act sanctioned by Court and it was held the the scheme superseded the decree which became incapable of execution.

The execution application filed prior to the present application, *viz*, E.P. No. 42 of 1943 cannot be said to be an application not in accordance with law. The ground on which it is contended that it was not in accordance with law is that instead of claiming a sum of Rs. 2,500 fixed in the order of Venkataramana Rao, J., the entire amount due under the decree in O.S. No. 325 of 1936 in which the petition was filed was sought to be recovered. It would then be a case where an amount in excess of what was rightly due was claimed. On this ground, it cannot be said

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* L. P. A. No. 17 of 1947. 23rd March, 1948.

1. I.L.R. (1937) 1 Cal. 781.

that the application was not in accordance with law. Vide *Subramanian Chettiar* v. *Muthuswami Goundan*[1].

The decision of the Patna High Court in *Durga Prasad Sahu* v. *Mst. Powdharo Kuer*[2], was relied on. In that case though the surety was declared liable only to the extent of one-sixth of the decree which was for Rs. 7,000 nevertheless the decree-holder applied for execution for the whole of the decree against the surety and the judgment-debtors. It was held in that case that the application being one for a relief which could not be granted under law, was not an application "in accordance with law" so as to save limitation. This decision is in conflict with several other decisions in which it has been held that where execution proceedings are taken to recover an amount due under a decree which had been varied or modified, the execution petition filed to recover a higher amount payable under the original decree would nevertheless be an application in accordance with law. These decisions are referred to in *Subramanian Chettir* v. *Muthuswami Goundan*[1]. With respect we agree with these decisions and express our dissent from the ruling in *Durga Prasad Sahu* v. *Mst. Powdharo Kuer*[2].

This appeal is dismissed with costs.

K.C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

D. H. Satyam .. *Petitioner**

Madras Criminal Rules of Practice, Rule 1—Pronouncing order of acquittal on Sunday—Legality.

Though rule 1 of the Madras Criminal Rules of Practice states that no judicial work should be transacted on Sunday it does not mean that the Court has no jurisdiction to acquit an accused on a Sunday and hence there would be no justification for admitting a revision on the ground that an order of acquittal was pronounced on a Sunday.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Stationary Sub-Magistrate of Chittoor in C.C. No. 1021 of 1947.

G. N. Chary for Petitioner.

The Court made the following

ORDER.—I do not see any justification for admitting the revision simply on the ground that the order of acquittal was pronounced on Sunday. Though Rule (1) of the Criminal Rules of practice states that no judicial work should be transacted on Sunday, it does not mean that the Court has no jurisdiction to acquit an accused on Sunday and release him from custody. The rule provides for cases of absolute urgency. Even if the pronouncing of the order of acquittal may not be one of absolute urgency I do not feel that this by itself will justify my interference in revision. This revision petition is therefore dismissed.

V.S. *Petition dismissed.*

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1. (1941) 1 M.L.J. 267.
2. (1930) I.L.R. 10 Pat. 183.

*Crl.R.C. No. 332 of 1948.
(Crl.R.P. No. 302 of 1948).

15th March, 1948.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL AND MR. JUSTICE MACK.

Krishnaswami *alias* Kittan .. *Appellant.**

Madras Borstal Schools Act (*V of* 1926), *section* 10-A—*Applicability—Murder by youth of seventeen years—Righteous indignation against his younger brother, cause of murder.*

In a case where righteous indignation in a youth of 17 years caused emotion to develop beyond control so as to lead him to stab his younger brother to death for his commission of petty thefts,

Held, that it was a fit case to which section 10-A of the Madras Borstal Schools Act could be applied as the accused was psychologically somewhat abnormal and was not a hardened criminal so as to merit a sentence of transportation for life.

Appeal against the order of the Court of Session of the Coimbatore Division dated 17th November, 1947, and made in Case No. 101 of the Calendar for 1947.

N. Somasundaram for the Accused.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court delivered the following

JUDGMENTS : *Horwill, J.*—The appellant has been convicted by the learned Sessions Judge of Coimbatore of the murder of his brother and has been sentenced to transportation for life.

Nobody actually saw the murder committed; but P.Ws. 2 to 4 came on the scene upon hearing cries of " Ayyo " from the deceased and found that he had a penetrating wound in the abdomen, through which the intestines were protruding. He said that the appellant had stabbed him. The evidence shows that the appellant had been much taking to heart the tendency of his brother to commit petty thefts ; and when taxed with the offence after his brother had been stabbed, he admitted that he had committed it because he was ashamed of his brother's conduct. The deceased made a statement to those gathered there immediately after the offence and said that his brother had stabbed him. He repeated this statement when he was formally examined at the hospital, where he said :

" My elder brother came near me and stabbed me in my abdomen. He ran away after stabbing . . . . . . He stabbed me like this because yesterday I stole buttons from the house of my elder brother, Krishnaswami's brother-in-law, Sinnappan."

In the Courts below the appellant denied all knowledge of the offence and attributed the evidence against him to enmity on the part of the witnesses. There is no reason to think that there was any substance in these allegations ; and the evidence seems to be beyond reproach.

The learned advocate for the appellant concedes that the evidence has made out a case of murder ; but he contends that the appellant should be dealt with under section 10-A of the Borstal Schools Act. It is conceded that section 8 would not apply ; but it seems clear that under section 10-A of the Act, the Provincial Government has power, in a case where an offender is of the age of the appellant, who is 17 years, and has been sentenced to transportation for life, to send him to a Borstal School if they consider that he might with advantage be detained in such an institution. The appellant is psychologically somewhat abnormal and not a hardened criminal. If no action is taken under section 10-A of the Act, it is difficult to think what suitable action can be taken against the appellant. His crime does not merit a life sentence ; and association with hardened criminals in an ordinary jail would cause his character to deteriorate. On the other hand, he might, under the sympathetic guidance of the Superintendent of a Borstal School, be helped to adapt himself better to the problems of life.

While therefore confirming the sentence of transportation for life, I recommend to the Provincial Government that they take action under section 10-A and commit the appellant to a Borstal School for such period as they think fit.

* Crl. Appeal No. 42 of 1948. 6th April, 1948.

Mack, J.—I should like to express complete agreement with my learned brother. We are not aware as to precisely what reasons guided the learned Sessions Judge into finding that this was not a suitable case for Borstal treatment. It may be that he applied the principles of section 8 of the Borstal Schools Act to this case which should be dealt with under section 10-A. Under section 8 an adolescent offender should have criminal habits or tendencies or association with persons of bad character. This is a peculiar case in which righteous indignation against his brother's commission of petty thefts developed a powerful emotion in this youth which he could not control and was the main motive for stabbing his brother and leading him into committing a far graver crime.

In fact no better case for treatment in a Borstal institution can in my opinion be imagined.

K.C. ——— *Sentence confirmed. Action under Borstal Schools Act recommended.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

K.S. Doraiswami Iyer .. *Petitioner.**

Government of India Act (1935), *section* 270, *Criminal Procedure Code* (*V of* 1898), *section* 197 *and Penal Code* (*XLV of* 1860), *sections* 120-B *and* 409—*Accused a public servant—Hiring out vehicle intended for military purposes to private contractors—Breach of trust—Not acting in the discharge of his duties—No sanction necessary for prosecution.*

The accused, who was a public servant was entrusted with the duty of allotting trucks to the various military departments for their use. The driver of each vehicle takes it to the accused every day for the purpose of getting the works allotted and when it is so taken it is the duty of the accused to indicate in the duty slip of the driver which place he has to go. The accused in agreement with 2nd accused instead of allotting certain lorries on the dates mentioned in the charge for military purposes entered falsely in the duty slips, some bogus military work and hired out the lorries to private contractors for their own work after receiving illegal gratification in each case for so hiring out. On the question whether the accused acted or purported to act in the discharge of his official duty and whether sanction under section 270, Government of India Act or section 197, Criminal Procedure Code was necessary for his prosecution,

Held, that, when the accused agreed with the 2nd accused, to commit an illegal act, that is to hire a vehicle entrusted to him for military use for private use, neither he nor the 2nd accused was doing anything, which was in the discharge of their official duties ; in fact it was a negation of the execution of public duty. Both of them knew it was against the official duty to hire out a military vehicle for private purpose. Neither of them had any intention that the act which they were doing in pursuance of that agreement was in any way connected with their official capacity. It may be that but for the opportunity when presented to these persons on account of the official position they would not have been in a position to enter into this illegal agreement. But that would not matter and no sanction under section 270 of the Government of India Act or section 197 of the Criminal Procedure Code was necessary.

Held further, that, as regards the charges under section 409 of the Penal Code, where a public servant commits breach of trust in respect of some property entrusted to him, he is not doing an act, nor even properly to do an act in the execution of his duty ; when he commits the act he does not pretend to act in the official discharge of his duty, and no sanction is necessary for his prosecution.

Petition praying that in the circumstances stated therein, the High Court will be pleased to quash all proceedings including the charges framed against the petitioner in C.C. No. 231 of 1947 on the file of the Additional First Class Magistrate of Ranipet.

K. V. Ramaseshan and *R. Subrahmanyam* for Petitioner.

The Assistant Public Prosecutor (*A. S. Sivakaminathan*) on behalf of the Crown.

The Court made the following

ORDER.—This is an application to quash the four charges framed against the petitioner, by the Additional (First Class Magistrate of Ranipet in C.C. No. 231 of 1947 on his file. The first of these charges relates to an offence under section 120-B of the Indian Penal Code in that the petitioner, between 1st May, 1946, and 1st June, 1946, at Arkonam, with a person who is the second accused in the

* Crl. M. P. No. 337 of 1948. 12th March, 1948.

Court below, agreed to do an illegal act, *viz.*, hiring out the military vehicles entrusted to the petitioner for allotting to the Sub-Divisional Officers for military works, to P.W. 2, a civilian building contractor, and that the same act, *viz.*, the hiring out of the military lorries to the private contractor, having been done in pursuance to an illegal agreement the petitioner hereby committed an offence of criminal conspiracy. The next three charges relate to cases of criminal breach of trust by a public servant, *viz*, the petitioner, in that he as Sub-Divisional Officer, M.E.S., Arkonam, being entrusted with military lorries for allotment to other Sub-Divisional Officers for military work, used those military lorries dishonestly in contravention of such entrustment and thereby committed criminal breach of trust on three occasions.

The contention raised in this application is that the charges should be quashed for the reason that the Magistrate had no jurisdiction to entertain the proceedings before him on the ground that there was no sanction as contemplated by section 270 (1) of the Government of India Act, 1935, and also that the petitioner being a public servant under a contract of service with the Governor-General in Council and not removeable from his office save by or with the sanction of the said authority, and the offences alleged against him being said to have been committed by him while acting or purporting to act in the discharge of his official duty, the Court should not have taken cognizance of the said offences without the previous sanction of the Governor-General in Council under section 197 of the Criminal Procedure Code. Both these objections converge to the same point, *viz.*, whether the petitioner in committing the alleged acts which form the subject of the charges was doing an act or purporting to do an act in execution of his duty as a servant of the Crown in India.

According to the prosecution, the petitioner who was employed as a Sub-Divisional Officer in the Transport Garrison Engineering Office at Arkonam was entrusted with the duty of allotting trucks to the various military departments for their use. These trucks belong to a company known as the General Provisions Transport Company and were at the disposal of the military authorities to be used for military purposes. According to the evidence now let in, it is seen that the driver of each vehicle takes it to the petitioner every day for the purpose of getting the work allotted and when it is so taken, it is the duty of the petitioner to indicate in the duty slip of the driver which place he was to go. Such allotment should be, only for military purposes and not for anything else. The prosecution case is to the effect that instead of allotting certain lorries on the dates mentioned in the charge for military purpose, the petitioner entered falsely in the duty slips some bogus military work and hired out the lorries to private contractors for their own work after receiving illegal gratification in each case for so hiring out. It is said that the offence of criminal breach of trust arises from the fact that the lorries entrusted to him in his official capacity for the purpose of using them for military work alone were diverted for private use after he received consideration for such diversion. This was done as a result of a conspiracy between the petitioner and the second accused in the lower Court. Such being the case, the two accused have been arraigned firstly for the offence of criminal conspiracy and secondly for the various instances of criminal breach of trust on specific dates.

The question that falls for decision is whether on the prosecution evidence as it stands (I do not wish to express any opinion about the credibility or otherwise) the petitioner was acting or purporting to act in the discharge of his official duty. There are certain essential circumstances to be kept in view according to the learned advocate for the petitioner. They are as follows : but for the fact that the petitioner was the Sub-Divisional Officer and was empowered to direct the lorries entrusted to his charge for the particular or specific military purposes, he would not have had the opportunity of doing what he is alleged to have done. Therefore, Mr. Ramaseshan urges that there is an element of the official duty being done by the petitioner when he directed the driver to take the lorry to private contractors like P.W. 2 and others. Secondly, according to him, drivers like P.W. 6 would not have

obeyed the direction given by the petitioner unless it were that the petitioner's act would amount to one purporting to be done in the discharge of his official duties. The evidence of P.Ws. 6 and 2 is clearly to the effect that they would not have acted as they did but for the belief instilled in them by the petitioner that he was acting in the discharge of his official duties.

On the strength of the above circumstances, Mr. Ramaseshan contends that the prosecution cannot stand in the absence of the previous sanction of the Governor-General in Council under section 270 of the Government of India Act or under section 197 of the Criminal Procedure Code. For this argument he relies upon the observations of the Federal Court in *Dr. Hori Ram Singh* v. *The Crown*[1]. In particular, reliance is placed on the observations of Sulaiman, J., at pages 33, 36 and 37 of the report where the learned Judge was discussing the question as regards the applicability of section 270 of the Government of India Act to the facts of that case, as well as to the contention raised therein regarding the breach of trust. There are other passages in the judgment also to which reference is to be made especially to the judgment of Varadachariar, J., at pages 38 to 41. What the Federal Court decided in that case was that for an offence of breach of trust under section 409, Indian Penal Code, committed by a public servant, no sanction under section 270 of the Government of India Act or under section 197 of the Criminal Procedure Code is necessary. I need not refer to the various other cases where the question has been discussed at some length. Suffice it for the present case to rely upon a recent decision of Rajamannar, J., as he then was in Crl.R.C. No. 1091 of 1946 dated the 2nd April, 1947. That was a case where the accused were charged with criminal conspiracy to commit various offences. The lower Court in that case held that for the initiative of proceedings under sections 409 and 420 of the Indian Penal Code the consent of the Governor-General was necessary but that no such consent was necessary in respect of the charge under section 120-B of the Indian Penal Code. The application to revise the order of the lower Court therefore was concerned only with the point regarding the necessity of the previous sanction of the Governor-General in Council for an offence under section 120-B of the Indian Penal Code. The learned Judge after a very exhaustive discussion, if I may say so, came to the conclusion that the offence of conspiracy could not have been committed by the accused by acting or purporting to act in the discharge of his duty. The following observations of the learned Judge are pertinent to be considered for the present case:

"Applying the test so laid down by the Federal Court to my mind it is clear that the offence of criminal conspiracy cannot fall within the category of 'an act done or purporting to be done in the execution of his duty as a public servant.' As I have already said the gist of the offence consists in the agreement to commit certain illegal acts. No doubt the agreement was arrived at at a time when the petitioner held an official capacity. It may also be because he was holding a particular official position that he became a party to that agreement. But for the fact that he was a servant in charge of certain official work, he would not have been a party to the conspiracy. But it cannot be said that the agreement was an act done in his official capacity. It was not an act which the offender professed to do in pursuance of his official duty and meaning 'to convey to the mind of another the impression that he is so acting.' The act complained of, *viz.*, that he agreed to do, or cause to be done, certain illegal acts was not an official act just as it was pointed out in *Hector Thomas Huntley* v. *King-Emperor*[2] that the act of receiving illegal gratification could not be an act done or purporting to be done in the execution of duty. In my opinion the contention on behalf of the petitioner based on section 270, sub-section (1) of the Government of India Act, should be rejected."

These observations apply directly to the present case. When the petitioner agreed according to the prosecution, with the second accused to commit an illegal act, *i.e.*, to hire out a vehicle entrusted to him for military use for private use, neither he nor the second accused was doing anything which was in the discharge of their official duties. Both of them knew that it was against the official duty to hire out a military vehicle for a private purpose. Neither of them had any intention that the act which they were doing in pursuance of that agreement was in any way connected with their official duties. It may be, that but for the opportunity when presented to these persons on account of their official position, they would not have been in a

1. (1939) 2 M.L.J. (Supp.) 23 : 2 F.L.J. 153 : (1939) F.C.R. 159.

2. (1944) 1 M.L.J. 503 : 1944 F.L.J. 167 : I.L.R. 23 Pat. 517 (F.C.).

position to enter into this illegal agreement. But that does not matter. The question has to be considered from this aspect, *viz.*, whether the persons according to their knowledge were doing or not doing an official act. I have no doubt that when—if the prosecution story is true—the petitioner and the second accused agreed to hire out the lorries to private individuals, they were not, to their knowledge, doing or purporting to do any official act. This disposes of the first charge regarding the offence under section 120-B, Indian Penal Code.

Even as regards the three charges under section 409, Indian Penal Code, it cannot be said that the petitioner was acting or purporting to act in the discharge of any official duty. Sulaiman, J., in *Dr. Hori Ram Singh* v. *The Crown*[1], observes at page 36 of the report as follows :

> "The question whether a criminal breach of trust can be committed while purporting to act in execution of duty is not capable of being answered hypothetically in the abstract, without any reference to the actual facts of the case. An attempt to answer the question in a generalised way has been responsible for loose language used in some of the cases cited before us. It is possible to conceive of a case where a criminal breach of trust may be committed in conspiracy with other servants and payment of money is dishonestly ordered ostensibly in execution of duty. The question whether the act purported to have been done in execution of duty or not must depend on the special circumstances of each case."

Further on the learned Judge observes that,

> "When a public servant simply embezzles some property entrusted to him and thereby commits a criminal breach of trust under section 409, he is not doing an act, nor even purports to do an act in execution of his duty ; when he commits the act, he does not pretend to act in the official discharge of his duty.".

The contingency envisaged by the learned Judge of the possibility of a case where a criminal breach of trust is committed in conspiracy by one public servant with other public servants and payment of money is dishonestly ordered ostensibly in execution of duty, does not arise here, for it is not pretended that there is any payment of the public funds by the petitioner in pursuance of a conspiracy with any other public servant dishonestly. What the petitioner is charged with is, that by using a vehicle entrusted to him in his capacity as a public servant in derogation and utter violation of the entrustment, he thereby caused wrongful gain to himself. To such a state of things the observations of Sulaiman, J., cannot apply. Varadachariar, J., also at page 41 of the report came to the same conclusion and observed that in so far as the charge under section 409 was concerned, the acts in respect of which the appellant therein was prosecuted could not be regarded as acts done or purporting to be done in the discharge of his duty. The above decision of the Federal Court has been followed in a number of other cases to which it is unnecessary to make any detailed reference. All these cases have been considered by Rajamannar, J., as he then was, before coming to the conclusion that for an offence of criminal conspiracy under section 120-B it is not necessry to have the previous sanction of the Governor-General under section 270 of the Government of India Act.

On principle, it is difficult to see how a person in doing an act in the utter contravention and entire violation of his official duties can be deemed to do the same in discharge or execution of his official duty or purporting to do in the discharge or execution of his official duty. It is not pretended or even remotely suggested that a public servant like the petitioner can use the property entrusted to him for his own purposes. If he does any act in violation of the terms of the entrustment, it is a negation of the execution of public duty. I am therefore satisfied that the argument advanced by the petitioner's counsel are unacceptable, and that the provisions of section 270 of the Government of India Act or section 197 of the Criminal Procedure Code are not applicable to the facts of the present case. I wish it to be distinctly understood that I do not intend to express any opinion whatever about the merits of the case and whether the prosecution evidence as it stands is sufficient or not to prove the offences with which the petitioner is charged.

The petition is therefore dismissed.

V.P.S. ——— *Petition dismissed.*

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1. (1939) 2 M.L.J. (Supp.) 23 : 2 F.L.J. 153 : (1939) F.C.R. 159.

[PRIVY COUNCIL.]

(On appeal from the Federal Court of India).[1]

PRESENT :—LORD SIMONDS, LORD NORMAND, LORD MORTON OF HENRYTON, LORD MACDERMOTT, SIR MADHAVAN NAIR AND SIR JOHN BEAUMONT.

Albert West Meads .. *Appellant**

v.

The King .. *Respondent.*

Government of India Act (1935), section 270 (1)—" Proceedings civil or criminal "—If includes proceedings before a Court-Martial—Public servant fraudulently misapplying money entrusted to his care as public servant —If an act done in the execution of his duty as a public servant—Sanction under section 270 (1)—Necessity.

Proceedings before a Court-Martial are not "proceedings civil or criminal" in the sense in which those words are used in section 270 (1) of the Government of India Act, 1935. The phrase " proceedings civil or criminal " indicates only the civil or criminal proceedings capable of being instituted under the ordinary law of the land and does not include proceedings under the military law.

The acts of a public servant of fraudulently misapplying money entrusted to his care as a public servant cannot be said to be acts done by him by the virtue of the office that he held and as such sanction under section 270 (1) of the Government of India Act is not necessary for his prosecution for the offences committed by him.

Appellant in person.

Sir Walter Moncton, K.C. and *John Megaw* for Respondent.

Their Lordships' Judgment was delivered by

LORD MORTON OF HENRYTON.—This is an appeal, by leave of the Federal Court of India, against the judgment of the Federal Court[1] dated the 20th November, 1944, dismissing the appellant's appeal against the judgment of the High Court of judicature at Lahore dated the 24th April, 1944, whereby the said High Court dismissed the appellant's petition praying for a writ in the nature of *Habeas Corpus* for his release from imprisonment. The appellant had been sentenced by Field General Court-Martial to be cashiered and to undergo two years' imprisonment with hard labour.

The appellant was, at the date of his conviction by Court-Martial, an officer of His Majesty's Forces, holding the temporary rank of Major in the Royal Engineers. He had enlisted in the United Kindom in October, 1939, and had subsequently been commissioned and posted to India in the Royal Engineers in 1940. At the time of the events which gave rise to his trial by Court-Martial, the appellant was attached to a unit of the Indian Engineers. He remained, however, subject to the Army Act.

The appellant was charged before a Field General Court-Martial at Lahore on the 12th October, 1943, on four charges, framed under the Army Act. The first charge, under section 17 of the Army Act, alleged that the appellant, on or about the 22nd April, 1943, when concerned in the care of public property, namely, Rs. 8,089-7-0 the imprest money of the Company commanded by the appellant, had fradulently misapplied the same. The third charge, also under section 17 of the Army Act, alleged similarly that the appellant had fraudulently misapplied regimental property, namely, Rs. 871-12-9, being part of the regimental funds of the said Company. The second and fourth charges were framed under section 40 of the Army Act, and were alternative charges to the first and third charges respectively, alleging neglect to the prejudice of good order and military discipline in that the appellant so negligently performed his duties as to suffer the said sums of money to be destroyed by fire.

It would appear from the appellant's affidavits hereafter mentioned that there was no dispute that on the 22nd April, 1943, the appellant had in his possession the two sums of money alleged in the charges, and that subsequently he was unable

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1. (1945) 1 M.L.J. 31 : 1944 F.L.J. 265.

* 19th April, 1948.

to produce them. His defence, on the facts, appears to have been primarily that the whole of the moneys was destroyed in an accidental fire which occurred in a chest of drawers in the appellant's room on the night of the 22nd or 23rd April, 1943, owing to the overturning of a candle, while the appellant was temporarily absent from the room.

On the 17th October, 1943, the Court-Martial found the appellant guilty on the first and third charges, and not guilty on the second and fourth charges, and sentenced him to be cashiered and to undergo two years' imprisonment with hard labour. The findings and sentence were reserved by the Commander, Lahore District, who had convened the Court-Martial. They were confirmed on 23rd November, 1943, by the General Officer Commanding-in-Chief, Central Command. The appellant was committed to prison to serve his sentence on the 30th November, 1943.

On the 20th January, 1944, the appellant petitioned the High Court of Judicature at Lahore, under section 491 and section 561-A of the Code of Criminal Procedure (Act V of 1898), praying that the Superintendent of the Central Jail, Lahore, should be directed to produce the appellant, and the Adjutant-General in India should be directed to show cause why the appellant should not be set at liberty. By his amended petition, dated the 11th February, 1944, supported by two affidavits by the appellant, the appellant averred that his trial and conviction by Field General Court-Martial was illegal, on grounds which may be summarised as follows :

(*a*) The alleged offence took place within the Area Command of Rawalpindi. The Court-Martial was, improperly, convened by the Commander of the Lahore District.

(*b*) The appellant should have been tried by a General Court-Martial consisting of five officers, and not by a Field General Court-Martial consisting of three officers. The reasons given by the Convening Officer for convening a Field General Court-Martial were not *bona fide.*

(*c*) Under section 270 of the Government of India Act, 1935, the previous sanction of the Governor-General was required before proceedings could be taken. Such sanction had not been given.

(*d*) There was no evidence before the Court-Martial on which the appellant could have been found guilty.

(*e*) The trial was against the provisions of the Army Act, Rules of Evidence and Procedure and the conviction was against natural justice. In substance and in law the prisoner did not have a trial at all.

(*f*) It had been averred by the Prosecuting Officer before the Court-Martial, and so held by the Court-Martial, that there was no obligation on the prosecution to prove where the money went to and that it was entirely for the appellant to substantiate his innocence.

The appellant's petition came before Blacker, J., who referred to a Special Bench of the High Court the question whether section 270 of the Government of India Act, 1935 (hereafter referred to as " the Act ") is applicable to Courts-Martial held under the Army Act in respect of a British Officer attached to the Indian Army. Sub-sections (1) and (2) of that section are as follows :

"S. 270 (1)—No proceedings civil or criminal shall be instituted against any person in respect of any act done or purporting to be done in the execution of his duty as a servant of the Crown in India or Burma before the relevant date, except with the consent in the case of a person who was employed in connection with the affairs of the Government of India or the affairs of Burma of the Governor-General in his discretion, and in the case of a person employed in connection with the affairs of a Province, the Governor of that Province, in his discretion.

(2) Any civil or criminal proceedings instituted, whether before or after the coming into operation of this part of this Act, against any person in respect of any act done or purporting to be done in the execution of his duty as a servant of the Crown in India or Burma before the relevant date shall be dismissed unless the Court is satisfied that the acts complained of were not done in good faith, and, where any such proceedings are dismissed, the costs incurred by the defendant shall in so far as they are not recoverable from the person instituting the proceedings be charged in the case of persons employed in connection with the functions of the Governor-General in Council of the affair

of Burma on the revenues of the Federation and in the case of persons employed in connection with the affairs of the Province on the revenues of that Province."

Sub-section (3) defines " the relevant date " and it is not disputed that 22nd April, 1943, was before the relevant date. At the hearing before the Special Bench the Advocate-General of India, who appeared for the Crown, conceded that proceedings before Courts-Martial were in the nature of criminal proceedings, that a Court-Martial could be properly described as a Court, and that at the relevant date the appellant was " a servant of the Crown employed in connection with the affairs of the Government of India." He contended, however, that Courts-Martial were not " criminal proceedings" in the sense in which that phrase was used in section 270 of the Act. The Special Bench accepted this contention, taking the view that the criminal proceedings referred to in section 270 of the Act were proceedings in the ordinary criminal Courts, and not proceedings in special Courts which were the creation of military law.

The appellant's petition was accordingly referred back to Blacker, J., with the answer that section 270 of the Act is not applicable to a Court-Martial held under the Army Act in respect of a British Officer attached to the Indian Army.

The appellant's petition was then heard and determined by Blacker, J., and judgment was given on the 24th April, 1944. The learned Judge said that the appellant's objection to his convictions could be divided into three groups :

(1) Objections to the jurisdiction of the Court-Martial.

(2) Want of the consent of the Governor-General under section 270 of the Act.

(3) Objections to the conduct of the trial that is to say, contentions that the procedure was such as to deny him justice, and that there was no evidence on which a conviction could be based.

As regards the second objection, the learned Judge held that he was bound by the judgment of the Special Bench referred to above, with which he agreed. As regards the third group of objections, the learned Judge said :

" With regard to the question of procedure I have seen the record of the Court-Martial, and the procedure adopted appears to me to be absolutely consistent with all principles of natural justice. . . . On the point whether there was evidence on which the conviction could be based, there was considerable argument before me regarding the powers of the High Court to inquire into this question. I have, however, been saved the labour of discussing these arguments in this judgment, as the matter has also been decided by the Special Bench, whose decision that this Court cannot inquire into the sufficiency of the evidence is not only binding on me, but is one with which I most respectfully concur. I have moreover perused the evidence on which the convictions were based, and I have found not only that there was evidence, but that it certainly could not be called insufficient. I can find no force, therefore, in the objections in the third group."

The learned Judge also rejected the first group of objections, relating to the jurisdiction of the Court-Martial, on grounds which need not be set out. Accordingly he held that there was no substance in any of the objections taken by the appellant and that the custody in which he was detained was clearly lawful. He, therefore, dismissed the petition and discharged the rule. He granted a certificate for leave to appeal to the Federal Court on the ground that the decision involved a substantial question as to the interpretation of section 270 of the Act.

The appellant appealed to the Federal Court of India. In his Amended Petition of Appeal he contended that the High Court's interpretation of section 270 of the Act was erroneous. In a petition for leave to urge further grounds he sought leave to appeal on additional grounds, which are substantially the same as those which had been dealt with in the judgment of Blacker, J. The appellant argued his case in person before the Federal Court. It appears from the judgment of that Court, and it was admitted by the appellant in arguing his case before their Lordships' Board, that in the Federal Court he only argued the question as to the true construction of section 270 of the Act, although he was given an opportunity to raise any other matte on account of which he considered that the proceedings against his were invaled or his conviction unjustified. The Federal Court dismissed the appeal, but granted laeve to appeal to His Majesty in Council.

Before this Board the appellant argued fully and clearly the question as to the true construction of section 270 of the Act. He opened his argument by saying that he did not rely on the other objections to the jurisdiction of the Court-Martial which he had argued before Blacker, J. He did, however, seek to raise, by an "application for permission to urge further grounds," a number of matters relating to the facts of the case and the conduct of the proceedings before the Court-Martial. Their Lordships did not think it right to allow the appellant to argue matters which he had elected not to argue before the Federal Court and on which, in consequence, that Court had given no decision. It is obvious, however, that if this application had been granted, the appellant would have been faced with a very difficult task, having regard to the observations of Blacker, J., already quoted.

The result is that the only question now arising for decision is whether section 270 (1) of the Act applies in the present case. If the sub-section does apply, the Court-Martial which convicted the appellant had no jurisdiction to try him, since the consent of the Governor-General was not obtained, and his conviction cannot stand. If the sub-section does not apply, the present appeal must fail.

The first matter to be considered is whether proceedings before a Court-Martial are "proceedings civil or criminal" in the sense in which these words are used in section 270 (1). Clearly proceedings before a Court-Martial are not "civil proceedings", but it is conceded that they may well come within the description of "criminal proceedings" in a suitable context. Their Lordships, however, agree with the view of the Federal Court that in section 270 (1) the phrase "proceedings civil or criminal" "indicates only the civil or criminal proceedings capable of being instituted under the ordinary law of the land" and does not include proceedings under the military law. The Courts in India gave several reasons for this view. It will be sufficient to refer to two of them, although the others are of some weight.

The first is based on the language of sub-section (2) of section 270. Clearly the phrase "civil or criminal proceedings" in that sub-section must bear the same meaning as the like phrase in sub-section (1), and in sub-section (2) the phrase cannot be construed as extending to Courts-Martial. As the Special Bench pointed out, the provision for the dismissal of proceedings "unless the Court is satisfied that the acts complained of were not done in good faith" if applied to proceedings under the Army Act, would render it practically impossible to maintain discipline. Further, it could hardly have been intended by the Legislature that, when a charge before a Court-Martial was dismissed, the costs should be recovered "from the person instituting the proceedings," nor would there appear to be any means of executing any such order for payment of costs.

Secondly, the necessity for speedy punishment is stressed by the preamble to the Army Act, but if section 270 (1) applies to Court-Martial proceedings, the trial would inevitably be delayed. Nor does the difficulty end there, for if section 270 (1) applies to Court-Martial proceedings, it would seem that it must equally apply to proceedings before a commanding officer, in which he is empowered to award summary punishments. It is inconceivable that the Legislature intended such proceedings to be delayed until the consent of the Governor-General had been obtained.

The appellant, conscious of the difficulties just mentioned, sought to meet them by contending that the sub-section did not apply to all proceedings under the Army Act, but only to proceedings in respect of acts on which charges under the ordinary criminal law could be based. In their Lordships' view it is quite impossible to read any such qualification into the sub-section. They agree with the view expressed by the learned Chief Justice in the Federal Court that,

"there is no halfway house. Either all Court-Martial proceedings under the Army Act are criminal proceedings within section 270 (1), or no Court-Martial proceedings are. If all Court-Martial proceedings under the Army Act are "criminal proceedings"—within section 270 (1)—there is no way to escape from the fantastic results which would follow from such a decision."

It is unnecessary to elaborate this matter further, as there is another reason why this appeal could not succeed, even if proceedings before a Court-Martial were " criminal proceedings " within section 270 (1). That sub-section only applies to proceedings instituted against any person " in respect of any act done or purporting to be done in the execution of his duty as a servant of the Crown in India or Burma " before the relevant date. On 17th February, 1948, the judgment of this Board was delivered in Privy Council Appeal No. 57 of 1947 (*Gill and another* v. *The King*[1]). In that case the appellant had been charged with accepting or conspiring to accept bribes, and the following passage from the judgment is relevant in the present case :

" The Federal Court has not expressed an opinion upon the necessity of a sanction under section 197 of the Code, but, as the High Court has expressed the view that such a sanction was in this case necessary and upon this much-vexed question the Board has heard full argument, their Lordships think it right to express their own view."

" In the first place their Lordships find it impossible at least in relation to an offence of this character to distinguish between section 270 and section 197. The words in section 270 in respect of any act done or purporting to be done in the execution of his duty as a servant of the Crown ' appear to them to have precisely the same connotation as the words in section 197 (1) ' any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty.' It is idle to speculate why a change of language was made. But, if a temporal meaning is not given, as in their Lordships' view it clearly should not be given, to the words in section 197 ' while acting, etc.' it is in their opinion impossible to differentiate between the two sections. In the consideration of section 197 much assistance is to be derived from the judgment of the Federal Court in *Hori Ram Singh* v. *R.*[2], and in particular from the careful analysis of previous authorities which is to be found in the opinion of Varadachariar, J. Their Lordships, while admitting the cogency of the argument that in the circumstances prevailing in India a large measure of protection from harassing proceedings may be necessary for public officials, cannot accede to the view that the relevant words have the scope that has in some cases been given to them. A public servant can only be said to act or to purport to act in the discharge of his official duty, if his act is such as to lie within the scope of his official duty. Thus a judge neither acts nor purports to act as a judge in receiving a bribe, though the judgment which he delivers may be such an act : nor does a Government medical officer act or purport to act as a public servant in picking the pocket of a patient whom he is examining, though the examination itself may be such an act. The test may well be whether the public servant, if challenged, can reasonably claim that, what he does, he does in virtue of his office, Applying such a test to the present case, it seems clear that Gill could not justify the acts in respect of which he was charged as acts done by him by virtue of the office that he held. Without further examination of the authorities their Lordships, finding themselves in general agreement with the opinion of the Federal Court in the case cited, think it sufficient to say that in their opinion no sanction under section 197 of the Code of Criminal Procedure was needed."

In the present case, it is equally clear that the appellant " could not justify the acts in respect of which he was charged ", *i.e.*, acts of fraudulently misapplying money entrusted to his care as a public servant, " as acts done by him by virtue of the office that he held."

For these reasons their Lordships will humbly advise His Majesty that this appeal should be dismissed.

V.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAMANNAR.

The Public Prosecutor .. *Appellant**

v.

Nagalla Seshagiri Rao .. *Respondent.*

Madras Prevention of Adulteration Act (III of 1918), *section* 20 (2) (f)—*Rules under, rule* 27-*A*—*Possession for purposes of sale of mixed oils—Offence whether constituted.*

The fact that a merchant mixes inferior oil with superior oil necessarily leads to the conclusion that it is the intention of the merchant to sell the mixture as superior oil. Where the accused who had in his possession a mixture of gingelly oil and groundnut oil in the proportion of 75 and 25 per cent. respectively, when asked by the inspecting maistri of the Municipality told him that he had groundnut oil with him,

1. (1948) 2 M.L.J. 6 (P.C.).
2. (1939) F.C.R. 159 : 2 F.L.J. 153 : (1939) 2 M.L.J. (Supp.) 23.

* Crl. Appeal No. 87 of 1947. 12th August, 1947.

Held, that the possession by the accused for purposes of sale of the mixed oils constituted an offence under rule 27-A of the rules made under section 20 (2) (*f*) of the Madras Prevention of Adulteration Act.

Appeal under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid respondent (accused) by the Stationary Sub-Magistrate of Guntur in C. C. No. 3579 of 1946 on his file.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

B. V. Ramanarasu for Respondent.

The Court delivered the following

JUDGMENT.—In this appeal by the Crown, the decision depends upon the construction of rule 27-A of the rules made under section 20 (2) (*f*) of the Madras Prevention of Adulteration Act and its application to the facts of the case, which are not in dispute.

The Sanitary Inspector employed by the Guntur Municipality sent his maistri on 30th July, 1946, to the shop of the accused to find out if accused was selling gingelly oil. The result of the inquiry was that the accused said that he had groundnut oil with him. The Inspector took from him a sample of the oil. He sent the oil for analysis and the Government Analyst, Guindy, reported that the sample contained 25 per cent. of groundnut oil and 75 per cent. of gingelly oil. The accused was thereupon prosecuted for an offence of contravening rule 27-A which is as follows :—

"No person shall sell or have in his possession for the purpose of sale a mixture of gingelly oil with groundnut oil, safflower oil or any other oil."

The accused in his statement of 22nd October, 1946, in answer to the charge that he had in his possession a mixture of gingelly oil with 25 per cent. of groundnut oil for the purpose of sale in his shop pleaded that the oil which he kept in his possession for the purpose of sale was not gingelly oil, but it was groundnut oil. The Stationary Sub-Magistrate, Guntur, acquitted the accused on the ground that the accused had not contravened rule 27-A. His reasoning was shortly this. When the sample oil was sold to the Sanitary Inspector it was sold as groundnut oil and rule 27-A prohibits only the mixture of gingelly oil with groundnut oil which meant that to come within the purview of rule 27-A, the added substance should be groundnut oil, but here the added substance was gingelly oil. The Magistrate also tried to support his conclusion by making a reference to the relative prices of groundnut oil and gingelly oil. It was in evidence that the price of groundnut oil was Rs. 1-8-0 whereas the price of gingelly oil was Rs. 3 per viss. According to the Magistrate, therefore, it was unnatural and mysterious that the merchant should add 75 per cent. of gingelly oil which costs more and 25 per cent. of groundnut oil which costs less and to sell the mixture as groundnut oil for a loss.

The entire basis of the argument of Mr. Ramanarasu who argued the case for the accused with great resourcefulness was that the sample of the oil sold to the Sanitary Inspector was sold as groundnut oil. According to him, that would make groundnut oil, as it were, the base with which any other oil like gingelly oil, in this instance, is added. In my opinion that is not the proper way of construing the rule. The oil as it actually was, at the time it was kept for sale, cannot properly be said to be either groundnut oil or gingelly oil. It was certainly a mixture of both. In this case the Magistrate thought that the added substance was gingelly oil. I am unable to follow why. Even from the point of view of the relative proportion, gingelly oil was 75 per cent. whereas groundnut oil was only 25 per cent. The Magistrate thought that the action of the accused in selling this mixture as groundnut oil at a distinct loss was unnatural and mysterious. The mystery is because the one instance of the sale of the sample oil to the Sanitary Inspector as groundnut oil was taken as the criterion. I agree with the Magistrate that it is impossible to believe that any merchant in his senses would make a mixture of gingelly oil and groundnut oil in the proportion found in this case and sell it as groundnut oil which costs less. The obvious inference is that though for reasons

which can easily be comprehended the particular sample in question was sold to the officer as groundnut oil, the accused was having this mixture to be sold as gingelly oil which certainly costs more.

But I am not deciding this case on that ground. There is some force in the contention of Mr. Ramanarasu that gingelly oil is mentioned as being mixed with groundnut oil, safflower oil and any other oil. That is evidently because the idea underlying the rule is that gingelly oil is the best and the costliest of the oils mentioned there. Mr. Ramanarasu also pressed upon me that the idea of adulteration connotes always a mixture of inferior stuff and a superior article of consumption, but I do not think that this contention really helps him. The fact that a merchant mixes inferior oil with superior oil necessarily, in my opinion, leads to the conclusion that it is the intention of the merchant to sell the mixture as superior oil; otherwise the action of the merchant would be, in the words of the Sub-Magistrate "unnatural and mysterious." In the present case we have certainly a mixture of the inferior groundnut oil with gingelly oil. In my opinion, the proportion would not matter at all. If in this case the proportion was 75 per cent. gingelly oil and 25 per cent. of groundnut oil, it may be in another case the proportion gingelly oil 25 per cent. and groundnut oil 75 per cent. It would nevertheless mean that another oil has been added to gingelly oil which I agree with Mr. Ramanarasu is treated as the primary oil.

The accused was charged with the offence of contravening rule 27-A which covers the case of possessing for the purpose of sale a mixture of gingelly oil with groundnut oil. The mixture in question is certainly a mixture of gingelly oil with groundnut oil. To say that it is also a mixture of groundnut oil with gingelly oil may not be incorrect, but on that ground it cannot be denied that it is a mixture of gingelly oil with groundnut oil; and the possession of such a mixture is an offence within the meaning of rule 27-A. I am therefore of opinion that the accused was guilty of the offence with which he was charged and the acquittal was wrong in law. I therefore set aside the order of acquittal passed by the Sub-Magistrate and convict the accused of the offence with which he was charged and I sentence him to pay a fine of Rs. 20; in default to undergo simple imprisonment for one week.

B.V.V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE GOVINDA MENON.

Gowleru Kotrappa and others .. *Accused.**

Criminal Procedure Code (V of 1898), *section* 438—*Reference to High Court on questions of law raised during the course of proceedings in a lower Court—Competency.*

It is not the function of the High Court to give opinions on questions of law raised during the course of proceedings in the lower Court and therefore a reference to the High Court by a District Magistrate on such questions would be incompetent. The Legislature has not chosen to give power to a District Magistrate to refer questions of law arising interlocutorily during the course of an enquiry or trial

Case referred for the orders of the High Court under section 438, Criminal Procedure Code, by the District Magistrate, Bellary, in his letter C. R. P. No. 15 of 1947 E., 1, dated 25th February, 1948.

Accused not represented.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—The District Magistrate of Bellary has moved this Court under section 438, Criminal Procedure Code, for a decision on the point raised by him

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* Crl. R. C. No. 292 of 1948. 6th July, 1948.
(Case Referred No. 26 of 1948.)

regarding the correctness or otherwise of a ruling given by the Stationary Sub-Magistrate, Hospet, in C. C. No. 1179 of 1946 on his file. From the letter of reference of the District Magistrate it is seen that during the course of the examination of a prosecution witness the vakil for the complainant wanted to get a copy of the report of the police under section 202, sub-clause (1), Criminal Procedure Code and file the same as an exhibit in the case. The Stationary Sub-Magistrate held, on the objections of the defence counsel, that the copy of the report is irrelevant. Later on, during the course of the further cross-examination of P. W. 7, the Sub-Inspector of Police, a question was put to him as to whether he found the case of the complainant to be true or not in the course of his enquiry under section 202, Criminal Procedure Code. This question also was disallowed by the trial Court on the objection raised by the defence counsel. The District Magistrate after discussing the point of law involved in these rulings disagrees with the view taken by the Stationary Sub-Magistrate and has submitted the papers to this Court for action under section 439, Criminal Procedure Code. When it came on for hearing on a previous occasion, as no notice had been sent to the accused I issued notice to them, and even though the same was served, nobody appeared in this Court. The learned Public Prosecutor has placed before me all the relevant and important materials.

At the very outset I may say that the procedure adopted by the District Magistrate is not correct or proper. It is not the function of this Court to give opinions on questions of law raised during the course of proceedings in a lower Court. If a ruling on a particular point given by a Magistrate is wrong it is permissible for a complainant or an accused to come up in revision if there are any valid grounds for such procedure ; but the more appropriate course is to raise the question at the stage of an appeal and not come up in revision at an interlocutory stage even where the party aggrieved is a private party. Therefore, it is incumbent upon Subordinate Courts to take care that questions of law arising in pending proceedings are not referred for the opinion of the High Court. The analogous provisions regarding reference to the High Court in the Civil Procedure Code are contained in section 114 and Order 46. Order 46, rule 1 says that where the decree *is not subject to appeal* and where any question of law or usage having the force of law arises, on which the Court trying the suit or appeal, or executing the decree entertains reasonable doubt, the Court may, either of its own motion or on the application of any of the parties, draw up a statement of the facts of the case and the point on which doubt is entertained, and refer such statement with its own opinion on the point for the decision of the High Court. Therefore in the Civil Procedure Code, there is no provision for reference where the decree in the suit or appeal is subject to an appeal.

In a decision reported in In re *Palani Goundan*[1], Sadasiva Aiyar, J., has held that a District Magistrate is not competent to report to the High Court under section 438 a point of law actually arising in a case pending before him. In that case what happened was that there was a revision petition before the District Magistrate and a question of law arose therein, whereupon the District Magistrate referred the matter to the High Court. It was held by the learned Judge that such a procedure was irregular. In this case also on the disallowance of the question and the refusal to admit the document as evidence the aggrieved party filed a revision on which this reference has been made. The decision cited above is authority against the procedure adopted by the District Magistrate. Moreover it seems to me that the Legislature has not chosen to give power to a District Magistrate to refer questions of law arising interlocutorily during the course of an enquiry or trial. I therefore hold that this reference is incompetent and the records are directed to be returned.

V.S. *Reference held incompetent.*

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1. A.I.R. 1914 Mad. 100 (2).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO.

S. Subba Rao .. *Appellant**

v.

Mangavalli Venkataseshacharlu and another .. *Respondents.*

Civil Procedure Code (V of 1908), *section* 47 *and Transfer of Property Act (IV of* 1882), *section* 52—*Appellant's purchase* pendente lite *respondent's mortgage suit—Appellant and respondent representatives of common judgment-debtor—Applicability of section* 47 *of the Code—Principle of* lis pendens *operates.*

The respondent filed a suit against one *M* on the foot of a mortgage and in execution of the decree obtained by him brought the property to sale and purchased it himself. He then applied to the Court for delivery of possession and impleaded as party to the application, the appellant, who pending the disposal of the respondent's suit had purchased the property in a Court sale, in execution against *M*. The appellant contended that the respondent's application under section 47, Civil Procedure Code, was not maintainable, as both he and the respondent derived title from the common judgment-debtor.

Held, whatever the merits of that contention might have been, it could not be urged by the appellant in the circumstances of this case, where he purchased the property pending disposal of the mortgage suit; even though the transfer was not a voluntary one, the principle of section 52 of the Transfer of Property Act applied.

Parameswari Debi v. *Ramcharan*, (1937) 2 M.L.J. 359 (P.C.), followed.

Appeal against the order of the District Court of Cuddappah, dated 26th September, 1945, in A. S. No. 138 of 1943, preferred against the E. A. No. 435 of 1945 in O. S. No. 47 of 1940, District Court, Cuddappah.

V. Ramaswami Aiyar for Appellant.

C. Rangaswami Aiyangar for Respondents.

The Court delivered the following

JUDGMENT.—This appeal is preferred against the order of the learned District Judge of Cuddappah confirming the order of the learned District Munsiff of Cuddappah made in E. A. No. 435 of 1943. The second respondent in the execution application is the appellant in this Court.

The Co-operative Society, Cuddappah, obtained an award decree, dated 6th June, 1930, in respect of a mortgage debt against one Ambakka. That decree was assigned by the Co-operative Society to one Subba Rao, the appellant in this appeal on 12th February, 1931. On the 25th November, 1933, Ambakka conveyed all the properties belonging to her to one Muneyya. On the 16th January, 1935, Ambakka died. In E. P. No. 1935, Subba Rao executed the award decree against Muneyya and the properties mortgaged was sold. On 12th July, 1937, Muneyya executed a mortgage in favour of one Seshacharlu for a sum of Rs. 600 borrowed by him for financing a litigation. This mortgage was created against a house belonging to Ambakka and sold by her to Muneyya under the aforesaid sale deed but not comprised in the mortgage in favour of the Co-operative Society. Subba Rao filed E. P. No. 1340 of 1939 against Muneyya impleading him in the execution petition as a person who covenanted under the sale deed from Ambakka to pay a debt due to the Co-operative Society. The house was sold and was purchased by Subba Rao on the 4th November, 1940. He obtained possession of the house on 10th November, 1940. Meanwhile on the 10th February, 1940, Seshacharlu filed a suit O. S. No. 47 of 1940 in the District Munsiff's Court of Cuddappah on foot of the mortgage in his favour executed by Muneyya and obtained a preliminary and then a final decree in that suit. The final decree is dated the 12th July, 1940, and in execution of that decree Seshacharlu purchased the house himself in the sale held on 21st October, 1940, which was confirmed on 25th November, 1940. He then filed E. A. No. 435 of 1943 and impleaded as parties to that application, Muneyya as the first respondent and Subba Rao as the second respondent. He sought the permission of the Court in that application to implead Subba Rao as a party and prayed for possession of the scheduled property, *i.e.*, the property

* A. A. A. O. No. 77 of 1946. 14th November, 1947.

purchased by him in pursuance of the mortgage decree. This was resisted by Subba Rao on the ground that the petition was not maintainable. The application, it may be stated here, was made under sections 47, 146 and 151 and Order 21, rule 95 of the Civil Procedure Code.

The main contention of Subba Rao in the Courts below and here is that section 47 of the Code has no application as himself and Seshacharlu (the first respondent in this appeal) derived title through Muneyya, the common judgment-debtor. This contention, which is repeated here, was rejected by the Courts below. If there is not a further complication of the fact that there was a Court sale in favour of Subba Rao, and delivery of possession to him through Court during the pendency of the mortgage suit instituted by Seshacharlu, probably there might be some force in the contention urged on behalf of the appellant. As the purchase by Subba Rao was during the pendency of the mortgage suit, though the transfer was not a voluntary transfer, the principle of section 52 of the Transfer of Property Act applies and this position has been established in this Court and is not challenged before me. In a case parallel to the present case, the Privy Council in a decision reported in *Parameswari Debi* v. *Ramcharan*[1] had to consider the applicability of section 47 of the Code. There, during the pendency of a suit on mortgage, the appellant obtained a usufructuary mortgage in his favour from the mortgagor and came into possession of the property. Subsequently, during the pendency of the mortgage suit, the equity of redemption of the mortgagor in the property was sold in execution of a mortgage decree and was purchased by the appellant. The mortgagee decree-holders purchased the property in execution of their decree and obtained symbolical possession from the judgment-debtors. They then applied for actual possession against the appellant who resisted the application on the ground that section 47 of the Code had no application and that the remedy of the mortgagee-decree-holder-purchasers, if any, was by way of a separate suit. It was also contended that the appellant was not a party to the decree which was sought to be executed against him and therefore section 47 of the Code had no application. In repelling this contention, their Lordships of the Judicial Committee observed at page 361 as follows :

" It is then said that the appellant was not a party to the decree which is sought to be executed against him. But he took the property from the defendant *pendente lite* and must be treated as his representative in interest. He is bound by the result of the decree. If he had not obtained possession of the property from the defendant, the latter would have been required to deliver it to the plaintiffs. And the mere circumstance that he got possession from the defendant in pursuance of a transfer, which was invalid as against the plaintiffs, cannot detract from their rights under the decree . . . . The dispute between the appellant and the decree-holders related to the execution of the decree, and, as he was the representative of the judgment-debtor, the Court executing the decree had jurisdiction under section 47 of the Civil Procedure Code to determine that dispute. The Court of first instance did determine it, and, as all the requirements of the section were satisfied, the decree-holders were entitled to appeal against that decision to the High Court."

In view of this decision it is unnecessary to consider the effect of the Full Bench decision in *Annamalai* v. *Ramaswami*[2] and the other cases relied on by Mr. Ramaswami Aiyar, the learned advocate for the appellant, as in those decisions there was no necessity to consider the principle of *lis pendens* and its applicability. I therefore hold that the decision of the Courts below is correct. This appeal fails and is dismissed with costs of the first respondent.

(Leave to appeal is refused.)

V.P.S. *Appeal dismissed.*

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1. (1937) 2 M.L.J. 359 (P.C.).
2. (1941) 1 M.L.J. 45 : I.L.R. 1941 Mad. 438 (F.B.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO.

Kandaswami Udayan and another .. *Petitioners**

v.

Annamalai Pillai and others .. *Respondents.*

Court-Fees Act (VII of 1870 *as amended in Madras), section* 7 (iv-A) *and* (v)—*Alienation by father—Suit for partition and possession—Election to treat alienation as void—Setting aside sale deed—Court-fee whether payable under section* 7 (iv-A).

An alienation by a limited owner or a manager is not absolutely void but is *prima facie* voidable at the election of the reversionary heir or other members of the family. They can elect to treat it as a nullity without the intervention of the Court and the commencement of an action to require possession of the property may amount to such an election. In such cases the plaintiff is not bound to ask for cancellation of the sale deed but can claim the relief of possession of the property covered by the sale deed, ignoring the sale.

The plaintiffs instituted the suit for partition of the family properties by metes and bounds. It was alleged that the properties were the ancestral properties of the plaintiffs and their father the first defendant and that the first defendant executed a mortgage and that he had later on sold the said properties though there was no necessity for the sale. The plaintiffs while seeking to recover possession ignoring the alienation offered to pay their share of the mortgage debt if it was found that they were bound to do so,

Held, that as the plaintiffs had by filing the suit elected to treat the alienation as not binding on them the suit was in substance one for mere possession falling under section 7 (*v*) of the Court-Fees Act and that the plaint was not leviable to court-fee under section 7 (*iv-A*) of the Act as amended in Madras.

Ramasami v. *Rangachariar*, (1940) 1 M.L.J. 32 : I.L.R. (1940) Mad. 259 (F.B.) and *Kalianna Goundan* v. *Balasubramaniam*, (1946) 2 M.L.J. 459, relied on.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the District Munsiff of Salem, dated 7th January, 1947, in O. S. No. 127 of 1946.

N. Sivaramakrishna Aiyar for Petitioners.

D. Ramaswami Aiyangar and *P. S. Srinivasa Desikan* for Respond ents.

The Court delivered the following

JUDGMENT.—The question that arises in this revision petition is one of pecuniary jurisdiction. It is conceded that if section 7 (*iv-A*) of the Court-Fees Act applies to the relief claimed in the plaint, the District Munsiff's Court of Salem, will have no jurisdiction to entertain the suit.

The suit was for partition of the properties by metes and bounds into four equal shares and for the allotment of three such shares to the plaintiffs. It is alleged in the plaint that the properties described therein were the ancestral properties of the plaintiffs and their father, the first defendant. The first defendant had executed a mortgage in respect of the said properties in favour of the second defendant for Rs. 2,320. The first defendant being addicted to bad habits, was prevailed upon to execute a sale deed on 22nd January, 1937, for discharging the mortgage debt and other fictitious considerations recited in the sale. It is also stated that there was no necessity to alienate the entire property as the mortgage debt could have been discharged by selling a one-fourth part of the properties. It is also alleged in the plaint that the plaintiffs were willing to pay their share of the mortgage amount due to the second defendant if the Court found that the shares of the plaintiffs also should pay up the mortgage proportionately. The plaint also discloses that immediately the plaintiffs came to know of the alienation a year back, they called upon defendants 2 and 3 to give back the lands to them. It will therefore be seen that the suit is a simple suit for partition by members of a joint Hindu family and for possession of their shares after electing to treat the said sale as not binding on them.

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* C. R. P. No. 315 of 1947. 25th March, 1948.

The plaintiffs valued the suit under section 7 (*v*) of the Court-Fees Act at Rs. 62-5-6 and have given the same valuation for purpose of jurisdiction also. The defendants contended in the lower Court that the plaintiffs should have asked for the cancellation of the sale deed and paid court-fees under section 7 (*iv-A*) of the Court-Fees Act. If that section applied, as the market value of the suit property was beyond the pecuniary jurisdiction of the District Munsiff's Court the plaint should be returned for presentation in the proper Court. The learned District Munsiff rejected this contention relying upon the decision in *Ramaswami* v. *Rangachariar*[1].

Learned counsel for the petitioners contended that section 7 (*iv-A*) of the Court-Fees Act applies to the reliefs claimed in the plaint. He made a distinction between a case where the plaintiff alleges that a sale deed is not supported by consideration at all and a case where he admits the binding nature of at least a part of the consideration. Basing on that distinction he argued that as in the present case the binding nature of the mortgage is not questioned by the plaintiffs and as they have also indicated their intention to redeem a proportionate share of the mortgage amount, they are bound to ask for a cancellation of the sale deed. In support of his contentions he relied upon the decisions in *Malkarjun* v. *Narhari*[2] and *Ganpat Lal* v. *Bindabasini Prasad Narayan Singh*[3]. In *Malkarjun* v. *Narhari*[2] the Court refused redemption of a mortgage to the plaintiff on the ground that the properties were sold in execution of a decree. The sale took place after notice had been wrongly served upon a person who was not the legal representative of the judgment-debtor's estate. Their Lordships held that the decree was not a nullity and it was necessary for the plaintiffs to set aside the sale in order to clear the ground for redemption of the mortgage. That decision does not in any way support the distinction sought to be made by the learned counsel for the petitioners. The question of court-fee or of pecuniary jurisdiction did not arise for decision in that case. The decision in *Ganpat Lal* v. *Bindabasini Prasad Narayan Singh*[3] is also that of the Judicial Committee. In that case a decree was made on the 20th January, 1902, in execution of which the mortgaged property was sold and purchased by the mortgagee. In a suit in 1909 by the sons of the mortgagor they impeached neither the debt nor the mortgage but admitted they were binding on them and they did not in their plaint seek to set aside the decree or the sale under it but only claimed to be entitled to redeem the mortgaged property on the ground that they had been minors at the time of the suit. Their Lordships held that the right of redemption had been extinguished by the decree and that until the sale had been set aside it could not be exercised. The point decided in the case was that the plaintiff could not claim a right of redemption after the decree and sale without getting them set aside. It has no bearing on the question that is raised in this revision petition.

The principle applicable to this class of cases has been laid down by the Privy Council in *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi*[4]. The relevant passage from the decision has been extracted in the Full Bench decision in *Ramaswami* v. *Rangachariar*[1] and I need not therefore quote it *in extenso*. An alienation by a limited owner, or a manager, is not absolutely void but is *prima facie* voidable at the election of the reversionary heir or the other members of the family. He can elect to treat it as a nullity without the intervention of the Court and the commencement of an action to require possession of the property may amount to such election. In the present case it is stated clearly that the plaintiffs have elected to treat the sale as not binding on them and the suit was filed on the basis of such election. They are not therefore bound to ask for cancellation of the sale deed but can claim the relief of possession of the property covered by the sale deed, ignoring the sale. They are not bound under substantive law to sue for a declaration or cancellation in respect of the said alienation. In the same decision,

1. (1940) 1 M.L.J. 32 : I.L.R. (1940) Mad. 259 at 279 (F.B.).
2. (1900) 10 M.L.J. 368 : L.R. 27 I.A. 216 : I.L.R. 25 Bom. 337 (P.C.).
3. (1920) 39 M.L.J. 108 : L.R. 47 I.A. 91 : I.L.R. 47 Cal. 924 (P.C.).
4. (1907) 17 M.L.J. 154 : L.R. 34 I.A. 87 : I.L.R. 34 Cal. 329 (P.C.).

Ramaswami v. *Rangachariar*[1] Leach, C.J., held that in regard to an alienation where possession had passed to the alienee and where the plaintiff asked for setting aside the same and be put in possession of the share of the properties so alienated, the plaintiff had to stamp his relief in accordance with the provisions of section 7 (*v*) of the Court-Fees Act. Though no argument was addressed in that case seeking to apply section 7 (*iv-A*) to such alienations and though there was no discussion in regard to the application of the said section, this is a direct decision on the point and I am bound by the same. Bell, J., followed the observations of the Full Bench decision and held in similar circumstances in *Kalianna Goundan* v. *Balasubramaniam*[1], that section 7 (*iv-A*) has no application. In that case a suit was filed by three sons by their next friend, their mother, for a declaration that a sale deed executed by their father for himself and as guardian of the first and second plaintiffs was not binding on them, not having been executed for family necessities, and for partition and recovery of the properties. The learned Judge held that the suit was in essence one for possession and should be dealt with under section 7 (*v*). He rejected the plea that the plaint was governed by section 7 (*iv-A*) of the Court-Fees Act. With respect I agree with the reasoning of the learned Judge in the judgment.

For the aforesaid reasons I hold that the plaint has been properly valued and the District Munsiff has jurisdiction to entertain the suit. No other point was argued in the revision. In the result the revision petition is dismissed with costs.

B.V.V. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HAPPELL AND MR. JUSTICE GOVINDARAJACHARI.

Antony D'Silva and others .. *Petitioners.**

Criminal Procedure Code (V of 1898), sections 177, 179 and 188—Offence under section 420, Indian Penal Code—Selling of bogus lottery tickets—Place where offence is committed—Offence committed partly in Indian State—Absence of certificate from Political Agent—Effect—Trial for other charges—Permissibility.

The accused who were residents of South Kanara were charged with an offence under section 420, Indian Penal Code, with selling to a resident of Travancore through another person who was also a resident of Travancore certain lottery tickets without running a lottery and thereby inducing the former to part with money. It was proved that the lottery tickets were printed in South Kanara and that they were despatched from South Kanara to Travancore and sold there through the agent of the accused. In certain cases the lottery tickets were sent by the accused by Value Payable Post to the residents in Travancore.

Held, that the offence was committed only in Travancore because the purchaser was deceived and made to part with his money only at that place.

Held further, that even assuming that part of the offence occurred in British India and a part in the Indian State the prosecution in British India could not be proceeded with in the absence of a certificate from the Political Agent as prescribed by the proviso to section 188, Criminal Procedure Code.

The mere fact that the Court has no territorial jurisdiction or the requirement of the proviso to section 188 of the Criminal Procedure Code has not been satisfied as regards one charge will not in any way exclude the jurisdiction of the Court to entertain another or other charges not similarly affected or render the prosecution under such charges illegal or irregular.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the Special First Class Magistrate, Mangalore, dated 1st December, 1947, in C. C. No. 10 of 1947, etc.

M. K. Nambiar and *M. Sekhara Menon* for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

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1. (1946) 2 M.L.J. 459.

* Crl. R. C. No. 1338 of 1947. (Crl. R. P. No. 1213 of 1947) and Crl. M. P. Nos. 2024, etc., of 1947 and 48 and 198 of 1948.

19th March, 1948.

The Order of the Court was made by

Govindarajachari, J.—The above Criminal Revision Case and Criminal Miscellaneous Petitions arise out of seven cases on the file of the Special First Class Magistrate of Mangalore and involve an important question of jurisdiction. They have been placed before a Bench by order of Govinda Menon, J. It is unnecessary at this stage to set out the several charges framed against the various petitioners.

The arguments before us proceeded on the footing that there are only two classes of cases involved, that the first charge in C. C. No. 10 of 1947 out of which Crl. R. C. No. 1338 of 1947 arises is typical of one of these classes while the other is typified by the second charge in the same Calendar case.

Under the first charge the petitioners in Crl. R. C. No. 1338 of 1947 are charged with cheating P. W. 13 by sending him certain lottery tickets without running a lottery and thereby inducing him to deliver money which act of cheating was partly committed in South Kanara and partly in Trichur. The accused in this case and in the other cases are residents of South Kanara and therefore " native Indian subjects of His Majesty " within the meaning of the Indian Penal Code. P. W. 13 is a resident of Trichur. Under the second charge which is also under section 420, Indian Penal Code, the accused are charged with selling to P. W. 10, a resident of Travancore through P. W. 9 also a resident of Travancore, certain lottery tickets without running a lottery and thereby inducing the former to part with money. It is said to have been committed partly in South Kanara and partly in Travancore.

In regard to the latter charge the relevant evidence is that of P. W. 9 and P. W. 10 which is to the following effect. For the purpose of deciding the preliminary question of jurisdiction the truth of this evidence must, of course, be assumed. P. W. 10 saw in Travancore certain lottery tickets similar to Exs. P-83 series and was led to believe that a lottery would be held. He then purchased from P.W. 9 Exs. P-83 series and paid cash for them. The accused never held the lottery. P. W. 9 was, according to his evidence, the outright purchaser of the tickets—P-83 series—from the accused and was not a mere agent to sell the tickets on their behalf. The argument of Mr. M. K. Nambiar the learned advocate for the petitioners was that the offence took place at Travancore. The learned Public Prosecutor argued on the other hand that it was committed in South Kanara. Looking at the definition of " cheating " contained in section 415, Indian Penal Code, there can be no doubt that it consists of two ingredients, namely, (1) deception and (2) parting with property by the person deceived. Under the Explanation a dishonest concealment of facts is deception within the meaning of the section. Deception may result from words spoken or written, or from visible representati ons or from conduct. When tickets resembling Exs. P-83 series were offered for sale in Travancore either by an agent of the accused or by a purchaser from them the accused must be taken to have represented to the persons who saw those tickets that a lottery would be run. If that representation or assurance turns out to be false the accused can certainly be said to have practised deception on the persons who saw those tickets of whom P. W. 10 is one. According to Mr. Nambiar the representation took place only when the tickets were so seen by P. W. 10. In consequence of that representation P. W. 10 bought Exs. P-83 series from P.W. 9 and the payment of money by P. W. 10 to P. W. 9 being also in Travancore the argument on behalf of the petitioners was that both parts of the offence occurred outside South Kanara and within the jurisdiction of a Sovereign State, namely, Travancore. The learned Public Prosecutor argued that the tickets were printed in South Kanara, that they were despatched from South Kanara to Travancore to P. W. 9, who sold them in his turn to P. W. 10, that all these facts must be regarded as part of one series and that the offence must be held to have occurred in South Kanara at any rate as regards the deception practised on P. W. 10.

Under section 177 of the Criminal Procedure Code every offence shall ordinarily be enquired into and tried by the Court within the local limits of whose

jurisdiction it was committed. This is based on the principle of English law that all crime is local. Section 177 of the Criminal Procedure Code provides for the simplest case and perhaps the case which most frequently occurs, namely, of an offence committed entirely within a single jurisdiction. The other provisions of Chapter XV of the Criminal Procedure Code deal with a variety of situations which are more or less complicated. Another material section for the present purpose is section 179 which provides that,

"When a person is accused of the commission of any offence by reason of anything which has been done, and of any consequence which has ensued, such offence may be inquired into or tried by a Court within the local limits of whose jurisdiction any such thing has been done, or any such consequence has ensued."

Dealing with a case coming under section 420, Indian Penal Code, it may at once be stated that if the deception and the deprivation of property both take place within the local limits of the jurisdiction of a Court, section 177 of the Criminal Procedure Code will directly apply. If, on the other hand, deception is practised within the territorial jurisdiction of one Court and the consequence, namely, payment of money occurs within the jurisdiction of another Court either Court can, by virtue of section 179 of the Criminal Procedure Code, try the case subject of course to the applicability of the Code of Criminal Procedure to both the Courts (see *Bichitranund Dass* v. *Bhug But Perai*[1]). If one of these Courts is not governed by the Criminal Procedure Code as for instance where it is a Court situated in an Indian State, section 179 of the Criminal Procedure Code has obviously no application to that Court. But where an offence is committed at any place without and beyond the limits of British India by a Native Indian subject of His Majesty section 188 of the Criminal Procedure Code provides that he may be dealt with in respect of such an offence as if it had been committed at any place within British India at which he may be found. To this, however, there is a proviso that,

"Notwithstanding anything in any of the preceding sections of this Chapter no charge as to any such offence shall be inquired into in British India unless the Political Agent, if there is one, for the territory in which the offence is alleged to have been committed, certifies that, in his opinion, the charge ought to be inquired into in British India; and, where there is no Political Agent, the sanction of the Provincial Government shall be required."

Section 188 of the Criminal Procedure Code is the procedural counter-part, if we may so describe it, of section 4 of the Indian Penal Code which makes the provisions of that Code apply to any offence committed by any Native Indian subject of His Majesty in any place without and beyond British India. The Explanation to that section which was added by way of abundant caution makes it quite explicit that the word "offence" in the section includes every act committed outside British India which, if committed in British India, would be punishable under the Code.

In support of his argument that the deception can be said to have been practised only in Travancore Mr. Nambiar cited the decisions in *Ratnam* v. *Emperor*[2], *Abdur Shukur Sahib*, In re[3] and *Sivaprakasam Pillai*, In re[4]. The first two of these cases were concerned with an offence under section 182, Indian Penal Code; namely, of giving false information with intent to cause a public servant to use his lawful power to the injury of another person, the letter addressed to the public servant concerned being posted at one place and delivered at another. The false information was held in both these cases to have been given at the place where the letter was delivered. Horwill, J., who decided *Abdur Shukur Sahib*, In re[3], put the matter pithily when he said that the post office acted as the agent of the accused in carrying the letter from one place to another and that the effect was the same as if the accused handed over the letter in person at the latter place. In *Sivaprakasam Pillai*, In re[4], the offence alleged was one under section 211, Indian Penal Code, namely, of making a false charge of offence with intent to injure the person against whom it is made. Here again it was held that where the posting and delivery of a letter which contained such a false charge were at different places,

1. (1889) I.L.R. 16 Cal. 667.
2. A.I.R. 1932 Mad. 427.
3. (1943) 1 M.L.J. 409.
4. (1948) 1 M.L.J. 21.

the jurisdiction to try the offence was in the Court within whose local limits the delivery was made. In our opinion the present case is analogical. The printing of the lottery tickets in South Kanara or their despatch to Travancore cannot be regarded as being an essential part of the deception which is contemplated by section 415, Indian Penal Code, though of course there could have been no deception if the lottery tickets had not been printed or if they were not sent by the accused to Travancore where they were seen by P. W. 10 amongst others. If the accused were guilty of deceiving P.W. 10 by the representation contained in the lottery tickets, the deception or representation for the purpose of section 415, Indian Penal Code, must be taken to have commenced only when P. W. 10 saw them and was induced to believe in something which was not true. The acts which preceded the display of the tickets to P.W. 10 can in no sense be regarded as forming an integral part of the offence of cheating. It is by seeing tickets similar to Exs. P-83 series that P. W. 10 was deceived. The distribution of such tickets through an agent or through a purchaser like P. W. 9 to people in Travancore may constitute an act of deception practised on P. W. 10 by the accused because they knew or must have known that when P. W. 10 or other persons in his position saw these tickets in the usual course they would be deceived into believing that the lottery would take place. It cannot be pretended otherwise. The representation, however, in our opinion, must be deemed to have been made in Travancore and nowhere else. As regards the payment of money there is so far as this charge is concerned no difficulty. The money was paid by P. W. 10 and received by P. W. 9 in Travancore. As regards, therefore, both the act that was done and the consequence that followed the offence under the second charge must be held to have been committed in Travancore.

Turning to the first charge the matter is somewhat more complicated and the series of events culminating in the final receipt of the price of the lottery tickets by the accused from the post office must be divided into several stages and viewed separately from the point of view of jurisdiction. The first of these events is the deception to which P. W. 13 was subjected when he saw Exs. P-93 series and believed that there would be a lottery and prizes would be drawn. This, from what we have already stated, must be taken to have occurred only in Trichur, the printing of the tickets and their despatch by the accused to Trichur being irrelevant as they form no part of the representations from which stage alone the committing of the offence of cheating would begin. The next stage is the letter which P. W. 13 addressed to the accused asking for lottery tickets to be sent by Value Payable Post and the compliance with that order by the accused. The conduct of the accused in sending a consignment of lottery tickets without any attempt to disillusion, P.W. 13 may be regarded as a concealment of facts within the meaning of the Explanation to section 415, Indian Penal Code and therefore deception by conduct, but that deception again, in our opinion, must be held to have been practised when the packet was delivered to P. W. 13 and was found to contain no communication of any kind informing him of the truth. According to the line of cases to which we have just adverted the post office may be regarded as the agent of the accused for the delivery of the packet and borrowing the reasoning of *Abdur Shukur Sahib,* In re[1], the effect is the same as if the accused came over to Trichur and delivered the packet to P.W. 13 without saying anything as to whether the lottery was to be run at all. When he received the packet which was sent to him by Value Payable Post, P. W. 13 paid the amount to the post office which, in our opinion, must be held to have received the amount as the agent of the person who sent the packet. The amount is no doubt handed over ultimately to the accused by the post office in South Kanara. But if the amount, when it was received by the post office in Trichur, was the property of the accused the secondary receipt of the same amount at South Kanara is of no importance. We do not regard *Kaleek* v. *Emperor*[2] as having decided anything more than that the handing over of money

1. (1943) 1 M.L.J. 409. 2. (1926) 52 M.L.J. 511.

to the post office in respect of a Value Payable Parcel completes the delivery contemplated by section 415, Indian Penal Code and that the subsequent delivery by the post office to the accused is not a necessary ingredient of the offence. The restricted scope of this decision is sufficiently indicated by its reference to *Krishnamachari* v. *Shah Wallace & Co.*[1]

Moreover from the point of view of P. W. 13 the delivery within the meaning of section 415, Indian Penal Code, took place at Trichur when he parted with money unless the post office is to be regarded as the agent of P. W. 13 for transmitting the amount to the accused in South Kanara. Assuming for a moment that the delivery of the money must be taken to have been made in South Kanara when the value of the packet was finally paid over to the accused the result would only be that the deception was in Trichur and the consequence was in South Kanara. Under section 179, Criminal Procedure Code, the South Kanara Court would then have jurisdiction but a part of the offence would have occurred outside British India. This brings us to another aspect of the case which we shall now proceed to deal with.

Assuming that section 179, Criminal Procedure Code, applies Mr. Nambiar argued that under the proviso to section 188, Criminal Procedure Code, a certificate of the Political Agent as contemplated by that proviso will be needed. In its opening words section 188, Criminal Procedure Code, refers to the commission of an offence by a Native Indian subject of His Majesty at any place without and beyond the limits of British India. Comparing this with the language of section 177, Criminal Procedure Code, it may seem as if section 188, Criminal Procedure Code, deals only with offences committed entirely outside British India and not with cases where one ingredient of an offence occurs outside British India while the other occurs within it; but in view of a series of decisions of this Court and of other Courts all doubts on this point must be taken to have been set at rest by the insertion by the Code of Criminal Procedure Amendment Act of 1923 (Act XVIII of 1923) of the words "Notwithstanding anything in any of the preceding sections of this Chapter" in the proviso to section 188, Criminal Procedure Code, the result according to these decisions being that a certificate such as is contemplated by that proviso must be produced even in cases falling under section 179. It is enough, in this connection to refer to *Emperor* v. *Sana Mathur*[2], *Superintendent and Remembrancer of Legal Affairs, Bengal* v. *Ludarchandra Das*[3], *Kakrullah Khan*, In re[4] and *Verghese*, In re[5]. If therefore section 179 of the Criminal Procedure Code should be held to be applicable to the first charge a certificate as prescribed by the proviso to section 188, Criminal Procedure Code, would be required. It is not denied that no such certificate has been obtained.

Mr. Nambiar further argued that where the objection as to jurisdiction applies to one or some of the charges and does not apply to the rest the whole case must still be regarded as being without jurisdiction. He cited in support of this argument *Rudragowda Rachangowda Patil* v. *Emperor*[6], *Ramachandra Rango* v. *Emperor*[7]. We are unable to agree with this contention. The mere fact that the Court has no territorial jurisdiction or the requirement of the proviso to section 188 of the Criminal Procedure Code has not been satisfied as regards one charge does not in any way exclude the jurisdiction of the Court to entertain another or other charges not similarly affected or render the prosecution under such charges illegal or irregular.

The learned Public Prosecutor has argued that in any event the Special First Class Magistrate, Mangalore, will have jurisdiction to try all cases in which the deception and the payment of money are both in the province of Madras though outside South Kanara and he relied for this purpose on section 14, Criminal Procedure Code, which says that

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1. (1915) 29 M.L.J. 178 : I.L.R. 39 Mad. 576.
2. (1929) I.L.R. 54 Bom. 171.
3. (1931) I.L.R. 59 Cal. 1065.
4. (1935) 68 M.L.J. 415.
5. (1947) 1 M.L.J. 277.
6. I.L.R. (1937) Bom. 256.
7. A.I.R. 1939 Bom. 129.

"The Provincial Government may confer upon any person all or any of the powers conferred or conferrable by or under this Code on a Magistrate of the First, Second or Third Class in respect to particular cases or to a particular class or particular classes of cases, or in regard to cases generally in any local area outside the Presidency towns."

Mr. Nambiar's answer to this argument is based on the terms of the Notification appointing a "Special First Class Magistrate in the South Kanara district" for the trial and disposal of bogus lottery cases. Mr. Nambiar reads this as indicating that the Provincial Government intended to confer jurisdiction on the Magistrate to try bogus lottery cases if the offence was committed in the District of South Kanara. It seems to us that the object of the Government was to confer upon the Magistrate jurisdiction to try a particular class of cases, namely, those relating to bogus lotteries, and all that might have been intended by the reference to the South Kanara district is that the Magistrate should sit and function in that district. The Provincial Government may perhaps make the matter clearer by substituting the words "at Mangalore" for the words "in the South Kanara district" occurring in the order of appointment.

It now remains to deal with the several charges in the light of our conclusions.

In C.C. No. 8 of 1947 there are two purchasers at Madanapalle and one at Tiruppur. The Magistrate has jurisdiction in respect of all the charges.

C.C. No. 9 of 1947 is concerned with a purchase at Honnavar in the Province of Bombay, a purchase at Shimoga in the Mysore State and a receipt of tickets by Value Payable Post at Anantapur. The Magistrate can now deal only with the third charge.

In C.C. No. 10 of 1947, which we treated as the main case, the purchases are at Travancore and Trichur and the receipt of tickets by Value Payable Post is at Trichur and none of them can be enquired into without the appropriate certificate under section 188 of the Criminal Procedure Code.

The charges in C.C. No. 11 of 1947 are based on two purchases at Cochin and a receipt by Value Payable Post at Dharwar (in the Province of Bombay) and cannot now be proceeded with.

There is absence of jurisdiction similarly in regard to C.C. No. 12 of 1947 which relates to two purchases at Gadag (Bombay) and a receipt by Value Payable Post at Alleppey (Travancore). The same reasoning applies to C.C. No. 14 of 1947 wherein we have a purchase at Sadasivagad and another at Sirsi, both in Bombay and a receipt of a packet by Value Payable Post at the latter place.

In C.C. No. 13 of 1937 there are two charges arising out of two purchases at Palghat which in the view we have expressed fall within the jurisdiction of the lower Court. The third charge however falls outside it as the purchase was at Gadag in Bombay.

The Revision Case and the Miscellaneous Petitions are allowed and the charges are quashed to the extent indicated above.

We need hardly add that it is quite open to the Government to take any fresh action they may be advised to take.

B.V.V. *Petitions allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Officiating Chief Justice*, MR. JUSTICE SATYANARAYANA RAO AND MR. JUSTICE RAJAGOPALAN.

Seraje Narayana Bhatta and others .. *Appellants.**

Criminal Procedure Code (V of 1898), section 239 (d)—Applicability—Joint trial of accused 1 for an offence under section 302, Indian Penal Code and accused 1 to 3 for an offence under section 201, Indian Penal Code and accused 4 for an offence under section 201 read with section 109, Indian Penal Code—No accusation against accused 2-4 of any connection with the murder at the time or before it was committed—Legality of joint trial.

No general rule can be laid down as to when different offences can be said to have been committed in the course of the "same transaction" within the meaning of section 239 (*d*), Criminal Procedure Code. The question when it arises must be determined on the facts of the particular case.

Where four accused were jointly tried, the 1st accused for an offence under section 302, Indian Penal Code, accused 1 to 3 for an offence under section 201, Indian Penal Code and the 4th for an offence under section 201 read with section 109, Indian Penal Code and there was no accusation that accused 2 to 4 were in any manner connected with the murder at the time or before it was committed.

Held, the case did not fall within section 239 (*d*), Criminal Procedure Code and a joint trial of the accused was therefore illegal and the convictions had to be set aside and retrial ordered.

Appeals respectively against the Orders dated 6th November, 1947, of the Sessions Court, South Kanara, in C.C. Nos. 36 etc. of 1947.

N. Santosh and *K. S. Nayarama Aiyar* for *S. Ramayya Nayak* for Appellants.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

(On an order of reference to the Full Bench, dated 6th April, 1948, by Horwill and Mack, JJ., this appeal coming on for hearing, the Court delivered the following judgment) :

The Officiating Chief Justice.—In Sessions Case No. 36 of 1947 in the Court of Sessions, South Kanara Division, there were four accused. The first accused was charged for an offence under section 302, Indian Penal Code. Accused 1 to 3 were charged for an offence under section 201, Indian Penal Code and the fourth accused for an offence under section 201 read with section 109, Indian Penal Code. The learned Sessions Judge acquitted the first accused of the offence under section 302 but convicted him of an offence under section 326, Indian Penal Code and sentenced him to rigorous imprisonment for five years. He found accused 1 to 3 guilty under section 201 and sentenced each of them to rigorous imprisonment for 18 months, the sentences on the first accused to run concurrently. The fourth accused was acquitted. C.A. No. 683 of 1947 is by the first accused and C.A. Nos. 627 of 1947 and 664 of 1947 are by accused 2 and 3 respectively. C.A. No. 91 of 1948 is by the Crown against the acquittal of the first accused of the offence under section 302, Indian Penal Code.

When these appeals first came on for hearing before Horwill and Mack, JJ., an objection was taken on behalf of the first accused that the trial was illegal because of a misjoinder of charges. It was contended that the offence under section 201 was altogether independent of the offence under section 302. The learned Judges thought that the case raised a point of considerable importance and that it was desirable that it should be disposed of by a Full Bench.

As the objection raised relates to a misjoinder of charges it is necessary to state the charges as framed. They ran as follows :

"Firstly.—That you, accused 1 (Mambady Krishna Bhatta) on the 18th day of December, 1946, at about 7-30 P.M., at Padayana in Koropady village did commit murder by intentionally causing the death of Thayampa Shetty, son of Sankar Shetty of Koropady village, Puttur Taluk, by beating him with an iron rod and thereby committed an offence punishable under section 302, Indian Penal Code and within my cognizance.

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* Crl. Appeals Nos. 627, 664 and 683 of 1947 and 91 of 1948. 12th April, 1948.

Secondly.—That you, accused 1 to 3 at the said place and in the course of the same transaction during the later hours of the same night and the early hours of the following morning knowing or having reason to believe that the offence of murder has been committed by accused 1, caused the disappearance of the evidence of the commission of the said offence of murder by accused 1 by secretly cremating the body of the said Thayampa Shetty in Padayana on a hill behind the house of the deceased, with intention of screening accused 1 from legal punishment and thereby committed an offence punishable under section 201, Indian Penal Code and within my cognizance.

Thirdly :—That you, accused 4 on the said day, time and place and in the course of the same transaction abetted the commission of the offence under section 201, Indian Penal Code, by the accused 1 to 3 mentioned in charge 2 which was committed in consequence of your abetment and that you have thereby committed an offence punishable under section 201, Indian Penal Code, read with section 109, Indian Penal Code and within my cognisance."

The case for the prosecution on which the above charges were framed was shortly as follows. The deceased Thayampa Shetty was a cooly working in the areca gardens in Korapadi village. He was living there with his wife and three children. Shortly before his death, he heard that the first accused who is a Brahmin resident of the same village, had been complaining that his (the deceased's) children were stealing cocoanuts from the first accused's garden. On the evening of the day of occurrence, the deceased was told about the complaint of the first accused and the deceased is said to have remarked that the first accused would not say such things unless he had seen the same personally if he was born of a true father. The first accused on hearing this went to the residence of the deceased at about 7-30 p.m. that night and asked the deceased as to what he had been saying. The deceased reiterated that the first accused should not have been saying that the children were stealing cocoanuts from his garden unless he had seen the same with his own eyes if he had been born to a true father. The first accused saying that the reply was an insolent one, caught hold of the deceased and gave him two or three blows with an iron rod. The deceased dropped down and expired soon after. Subsequently sometime after midnight, accused 1, 2 and 3, went to the house of the deceased and removed the body, accused 1 and 3 carrying the body and accused 2 following with a lantern. The body was cremated a short distance behind the house of the deceased.

The relevant provisions of the Code of Criminal Procedure on joinder of charges is section 239 which sets out when persons may be charged and tried together. The clause which has any possible application to the present case is clause (*d*) which runs as follows :

" Persons accused of different offences committed in the course of the same transaction."

Obviously no general rule can be laid down as to when different offences can be said to have been committed in the course of the same transaction. The question when it arises must be determined on the facts of the particular case. We do not therefore propose to deal with the general principles which arise in the case except in relation to the particular facts of this case.

It is clear that accused 2 to 4 were not alleged to have taken any part in the murder of Thayampa Shetty. There is no allegation, either of any conspiracy, before the commission of the offence between accused 1 and the other accused to commit the murder. Accused 2 to 4 were alleged to have come upon the scene only after the commission of the murder by the first accused. It may be that accused 2 to 4 suspected that the first accused was connected with the death of Thayampa Shetty but that circumstance alone would not, in our opinion, render the offence of murder and the offence of cremation of the corpse parts of the same transaction. In the complete absence of any allegation that accused 2 to 4 or any of them were in anyway connected with the commission of the murder or with any abetment of that offence or with any conspiracy to commit that offence, they could not be tried for an offence under section 201, Indian Penal Code, along with the first accused who was accused also of an offence under section 302, Indian Penal Code.

In *Begu* v. *The King-Emperor*[1], five persons were charged under section 302, Indian Penal Code, with murder and two of them were convicted of that offence.

1. (1925) 48 M.L.J. 643 : L.R. 52 I.A. 191 : I.L.R. 6 Lah. 226 (P.C.).

The evidence established that the other three had assisted to remove the body knowing that a murder had been committed. Without any further charge being made, they were convicted under section 201, Indian Penal Code, for causing the disappearance of evidence. An objection was taken to the conviction without a further charge being made under section 201, Indian Penal Code, but the objection was overruled by their Lordships of the Judicial Committee who considered that the case was covered by section 237, Criminal Procedure Code. In that case it may be observed that all the five persons had been charged under section 302, Indian Penal Code, with murder.

In *Brij Bhushan Singh* v. *The King-Emperor*[1], the appellant was charged for an offence under section 302, Indian Penal Code, originally; but he was committed for trial on the charge of culpable homicide not amounting to murder under section 304, Indian Penal Code. In the Court of Session the charge was altered to one of murder under section 302, Indian Penal Code and he was tried for that offence. He was eventually convicted under section 304, Indian Penal Code. At the same time, the appellant and four other persons who were accused 2 to 5 jointly were charged with the offence of causing evidence of the commission of the said offence of murder to disappear, to wit, with the destruction or disposal of the body knowing or having reason to believe that the offence had been committed and with the intention of screening the offender from legal punishment, an offence punishable under section 201, Indian Penal Code. Sir John Beaumont delivering the judgment of the Board, after stating the facts, observed as follows :

"No objection seems to have been taken to the trial of accused 2-5 jointly with the appellant, although it was not suggested that they had taken any part in, or had any knowledge of, the alleged murder by the appellant. However, as these accused were acquitted, this point need not be discussed."

The observations appear to imply that the objection, if it had been taken, would have been upheld.

It was laid down by the Privy Council in *Babulal Choukhani* v. *Emperor*[2], that the point of time with reference to which the objection as to misjoinder has to be decided is the time of the accusation and not the time of trial. Their Lordships held in that case that because the accused were alleged to have conspired to commit offences and had committed overt acts in pursuance of the conspiracy, a joint trial was justified because in their Lordships' opinion, it was sufficient for the purpose of justifying a joint trial that the accusation alleged the offence committed by each of the accused to have been committed in the course of the same transaction. The application of section 239 (*d*) depended on the accusation and not on the eventual result of the trial.

In this case, as already mentioned, no accusation was made that accused 2 to 4 were in any manner connected with the murder at the time or before it was committed. The case therefore would not fall within section 239 (*d*), Criminal Procedure Code. A joint trial was therefore illegal because it is settled law that the infringement of section 233 read with section 239 (*d*), Criminal Procedure Code, would, if made out, constitute an illegality, as distinguished from an irregularity. The conviction of accused 1 under section 326, Indian Penal Code, the conviction of accused 1 to 3 under section 201, Indian Penal Code and the acquittal of accused 1 of an offence under section 302, Indian Penal Code, should be set aside. There will be two separate trials, one of the first accused for the offence under section 302, Indian Penal Code and another of accused 1 to 3 each for an offence under section 201, Indian Penal Code.

The fourth accused has been acquitted and no appeal was preferred by the Crown against his acquittal. His acquittal will stand and he shall not be tried again.

V.S. ——— *Appeal allowed. Retrial ordered.*

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1. (1946) 1 M.L.J. 147 : L.R. 73 I.A. 1 : I.L.R. 21 Luck. 176 (P.C.).
2. (1938) 1 M.L.J. 647 : L.R. 65 I.A. 158 : I.L.R. (1938) 2 Cal. 295 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

M. V. Kalyanasundaram Chetty .. *Appellant**

v.

Nagalinga Achari and another .. *Respondents.*

Costs—Decree for plaintiffs—Defendants alienees of portions of property—Possession with mesne profits and costs decreed—Word 'respectively' omitted in the decree in the allocation of costs—Whether decree declaring liability to pay costs by defendants severally or jointly.

In a suit to recover possession of property from alienees from limited owners a decree for possession and mesne profits and costs was passed. In the matter of costs the defendants were made liable and the total amount of costs under the decree was also mentioned. On the question whether the decree in regard to costs was joint or several,

Held, read in the light of the judgment the decree was several and not joint, especially when the suit was for recovery from a number of individuals, possession of particular items together with mesne profits and costs relating to them.

Appeal against the decree of the City Civil Court, Madras, in O.S. No. 508 of 1945, dated 4th November, 1946.

V. Varadaraja Mudaliar and *A. M. Krishnaswami Mudaliar* for Appellant.

R. V. Seshagiri Rao for Respondents.

The Court delivered the following

JUDGMENT.—The suit was brought for recovery of certain property which had been alienated by limited owners. The alienations were made at different times to different persons. In appeal it was held that the alienations were not binding on the plaintiffs' reversioners, and a decree for possession and mesne profits and costs was passed. In the concluding paragraph of the judgment the learned Judges said :

"The plaintiffs are entitled to their costs in this Court and below in respect of items Nos. 1, 2 6 and 7 as against the first, second, fifth and sixth defendants. They will pay the costs here of the third, fourth and fifth defendants in respect of items 3, 4 and 5."

By Ex. D. 4 the second defendant entered into an arrangement with the decree-holder by which he obtained possession of one of the suit items and by which they settled all their outstanding claims with regard to mesne profits, costs, and improvements. The first defendant also claimed in evidence that he had entered into an agreement with the decree-holder, whereby the value of his improvements had been set off against the costs due by him to the decree-holder. The fifth defendant, who is the plaintiff here, and the sixth defendant later entered into another agreement with the decree-holder and they claimed that in that agreement, allowance was made for the total costs due by all the defendants. They have brought this suit for now contribution against defendants 1 and 2.

The lower Court held that the decree was a several one against the various defendants and that the plaintiff should not therefore have paid the whole of the costs. It further held that the second defendant entered into an agreement setting off his share of the costs even before the suit agreement, so that in any event he would not be liable.

With regard to the second defendant the case is clear ; but unless it is to be held that the first defendant had also entered into an agreement prior to the suit settlement—and the lower Court did not come to that conclusion—, it would be necessary to consider whether the decree passed was a joint one or a several one. If the learned Judges in the passage set out in the first paragraph above had added the word "respectively" after "sixth defendants" it would have been clear beyond all doubt that the decree was a several one. It is to be noted that the word "respectively" is not even used with regard to the order directing the plaintiff

* C. C. C. A. No. 6 of 1947. 12th March, 1948.

to pay the costs of the third, fourth and fifth defendants in respect of the items in their possession, although it is clear that in their cases the decree-holder would have to pay their individual costs and would not be liable to these three defendants jointly for their total costs. In a suit of this nature, where it is sought to avoid a number of alienations to different persons, the plaintiff would, if successful, ordinarily recover from each individual alienee the possession of the particular item in his possession, together with mesne profits on that item and the costs relating to that item. So one would expect in such a suit that a decree passed against the alienees would be a several one, even with regard to costs.

The wording of the decree is slightly more favourable to the plaintiff, because one does find the word "respectively" in connection with the third, fourth and fifth defendants, whereas it is not found in connection with the first, second, fifth and sixth defendants; but even here the decree is, to say the least, ambiguous. It is argued that since the total cost of the plaintiff was embodied in the decree, that in itself is an indication that a joint decree had been passed; but I am unable to accept this argument. It does not seem to me that any duty was cast upon any individual defendant to ask at that stage that the costs of the plaintiff should be apportioned between them.

Reading the decree in the light of the judgment, it seems to me that the decree is a several and not a joint decree. In any event, it is ambiguous; and I am unable to say in appeal that the decree of the lower Court is wrong.

The appeal is dismissed with the costs of the second defendant.

K.C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE GOVINDA MENON.

Addakula Subbamma and another .. *Petitioners**

v.

Doddi Ademma .. *Respondent.*

Criminal Procedure Code (V of 1898), *section* 264 *and Criminal Rules of Practice, rule* 131—*Bench of Magistrates—Equally divided—Casting vote by president—Delivery of differing judgments—Legality—Proper procedure.*

In a case tried by a Bench of Magistrates where the members were equally divided in opinion the president gave a casting vote and the accused were convicted. Two differing judgments were however written one by the notional majority composed of the president with his casting vote along with one member and the other by the two individuals who constituted the minority. On a question as to the correctness of the procedure adopted,

Held: Section 264 of the Criminal Procedure Code contemplates only one judgment and not more and it is made more specific by rule 131 of the Criminal Rules of Practice laying down that differences of opinion shall be settled by the votes of the majority of the Magistrates present, the chairman having the casting vote. The law does not contemplate that the internal differences of opinion between the Magistrates constituting the Bench should be exhibited in public. What is really essential is that the Magistrates should confer in private and it is only the majority view that should be given out as the judgment of the Bench.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the First Class Bench of Magistrates, Vizianagaram, dated 28th October, 1947, in B.C. No. 1068 of 1947 on his file.

S. Krishnamurthy and *Vepa P. Sarathi* for Petitioners.

P. Anjaneya Raju for Respondent.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

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* Crl. R. C. No. 179 of 1948. 8th July, 1948.
(Crl. R. P. No. 170 of 1948).

The Court made the following

ORDER.—The petitioners seek to revise the conviction and sentence passed by the First Class Bench of Magistrates, Vizianagaram, convicting them of an offence under section 352, Indian Penal Code and sentencing them to pay a fine. The Bench consisted of four members, of whom Sri Hanumantha Rao Pantulu was the president. They were equally divided in opinion, two of them for convicting the petitioners and the other two for acquitting them. Presumably acting under rule 131 of the Criminal Rules of Practice, the president gave a casting vote as stated at the end of his judgment, and convicted the petitioners. Two judgments have been written, one by the notional majority composed of the president with his casting vote along with one member and the other by the two individuals who constituted the minority. The question raised by Mr. Sarathi for the petitioners is whether this procedure is correct, that is whether the Criminal Procedure Code and the Rules of Practice contemplate the delivery of two judgments, a majority and a minority one, in a case like this. Section 264 of the Criminal Procedure Code lays down that in every case tried summarily by a Bench of Magistrates in which an appeal lies, such Bench shall, before passing sentence, record a *judgment* embodying the substance of the evidence and also the particulars mentioned in section 263 and that such judgment shall be the only record in cases coming within the section. It is clear that the Code contemplates only one judgment and not more and it is made more specific by rule 131 laying down that difference of opinion shall be settled by the votes of the majority of the Magistrates present, the chairman having the casting vote. The law does not contemplate that the internal differences of opinion between the Magistrates constituting the Bench should be exhibited in public. What is really essential is that the Magistrates should confer in private and it is only the majority view that should be given out as the judgment of the Bench. That this is the correct view and the Legislature did not intend to have the opinions of different Magistrates delivered is clear by analogy if we look at the other provisions of the Criminal Procedure Code itself dealing with judgments to be delivered by the High Court in Referred Trials, as well as in Appeals against convictions from Sessions Courts. According to section 378, where a referred trial is heard before a Bench of Judges of the High Court and such Judges are equally divided *in opinion*, the case with *their opinions* thereon shall be laid before another Judge and such Judge after such hearing as he thinks fit shall deliver his opinion and the *judgment* or order shall follow such opinion. What is expressed by the dissident Judges is termed an opinion and not a judgment and the judgment of the Court is the final expression of opinion by the third Judge. Section 429 dealing with the powers of the High Court when hearing appeals against other convictions also lays down,

"When the Judges composing the Court of Appeal are equally divided in opinion, the case, with their opinions thereon, shall be laid before another Judge . . . . . ."

It is therefore evident, as stated by me already, that the Legislature intended to lay down that what has been expressed by the Judges who have differed is only their opinion and not the judgment. When we compare and contrast section 264 with the above sections, the use of the words "such judgment" in section 264 and "opinion" in sections 378 and 429 will make the situation quite plain. All that rule 131 says is the method of arriving at the final conclusion. Rule 131 does not lay down the method of expression of the final opinion but only says how the conclusion can be arrived after discussion among the Magistrates.

We may usefully refer in this connection to section 98 of the Civil Procedure Code and clause 36 of the Letters Patent of our High Court. Section 98 of the Civil Procedure Code enacts what the procedure ought to be when an appeal is heard by a Bench of two or more Judges. The proviso to sub-clause 2 lays down that where the Judges composing the Bench differ on a point of law they may state the point of law upon which they differ and the appeal shall then be heard upon that point only by one or more of the other Judges and such point shall be decided according to the opinion of the majority of the Judges who have heard the appeal

including those who first heard it. This section cannot alter or affect the provisions of clause 36 of the Letters Patent, which is to the effect that if a Division Court is composed of two or more Judges and the Judges are divided in opinion as to the decision to be given on any point, such point shall be decided according to the opinion of the majority of the Judges, if there shall be a majority, but if the Judges should be equally divided, they shall state the point upon which they differ and the case shall then be heard upon that point by one or more of the other judges and the point shall be decided according to the opinion of the majority of the Judges who have heard the case including those who first heard it.

There is no provision, for a reference to a third Magistrate, so far as the Bench is concerned and since the section does not empower them to give out their individual opinions in public, all that they could do is to confer among themselves and give out only the opinion of the majority as laid down in rule 131.

There have been two judgments in this case, a majority and a minority one. Mr. Sarathi asks me to compare the two and give a decision in his favour accepting the view of the minority. Since the Magistrates have acted in delivering their judgments in derogation of the law as laid down in section 264 of the Criminal Procedure Code and rule 131 of the Rules of Practice, I think it advisable in the peculiar circumstances of this case that the judgments of both the majority and the minority be set aside and the case be remanded for retrial by the First Class Bench of Magistrates, Vizianagaram or such other Magistrate to whom the District Magistrate may transfer it.

V.P.S.

Petition allowed.
Case remanded for retrial.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HAPPELL AND MR. JUSTICE PANCHAPAGESA SASTRI.

V. R. Ramanatha Aiyar .. *Appellant**

v.

The Corporation of Madras, by its Commissioner .. *Respondent.*

Madras City Municipality Act (IV of 1919), *section* 321 (2)—*Licence fees—Principles in fixing—Power of Court to interfere with amount fixed.*

In principle, the licence fees in respect of hotels cannot be imposed for the purpose of taxation, but should only cover the reasonable expenses entailed by granting the licence and collecting the fees and exercising such supervision as may be necessary to see that the terms of the licence are complied with. The question whether a share of the cost of sanitation and conservancy should be included in the licence fee is not really relevant. But where there is no want of good faith and the fee is not *ex facie* unreasonable, the Court will not examine minutely whether the fee charged is exactly commensurate with the cost of granting the licence and the cost of supervision in accordance with its terms. From the mere fact that the corporation is making a profit on licensing fees as a whole, it cannot be contended that the licence fees amount to taxation.

Case-law discussed.

On appeal from the decree and judgment of Kunhi Raman, J., dated 21st September, 1945, in O. S. No. 206 of 1944.

V. Rajagopala Mudaliar for Appellant.

R. Rajeswara Rao and *Dr. V. K. John* for Respondent.

The Court delivered the following

JUDGMENT.—The appellant is the proprietor of two coffee hotels known as the Ramakrishna Lunch Home and the Sankar Cafe. In respect of each of these hotels, he had paid a licence fee of Rs. 50 to the Corporation of Madras upto 31st March, 1944. In February, 1944, when he applied for renewal of the licences in respect of the same premises and sent a cheque for Rs. 100 he was informed that the licence fee in respect of the Ramakrishna Lunch Home had been enhanced

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* O. S. A. No. 1 of 1946. 22nd April, 1948.

to Rs. 250 while the licence fee for the Sankar Cafe had been enhanced to Rs. 100. He paid these amounts under protest and then filed the suit out of which this appeal arises for a declaration that the scale of licence fees fixed by the Council for the official year 1944-45 was arbitrary and unreasonable and *ultra vires* and for an injunction restraining the Commissioner of the Corporation from levying the fees on the new scale or on any scale in excess of Rs. 50 for each coffee hotel. The suit was dismissed.

It is argued for the appellant that the enhancement of the fees was unreasonable in itself and, as the Corporation was already making a profit from the levy of fees as a whole, that the fees must be regarded as imposed for the purpose of taxation. The power of the Madras Corporation to impose a licence fee is derived from sub-section (2) to section 321 of the Madras City Municipality Act which states that " for every such licence or permission fees may be charged at such rates as may be fixed by the Council." It is well established that licence fees cannot be imposed for the purpose of taxation and that they should only cover the reasonable expenses entailed by granting the licence and collecting the fee and exercising such supervision as may be necessary to see that the terms of the licence are complied with. And on the question whether a Court will interfere with the exercise of the power by the Corporation, the principles laid down by Lord Russell, C.J., as applicable to by-laws in *Kruse* v. *Johnson*[1] have been followed. Lord Russell said :

"If, for instance, they were found to be partial and unequal in their operation as between different classes ; if they were manifestly unjust ; if they disclosed bad faith ; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say, ' Parliament never intended to give authority to make such rules ; they are unreasonable and *ultra vires*' "

Cases, to which reference will be made again, to which this principle has been applied are *Corporation of Madras* v. *Spencer & Co.*[2] and *Municipal Council, Kumbakonam* v. *Messrs. Ralli Bros.*[3]

The enhancement of the fees now in question was made on a report by the Commissioner of the Madras Corporation to the Standing Committee. In that report, the Commissioner pointed out that licence fees were fixed generally on the principle that they should be just sufficient to cover the costs of supervision, etc., for the particular trade and that they should not be considered a source of revenue. At the same time, however, he drew attention to the fact that in spite of the increase in prices and the cost of administration fees had not been altered since 1930 and that the time seemed to have come for a revision of them. As regards coffee hotels, eating houses and restaurants generally, he stated that the fees were low when compared with the fees levied in small municipal towns and that a rate of Rs. 50 was particularly low for hotels which paid a rent of more than Rs. 250 per mensem having regard to the constant supervision needed for enforcing the conditions of the licence. The Standing Committee, as appears from the proceedings in Ex. P-8, did not accept all the recommendations of the Commissioner, but did accept substantially the recommendations with regard to coffee hotels, eating houses, restaurants, etc., and it also appears that a fresh enquiry had been ordered with regard to the fees charged by other municipalities in respect of these establishments. In his report, the Commissioner made some observations which are open to criticism, such as that the rate of Rs. 50 for hotels paying a high rental was exceedingly low considering the nature and amount of business turned out in them and that the expenditure incurred in respect of sanitary and conservancy services had greatly increased. It is arguable that the ability to pay of the concern licensed should not be a governing consideration and that the proprietor as an ordinary rate payer was entitled to the normal conservancy and sanitary services irrespective of the fee which he paid. On the whole, however, it cannot be said that the Corporation was misdirected as to the nature of a licence fee or that the enhancement was not made in good faith. It appears that, previously coffee hotels had paid licence fees ranging between a minimum of Rs. 10 and a maximum of Rs. 50. The new schedule of rates was based on the rental value of the premises so that the appellant

1. (1898) 2 Q.B. 91. 764.
2. (1929) 57 M.L.J. 71 : I.L.R. 52 Mad.
3. (1930) 61 M.L.J. 748.

was required to pay a fee of Rs. 100 for the Sankar Cafe on the basis that the rental value of the premises exceeded Rs. 100 but did not exceed Rs. 250, while Rs. 250 was payable in respect of the Ramakrishna Lunch Home on the basis that the rental value of its premises exceeded Rs. 500 but did not exceed Rs. 1,000. What the over-all percentage of increase in respect of the licence fees charged for coffee hotels is not ascertainable from the evidence adduced. There was, however, some over-all increase, and as far as the hotels in question in the suit are concerned, the licence fee in respect of the Sankar Cafe was doubled and the licence fee in respect of the Ramakrishna Lunch Home was increased five times.

It will be convenient to consider first whether licence fees of Rs. 250 for the Ramakrishna Lunch Home and Rs. 100 for the Sankar Cafe are in themselves unreasonable. Argument has in fact been confined to the Ramakrishna Lunch Home as there is less ground for interference with the licence fee charged for the Sankar Cafe. The fee of Rs. 250 has been attacked as unreasonable mainly on the ground that the Corporation was not entitled to take into account in fixing the fee expenditure in respect of sanitary and conservancy charges. In our opinion, the question whether a share of the cost of sanitation and conservancy should be included in the licence fees is not really relevant. No doubt, in principle, the fee should not include more than the cost of granting the licence and exercising such supervision as may be necessary to see that the terms of the licence are complied with. If, however, there is no want of good faith as in the present case and the fee is not *ex facie* unreasonable, a Court will not examine minutely whether the fee charged is exactly commensurate with the cost of granting the licence and the cost of supervision in accordance with its terms. In our judgment, the fee of Rs. 250 in respect of the Ramakrishna Lunch Home cannot possibly be said to be *ex facie* unreasonable. It was not unreasonable to apportion the fees on the basis of the rental value of the premises of the hotels. As the larger the hotel is, the greater is the cost of supervision. If the terms of the licence issued in respect of the Ramakrishna Lunch Home are examined, it will be seen that constant supervision of the food served, of the method of serving it, and of the sanitary arrangements is required. In fact, as was pointed out in evidence for the Corporation, the hotel requires inspection every day, whereas the fee charged amounts to only 12 annas per diem. The cases relied on for the appellant, *Corporation of Madras* v. *Spencer & Co.*[1] and *Municipal Council, Kumbakonam* v. *Messrs. Ralli Bros.*[2] are clearly distinguishable. Both are cases of a want of good faith on the part of the Corporations and of unfair discrimination. In *Corporation of Madras* v. *Spencer & Co.*[1], the enhancement of the fee of storing foreign liquor from Rs. 25 to Rs. 200 was not made on the footing that the fee previously charged was low in comparison with the fees charged for similar licences, but because the Corporation was annoyed by the action of the Government in depriving it of the revenue from the sale of abkari shops and wanted to make up the loss by charging higher fees for storing foreign liquor. In short, the fee was being utilised for the purpose of taxation and those who stored foreign liquor were being unfairly discriminated against. In the *Municipal Council, Kumbakonam* v. *Messrs. Ralli Bros.*[2], again, it was found that there was a want of good faith on the part of the Municipal Council, because they appeared to have charged a fee which was far higher than the fee for similar licences not on a proper consideration of what the correct fee was for a godown for storing groundnuts but because Messrs. Ralli Brothers had successfully objected to the payment of a profession tax of Rs. 100 levied on them by the Council. In the present case, it has not been suggested that the fee charged is unfair as compared with the fees charged in respect of other licences of a different kind, although it is suggested that the fee is unfair in comparison with the lower fees charged for other coffee shops. As we have pointed out, however, we do not think that a sliding scale of fees for coffee hotels based on the rental value of the premises is unreasonable or leads to unfairness ; and we do not accept the argument that the same fee should be charged for what is admitted to be one of the biggest coffee hotels in the city as for a coffee shop that amounts to no more than a bunk in the street.

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1. (1929) 57 M.L.J. 71 : I.L.R. 52 Mad. 764. 2. (1930) 61 M.L.J. 748.

It is, however, also argued on general grounds that the enhanced fees charged on the two coffee hotels amount to taxation because even before the enhancement the Corporation was making a profit from the levy of licence fees so that any enhancement must have been for the purpose of taxation. There seem to us to be two answers to this contention ; the first being that it has not been established by satisfactory evidence that the Corporation had been making a profit from its licence fees so that any enhancement must amount to taxation ; and the second that the appellant must show that the fees made payable in respect of his own coffee hotels are unreasonable. It is not, in our opinion, open to him to argue that because an over-all profit is made the fees paid by him must amount to taxation. In support of the contention that the Corporation does make a profit out of its licence fees, it is argued that from the year 1930-31 to the year 1944-45 the receipts under licence fees have amounted each year to something like Rs. 2,25,000, whereas the cost of the licensing establishment has never exceeded Rs. 1,46,532, the figure for 1944-45, in which year as a result of the enhanced fees the receipts were Rs. 4,43,683. It is true that the expenditure on the cost of establishment would appear always to have been substantially below the receipts from licence fees. But it is not admitted by the Corporation that these figures are exhaustive of the expenditure which can properly be debited to the cost of the licensing department. However that may be, there is one item included in the receipts from licence fees which makes it impossible to accept the contention that on the evidence on record the receipts necessarily exceed the expenditure. Under section 304-B of the City Municipal Act, a licence fee is chargeable in respect of private markets upto a maximum of 15 per cent. of the gross receipts from the market. Licence fees for private markets are, therefore, charged on a different basis as compared with other licence fees ; and we do not accept the contention advanced for the appellant that any profit that may be derived from private markets should go in relief of other licence fees. The fees derived from private markets are included in the total receipts from licensing fees, but their amount is not disclosed by the evidence oral or documentary and the evidence does not enable them to be separated from the other fees. It is not, therefore, possible to ascertain whether the receipts from licence fees in respect of sources other than private markets are or are not in excess of the expenses properly chargeable to them. It seems to us, however, clear that in any case it is not open to the appellant to maintain that the fees charged him are unreasonable or that they amount to taxation because the Corporation makes a profit on licensing fees as a whole. If the ratepayers as a body are dissatisfied with the system of licensing fees and believe that they are being used for the purpose of taxation, it may be open to them to file a representative suit and challenge the whole system. The present suit, however, is not a representative suit, and the only question must be whether the particular fees charged to the appellant should be set aside because they are unreasonable or unfair. We have already given our reasons for holding that the licence fees in question in the appeal are not unreasonable, and, apart from the fact that this is not a representative suit, once it is held that the licence fees charged to the appellant are not unreasonable the fact that a profit is perhaps made from licence fees as a whole can accord no ground for holding the resolution fixing the fees now in question to be invalid. Even on the assumption that the Corporation derives a profit from licence fees as a whole, provided that the fees in respect of the two coffee hotels are not unreasonable, the proper course to be adopted by the Corporation might well be to reduce other licence fees and not the fees which the appellant is called upon to pay. The appeal is dismissed with costs.

V.P.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

Chinnappa Goundan *alias* Karuppanna Goundan ... *Appellant.**

Madras Debt Conciliation Act (XI of 1936 as amended), sections 7 and 25—First application to Board dismissed under section 7—Fresh application to Board—Application for stay of execution in Civil Court—Dismissal—Confirmation in revision—Execution sale held during pendency—Validity—Application to set aside sale—Maintainability.

The appellant was the first defendant in the suit on the file of the District Munsiff's Court wherein there were preliminary and final decrees on foot of a mortgage. The final decree having been assigned to the respondent he filed an application for executing the decree by sale of the mortgaged property. The appellant then applied to the Debt Conciliation Board of the place for scaling down the decree and also applied to the District Munsiff for stay under section 25 of the Debt Conciliation Act. The District Munsiff stayed the sale but the application before the Debt Conciliation Board was rejected under section 7 of the Act. Sometime later the respondent again took steps to execute his decree whereupon the appellant filed a fresh application before the District Munsiff for stay of execution on the ground that he had filed a second application before the Debt Conciliation Board and that the Court should not proceed with the proceedings in execution before the Debt Conciliation Board disposed of the matter. This application was dismissed by the District Munsiff on the ground that the second petition before the Board was not maintainable. A revision petition was preferred to the High Court against the said order but the same was also dismissed. In the meanwhile the properties were sold in execution of the decree and purchased by the decree-holder himself. Thereupon the appellant filed an application under section 47 of the Civil Procedure Code for setting aside the sale on the ground that the Court had no jurisdiction to proceed with the sale on account of the second application before the Debt Conciliation Board.

Held, that inasmuch as the first application was dismissed under section 7 of the Debt Conciliation Act, the second application preferred to the Debt Conciliation Board was legally sustainable and that the execution sale held during its pendency was a nullity and could be set aside.

Held further, that the dismissal of the earlier revision petition by the High Court did not operate as a bar to the maintainability of the application to have the invalid sale set aside.

Appeal against the order of the District Court, Trichinopoly, dated 29th September, 1945, in A. S. No. 265 of 1944 (E. A. No. 354 of 1943 in O. S. No. 219 of 1940, District Munsiff's Court, Karur), etc.

T. R. Ramachandran for *K. S. Desikan* for Appellant.

L. A. Gopalakrishna Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—This is an appeal against the decision of the District Judge of Trichinopoly in A. S. No. 265 of 1944 on his file.

The appellant was the first defendant in O. S. No. 219 of 1940 on the file of the District Munsiff's Court of Karur wherein there were preliminary and final decrees on foot of a mortgage. The final decree was passed on 1st September, 1941 and the same was assigned to the respondent on 11th November, 1941, who filed E. P. No. 58 of 1942 for executing the decree by sale of the mortgaged property. The appellant then applied to the Debt Conciliation Board, Karur, for scaling down the decree and applied to the District Munsiff for stay under section 25 of the Debt Conciliation Act. The District Munsiff stayed the sale but on 30th October, 1942, this application was rejected under section 7 of the Act by the Debt Conciliation Board. Sometime later, the respondent again took steps to execute his decree whereupon the appellant filed a fresh application before the District Munsiff in E. A. No. 300 of 1943 for stay of execution on the ground that he had filed a second application before the Debt Conciliation Board and that the Court should not proceed with the proceedings in execution before the Debt Conciliation Board disposed of the matter. This application was dismissed by the District Munsiff on the 16th June, 1943, on the ground that the application before the Debt Conciliation Board was a second petition which was not maintainable and therefore that Court declined to stay the execution proceedings. C. R. P. No. 771 of 1943 arose out of the dismissal of E. A. No. 300 of 1943 when Horwill, J., passed the following order :

* A. A. A. O. No. 32 of 1946 and C. M. P. No. 1866 of 1947. 22nd August, 1947.

"The order of the District Munsiff was right on the material available, though a typed paper now put in my hand suggests that the petition was in fact dismissed under section 7 of the Madras Debt Conciliation Act. I do not therefore feel justified in interfering in revision."

In the meanwhile, proceedings for the sale of the property went on and the properties were sold and purchased by the decree-holder himself. E. A. No. 345 of 1943 was thereafter filed by the appellant first defendant for setting aside the sale under section 47 of the Code of Civil Procedure on the ground that the Court had no jurisdiction to proceed with the sale on account of the pendency of an application before the Debt Conciliation Board. The lower appellate Court has held that a second application before the Debt Conciliation Board is not maintainable and therefore there can only be one stay in respect of a debt and has refused to set aside the sale. It is clear from Ex. P-1 that the dismissal of D. C. No. 77 of 1942 by the Debt Conciliation Board (Ex. P-3) was under section 7 of the Act, the second clause of which is to the effect that the rejection of an application under this section shall not preclude the applicant from making a fresh application; and in view of this provision the dismissal by the District Munsiff of the application for stay on 16th June, 1943, was illegal and without jurisdiction. It follows that the sale held when a valid application was pending before the Debt Conciliation Board was void and inoperative. When an application is pending before a Debt Conciliation Board, the Court before which an execution petition regarding the same matter is pending is *ipso facto* deprived of the jurisdiction to proceed further as the prohibition is statutory. Moreover, the fact that the Court did not know of the existence of the application and was therefore unaware of the fact that it had no jurisdiction to proceed does not clothe it with jurisdiction in regard to subsequent proceedings. This is clear from the decision of Horwill, J., in *Sitarama Reddi* v. *Bilehal Somappa*[1], which has been followed subsequently in *Achutaramayya* v. *Thimmaraju Ramamma*[2] and affirmed by a Bench in *Rathnasabapathy Iyer* v. *Subramania Pillai*[3]. In this view, the sale is entirely void as the Court had no jurisdiction to sell the property and its action in so doing must be regarded as a nullity. That even a sale which is null and void can be set aside is laid down by a Full Bench in *Rajagopala Iyer* v. *Ramanujachariar*[4].

But it is argued by Mr. L. A. Gopalakrishna Aiyar for the respondent that the dismissal of C. R. P. No. 771 of 1943 by this Court prevents the appellant from questioning the validity of the sale at a later stage. I do not agree. All that Horwill, J., decided in C. R. P. No. 771 was that there were no materials placed before the Court of first instance to show that a second petition before the Debt Conciliation Board was one provided for under section 7 of the Act. But the present appeal arises out of an application to set aside the void sale and it cannot be said that the question of the voidability of the sale was ever the subject-matter of C.R.P. No. 771 of 1943.

Along with the civil miscellaneous second appeal, C. M. P. No. 1866 of 1947 has been filed by the respondent to admit as evidence some documents produced in this Court. One of them is an assignment of all his rights in the property by the present appellant to a third party sometime before his first application before the Debt Conciliation Board was made and the other is a judgment of the District Munsiff of Karur in O. S. No. 214 of 1946 to show that the judgment-debtor had no interest in the property and therefore his application to the Debt Conciliation Board was made by a person without any *locus standi*. No valid grounds have been shown as to why the sale deed which is a registered one was not filed before the trial Court and I am therefore not inclined to entertain this petition for admitting additional evidence. But it is seen from the judgment of the learned District Munsiff that though the question as regards the appellant's *locus standi* was raised before him in the affidavit in E. A. No. 354 of 1943, he did not give any consideration to that aspect of the case, because according to him the application before the Debt Conciliation Board had already been dismissed. As I have already held

1. (1943) 1 M.L.J. 402.
2. (1944) 1 M.L.J. 298.
3. (1945) 1 M.L.J. 197.
4. (1923) 46 M.L.J. 104: I.L.R. 47 Mad. 288 (F.B.).

that the trial Court acted without jurisdiction in proceeding with the sale owing to the fact that the second application was a proper one, the reasons given by the lower Court for refusing to set aside the sales are unsound and unacceptable. But the respondent complains that he was given no opportunity to put forward his case regarding the want of status of the appellant to put in the stay application, as he had already parted with all his rights in the property. I think in view of the course the petition has taken in both the lower Courts it is just that he should be given an opportunity to adduce evidence on that aspect of the case.

The Civil Miscellaneous Second Appeal is therefore allowed, the orders of the lower Courts are set aside and E. A. No. 354 of 1943 is remanded to the District Munsiff for disposal according to law. The parties are entitled to adduce fresh evidence, if so advised. Costs of these proceedings will abide and follow the result.

C. M. P. No. 1866 *of* 1947.—In view of my observations contained in the judgment just delivered, it is unnecessary to pass any orders on this petition. The petitioner is entitled to take back the documents and file them before the District Munsiff in the future proceedings, if he is so advised.

B.V.V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

Periyasami Padayachi and another .. *Petitioners**

v.

Minor Ulaganathan by next friend mother Muthammal and others. *Respondents.*

Civil Procedure Code (*V of* 1908), *Order* 33, *rule* 1 *and section* 141—*Application for leave to sue* in forma pauperis—*Objection as to pecuniary jurisdiction—Competency of the Court to go into the question—Power of Court to return application for presentation to proper Court.*

When a petition is presented under Order 33, rule 1, Civil Procedure Code, for leave to sue *in forma pauperis* and an objection as to pecuniary jurisdiction is raised *in limine*, the Court can go into that question and decide it.

Though there is no express provision in Order 33, rule 1 for the return of the application made thereunder for presentation to the proper Court, where the Court finds that it has no jurisdiction to entertain it, as the application for leave to sue *in forma pauperis* embodies a plaint and is for all practical purposes to be treated as a plaint and interlocutory reliefs could be granted as if it were a plaint and as if the parties to the application were parties to a suit, the provisions of section 141 could be availed of and orders passed as on a regular plaint.

Case law discussed.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the District Munsiff, Ariyalur, dated 24th December, 1946, in O. P. No. 51 of 1946.

R. Rangachari for Petitioners.

K. S. Desikan and *K. Raman* for Respondents.

The Court delivered the following

JUDGMENT.—The minor first respondent filed an application under Order 33, rule 1 of the Civil Procedure Code, for leave to sue the petitioners who were respondents 1 and 2 in that petition and others, for partition and separate possession of his one-third share in the properties mentioned in the schedules attached to the petition. His father who is the first petitioner here objected to the grant of leave on the ground *inter alia* that the value of the suit properties is more than Rs. 3,000 and if the petition was to be admitted and registered as a suit, the subject-matter of the suit would be beyond the limits of the pecuniary jurisdiction of the Court of the District Munsiff of Ariyalur. The objection was overruled by the District

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* C. R. P. No. 694 of 1947. 21st April, 1948.

Munsiff. This civil revision petition is against that order. The learned District Munsiff relying upon a Bench decision of the Allahabad High Court reported in *Nur Muhammad* v. *Maulvi Jamil Ahmad*[1] was of the opinion that the question of jurisdiction could not be considered at that stage as the petition could not be returned for presentation to the proper Court in the event of its being found that the subject-matter of the suit was beyond its pecuniary jurisdiction.

The question involved in this revision petition is whether when a petition is presented under Order 33, rule 1, for leave to sue *in forma pauperis* and an objection as to pecuniary jurisdiction is raised *in limine*, the Court can go into that question and if it finds that it has no pecuniary jurisdiction over the matter, can the application be returned for presentation to the proper Court. The matter is not free from difficulty and there is, as far as I have been able to examine, no direct authority bearing upon this specific question at issue except the decision of the Allahabad High Court cited above. Before examining the decisions cited before me, I may refer to the language of rule 5 of Order 33, which provides that a Court shall reject an application for permission to sue as a pauper where, " the allegations do not show a cause of action." The corresponding clause of the old section ran thus :

" That his allegations do not show a right to sue in such Court."

The expression " cause of action " was substituted for the words " right to sue in such Court " to give effect to a number of decisions of various Courts which held that the clause even as it then stood did not limit the Court to an enquiry whether the right to sue arose within the jurisdiction, but that it had a more extended meaning and that the Court was competent to ascertain if the application showed a good subsisting cause of action capable of enforcement in Court and calling for an answer. It was even held upon the language employed in the old sub-section that questions of limitation could be gone into at that stage as also a question whether the suit contract was void as being immoral and opposed to public policy. It is clear therefore that the amended clause whose object was to adopt the extended interpretation placed by Courts thereupon was intended to have a wider application than the old clause which was *ex facie* confined to the plea relating to the jurisdiction of the Court. In other words even under the narrower expression used in the old clause, it was open to the Court to reject an application for permission where the allegations did not show that the right to sue arose within the jurisdiction, whether territorial or pecuniary of that Court. It is thus perfectly clear that an enquiry as to jurisdiction is well within the province of the Court which has to deal with an application under Order 33, rule 1. The difficulty arises not so much on account of the competency of the Court in an application for leave to sue *in forma pauperis* to go into the question of its jurisdiction to entertain the application but as to the precise order which can be passed upon the application in the event of its being found on enquiry that the subject-matter of the suit was beyond the limits of its pecuniary jurisdiction. In such a case, is the application to be dismissed or has it to be returned for presentation to the proper Court? The Allahabad High Court held that there is no provision contained in Order 33 entitling a Court to return an application under Order 33, rule 1 for presentation to the proper Court and it is in pursuance of that decision that the lower Court refused to go into the objection as to the pecuniary jurisdiction that was raised. The learned Judges who decided *Nur Muhammad* v. *Maulvi Jamil Ahmad*[1], after examining the respective rules of O. 33 concluded that what was presented to the Court was not a plaint but an application and it would reach the stage of a plaint when the application was granted and that the question as to whether the Court had jurisdiction to entertain the suit did not arise before the registration of the application as a plaint. It was also held that since there was no plaint before the Court, the order must be deemed to be an order returning the application which was not warranted by Order 33. With great respect to the learned Judges, I am constrained to observe that the view that when an application under

1. A.I.R. 1919 All. 213.

Order 33, rule 1 is presented there is no plaint before the Court is opposed to the decision of the Privy Council in *Stuart Skinner* alias *Nawab Mirza* v. *William Orde*[1] and this Court has in a series of decisions adopted the view laid down by their Lordships in that case and has held that an application under Order 33, rule 1 is a composite document consisting of a plaint and an application for being excused from the payment of court-fee. Their Lordships pointed out that a petition to sue *in forma pauperis* contains all that a plaint is required to do. Their Lordships were dealing with the Code of 1859 and referred to section 300 which provided that a petition shall contain the particulars required by section 26 in regard to plaints, and shall have annexed to it a schedule with the estimated value of the properties which shall be subscribed and verified in the manner prescribed for the subscription and verification of plaints. Similar provisions are found in rules 2 and 3 of Order 33 of the present Code. It was observed by their Lordships :

"Therefore it contains in itself all the particulars the statute requires in a plaint, and, plus these, a prayer that the plaintiff may be allowed to sue *in forma pauperis*."

On the original side of this Court in *Chidambaram* v. *Nataraja Mudaliar*[2], the question arose whether a Commissioner could be appointed under Order 33, rule 7 after the filing of a petition for leave to sue *in forma pauperis* and before the leave was granted. The objection raised to the appointment of the Commissioner was that there was no suit and there were no parties to a suit when the matter was still in the application stage and hence upon the terms of that rule a Commissioner could not be appointed. Gentle, J. (as he then was) referred to the observation of the Privy Council in *Stuart Skinner* alias *Nawab Mirza* v. *William Orde*[1], that the petition to sue as a pauper became a plaint and the suit must be deemed to be instituted when the application was filed within the meaning of the Statute of Limitations. The learned Judge held on the authority of the Privy Council decision that on the presentation of the petition to sue as a pauper, the suit must be deemed to have been instituted and therefore there must be parties, the parties being those persons cited in the copy of the plaint filed with the petition. The matter was more fully gone into by a Bench of this Court in *Brahamaramba* v. *Seetharamayya*[3]. The question that arose in that case was whether, if an applicant for leave to sue *in forma pauperis* dies, during its pendency, his legal representative is entitled to be brought on record and to continue the suit on payment of the requisite court-fee. The entire case-law bearing upon the question was fully reviewed. A reference was made to the decision of the Judicial Committee in *Stuart Skinner* alias *Nawab Mirza* v. *William Orde*[1] and it was held that an application under Order 33, rule 1, is in fact a plaint coupled with a prayer to be allowed to sue without payment of the required court-fee. The observation of Krishnan, J., in *Balaguru Naidu* v. *Muthuratnam Iyer*[4], that an application to sue as a pauper is a combination of a plaint and an application to excuse the payment of the court-fee on it, and the decision of Gentle, J., in *Chidambaram* v. *Nataraja Mudaliar*[2], to the effect that on the presentation of a petition for leave to sue *in forma pauperis* the suit should be deemed to have been instituted on that date, were fully approved and it was held that such an application is a composite document, a plaint coupled with a prayer to be allowed to sue without payment of *court-fee*. This view has also been taken in decisions of other High Courts. The Calcutta High Court in *Jagadeeswaree Debee* v. *Tinkarhi Bibi*[5], and the Patna High Court in *Bank of Bihar, Ltd.* v. *Sri Thakur Ramchandarji Maharaj*[6], gave pronouncements to the same effect. The contrary view taken by a Full Bench of the Allahabad High Court in *Chunna Mal* v. *Bhagawant Kishore*[7] that an application to sue as a pauper was not a composite document was dissented from by the learned Judges of this Court who decided *Brahamaramba* v. *Seetharamayya*[3]. The Bombay High Court in *Totaram Ichharam* v. *Dattu Mangu*[8], held that an application for the appointment of a Commissioner to take an inventory could be filed along with a petition for leave to sue *in forma pauperis* and be dealt

1. (1879) L.R. 6 I.A. 126 : I.L.R. 2 All. 241 (P.C.).
2. (1939) 1 M.L.J. 96 : I.L.R. (1938) Mad. 1060.
3. (1947) 1 M.L.J. 119.
4. (1923) 46 M.L.J. 254.
5. (1935) I.L.R. 62 Cal. 711.
6. (1929) I.L.R. 9 Pat. 439.
7. I.L.R. (1937) All. 22 (F.B.).
8. I.L.R. (1943) Bom. 138.

with by the Court under Order 33, rule 7. In that decision Beaumont, C.J., said that he entertained no doubt that the plaint, whether it consisted of the original plaint or of the petition deemed to be a plaint, took effect from the date when the plaint and the petition were presented. I may further point out that in *Brahamaramba* v. *Seetharamayya*[1], it was held that the petitioner was entitled in law to be brought on record as the legal representative of the deceased applicant for leave to sue *in forma pauperis* and to continue the suit on payment of the requisite court-fee, a clear distinction being made between the application which abated on the death of the applicant and the plaint that was filed with it with regard to which it was held that the legal representative could continue the proceeding on payment of the court-fee. This was done on the basis that the application for leave to sue *in forma pauperis* embodied a plaint. In fact at page 122 of the report while dealing with the decisions in *Subbiah* v. *Sundara Boyamma*[2] and *Duraipandiyan* v. *Solaimalai Pillai*[3], it was specifically stated that "*an application for leave to sue* in forma pauperis *is a plaint*" and that the legal representative of the applicant was entitled to enforce all the rights which he possesses and that section 149 of the Code of Civil Procedure was applicable. The limitation must be deemed to have stopped on the date on which the application for leave to sue *in forma pauperis* was filed. It will be sufficient to refer to one more decision of this Court in *Kuppusami Aiyangar* v. *Kanagammal*[4], where Pakenham Walsh, J., sitting singly, held that leave granted by one Court to a party to sue *in forma pauperis* did not enure for the continuation of that proceeding in another Court and that in the other Court leave would have to be asked for *de novo*. In that case leave to sue *in forma pauperis* was granted but when the suit came on for trial, the issue was raised as to the value of the subject-matter for the purpose of jurisdiction and the Court on enquiry found that the subject-matter was beyond its pecuniary jurisdiction and returned the plaint to be presented to the superior Court. When the plaint was presented to the Sub-Court it was rejected on the ground that it must be presented by the pauper in person. There was an appeal against that order to the District Judge who held that the District Munsiff had jurisdiction at the time when it was presented and that it was properly presented. This Court on further appeal held that the appeal lay from the order of the Sub-Court refusing to allow the suit to be filed *in forma pauperis* and that the proceedings before the District Munsiff were null and void and the presentation of the plaint to the Sub-Court was really an application to sue *in forma pauperis* and not having been presented in person was rightly rejected. This decision is material for the purpose of this case only to show that even if the application is returned, it cannot be merely presented in the other Court but a fresh application will have to be presented in accordance with the requirements of Order 33. The only question of limitation that arises in those circumstances and which may fall to be decided is whether section 149 of the Civil Procedure Code would apply or whether the case fell within the ambit of section 14 of the Indian Limitation Act, but that is a different matter. When a returned application is filed in another Court it does not have the same attributes as a plaint returned for proper presentation.

Having regard to the decisions discussed above, the conclusions that emerge are these : An application for leave to sue *in forma pauperis* embodies a plaint and is for all practical purposes to be treated as a plaint, because if the application is allowed the suit is deemed to have been filed on the date when the application was presented ; interlocutory reliefs can be granted as if it were a plaint and as if the parties to the application were parties to a suit. No doubt there is no express provision in Order 33 for the return of an application made thereunder for presentation to the proper Court in a case where the Court found that it had no jurisdiction to entertain it. But firstly there is section 141 of the Code which provides that the procedure in regard to suits should be followed as far as it can

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1. (1947) 1 M.L.J. 119.
2. (1927) 54 M.L.J. 582 : I.L.R. 51 Mad. 697.
3. (1934) 67 M.L.J. 332 : I.L.R. 58 Mad. 169.
4. (1933) M.W.N. 197.

be made applicable in all proceedings in any Court having civil jurisdiction. Secondly there is the fact that the expression in the old clause, *viz.*, "right to sue in such Court" which was sought to be extensively broadened by the expression "cause of action" in the present rule permitted questions of jurisdiction to be gone into even at the application stage. *A fortiori* under the new rule the Court should have the power and hence the duty to go into those quesions as the purpose of the amendment was not to curtail the scope of the rule. Thirdly, even if there had been no express provision in the Code it must be laid down as a fundamental principle of justice that every Court trying civil causes has inherent jurisdiction to take cognizance of questions which cut at the root of the subject-matter of controversy between the parties and a question as to the territorial or pecuniary jurisdiction of a Court to entertain a matter is a question which cuts at the root of the subject-matter of controversy. Vide *Shamu Patter* v. *Abdul Kadir Ravuthan*[1].

Applying these principles to the present case, there can be no doubt that the District Munsiff was competent and had jurisdiction upon the hearing of the application to investigate the question whether the subject-matter of the suit exceeded the limits of his pecuniary jurisdiction. He refused to exercise that jurisdiction on the ground that there was no plaint before him and that if he should hold at the end of the enquiry that it fell short of the limit of his pecuniary jurisdiction he had no power under Order 33, to return the application, there being no question of returning the plaint. As I have endeavoured to show that view is based upon the fallacy that an application under Order 33, rule 1 is not a plaint—a fallacy which was borne in upon the mind of the learned District Munsiff as a result of the decision of the Allahabad High Court. The view of the Judicial Committee as well as of this Court has on the other hand been to the contrary effect. The result is that there is a plaint before the learned District Munsiff embodied in the application and it is his duty to go into the question which has been raised *in limine* as to his pecuniary jurisdiction over the matter. It will be a waste of time if he should refrain from examining the question of jurisdiction, investigate the pauperism of the applicant, register the application as a suit and then try this issue of pecuniary jurisdiction *in limine* and find that he has no pecuniary jurisdiction and decide upon returning the plaint for presentation to the proper Court. It is the imperative duty of a Court when a preliminary objection as to jurisdiction is taken to decide that question at the earliest stage of the trial as a determination of that question is preliminary to his authority to entertain the matter or to make any further enquiry into it.

The only other matter that remains is as to the particular form in which the lower Court should word its order in the event of its finding after enquiry into the value of the subject-matter of the suit that it exceeded its pecuniary jurisdiction. The question is at this stage, merely hypothetical. But I have said enough in the course of this judgment which will, I imagine, render the District Munsiff the necessary assistance.

In the result the civil revision petition is allowed. The lower Court is directed to entertain the objection and dispose of it according to law. In the circumstances of the case, there will be no order as to costs.

V.S. *Petition allowed.*

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1. (1912) 23 M.L.J. 321 : L.R. 39 I.A. 218 : I.L.R. 35 Mad. 607 at 612 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Officiating Chief Justice*, AND MR. JUSTICE YAHYA ALI.

P. Venugopala Pillai .. *Appellant**

v.

V. Thirunavukkarasu and others .. *Respondents.*

Transfer of Property Act (IV of 1882), *sections* 105 *and* 106—*Agreement of rent in respect of toddy yield of coconut trees—Construction—Rights of parties—Lease or licence—Proper notice to quit—Necessity—Applicability of section* 106.

The defendant executed an agreement in favour of the plaintiffs who were the owners of the coconut gardens in suit in the following terms :

"I have agreed with you that I will act in accordance with the undermentioned conditions for the sake of my enjoying for a period of three years from October, 1934 to the 30th of September, 1937, the produce only of the coconut trees situate in the coconut garden . . . . . . In case you lease the aforesaid trees to any other person on the expiry of the aforesaid stipulated period I have no objection whatever to such lessee entering into the garden even a month previously and commencing and doing before hand itself the acts which he may require to do. I shall have the trees in the aforesaid garden marked and enjoy the toddy yield. I shall safeguard the said trees from damage of any kind. You shall yourself enjoy the coconuts, etc. . . from 12 trees of your choice in the garden aforesaid. I shall have no interest whatever in the produce thereof. For enjoying the usufruct of the trees leased out to me I shall pay a monthly rent of Rs. 150 (rupees one hundred and fifty) in cash, on or before the 15th of every month either to you or to your order and obtain receipt. I shall have nothing whatever to do with the leaves, the spathe and the pannadai (fibrous webs) etc., falling (from the trees) in the aforesaid garden. You shall yourself at your cost bale water etc., for the trees in the aforesaid garden and keep (the same) in good condition. . . . .

You shall yourself with your men and at your expense do all the acts of bettering or improving the vacant land in the said garden or baling out water, etc., and keep the garden in good condition . . . .

I shall deliver possession to you of your garden in the condition in which you delivered possession (to me). To this effect is the agreement of rent in respect of toddy yield of coconut trees executed by me with my consent. I have nothing to do with the land. Only the toddy."

After the expiry of the three years for the next year another agreement on the same terms was executed by the defendant and thereafter, there were no further agreements executed, but the defendant continued year after year to enjoy rights similar to those covered by the prior agreements under substantially similar terms. On the 5th September, 1947, the plaintiffs issued a notice to the defendant that he must quit the properties and stop entering thereon for any purpose from 1st October, 1947. On the defendant refusing to comply with the demand on the ground that he was an agricultural lessee entitled under the law to a six months' notice, the plaintiffs filed a suit for a permanent injunction restraining the defendant from entering into the two gardens after the expiration of 30th September, 1947. The suit was decreed on the ground that the defendant was a licensee and not a lessee and that the licence was properly terminated. On appeal,

Held, the defendant could not be held to be a lessee of the gardens as such. So far as the land was concerned, he was only a licensee and his right to enter upon the land and to use the land was only so long as he had the right to enjoy the toddy yield from the trees. But his right to tap the coconut trees and obtain toddy is in the nature of immoveable property because it is a benefit which arises out of land and the right conveyed by the agreements would be in the nature of leasehold right. The notice issued on 5th September, 1947, cannot be treated as a proper and valid notice. The lease of the toddy yield is a lease for agricultural purposes and therefore a sufficiently reasonable notice should have been given before it could be properly terminated. The principle underlying section 106, Transfer of Property Act would be applicable to such a case. As the lease was not properly terminated, the plaintiffs were not entitled to relief.

On appeal from the judgment of the Hon'ble Mr. Justice Kunhi Raman dated 25th day of September, 1947, in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in suit No. 393 of 1947.

K. V. Ramachandra Aiyar and *S. Thiagaraja Aiyar* for Appellant.

N. Narasimha Aiyar, *Subrahmanyam* and *Rajagopal* for Respondents.

The judgment of the Court was delivered by

The Officiating Chief Justice.—This appeal relates to two coconut gradens situated in Lloyd's Road and Sullavan's Garden Road, Mylapore, in the City, which admittedly belong to plaintiffs 1 to 3 who are respondents 1 to 3 here. The first

* O. S. A. No. 67 of 1947. 1st April, 1948.

plaintiff is the son of one Kandaswami Gramani, and plaintiffs 2 and 3 are the grandsons of Kandaswami by the first plaintiff's brother. The first item originally belonged to Jagadambal, wife of Kandaswami Gramani. The fourth plaintiff who is the fourth respondent claims to have obtained from plaintiffs 1 to 3 the right of tapping the coconut trees in these two gardens from 1st October, 1947, for a period of one year. The defendant has been enjoying the right of tapping the coconut trees in these two gardens for toddy continuously from 1st October, 1934. So far as item 1 is concerned, the defendant obtained a right to tap the trees for a period of three years from Kandaswami Gramani by a registered agreement, Ex. P. 1, dated 1st March, 1935. This covered the period from 1st October, 1934 to 30th September, 1937. For the next year, from 1st October, 1937 to 30th September, 1938, he executed another agreement on 15th September, 1937, Ex. P. 2. Thereafter, it is common ground that there were no further agreements executed, but the defendant continued year after year to enjoy rights similar to rights covered by Exs. P. 1 and 2 under substantially similar terms, substantially, because the rent was being raised occasionally. So far as item 2 is concerned, there is no document. But it is common ground that the terms in respect of this item were identical with those in respect of item 1. Though the learned advocate for the defendant-appellant contended that there were material alterations in the terms under which the defendant enjoyed the trees in the two gardens subsequent to 1938, we consider that substantially and in so far as they are material for the disposal of this appeal, the conditions continued to be the same as those contained in Ex. P. 1.

On the 5th September, 1947, plaintiffs 1 to 3 issued a notice to the defendant through their advocates informing him that he must quit the properties and stop entering thereon for any purpose on and from 1st October, 1947. The position taken up by the plaintiffs was that the defendant was being granted a licence year after year to enjoy the usufruct of the coconut trees in the two properties and that the last of such licences came to an end by efflux of time on 30th September, 1947. The defendant refused to comply with that demand on the ground that he was an agricultural lessee entitled under law to six months' notice. A week after the issue of that notice, the plaintiffs instituted the suit out of which this appeal arises on the Original Side of this Court praying for a permanent injunction restraining the defendant from causing any obstruction to the fourth plaintiff, his servants and agents, taking charge of half the number of trees in the two gardens and doing all usual and necessary acts for making the trees fit for yielding toddy from 1st October, 1947 and also for a permanent injunction restraining the defendants, his servants and agents from entering into the two gardens after the expiration of 30th September, 1947. Kunhi Raman, J., who tried the case held that the defendant was a mere licensee and not a lessee and that the licence was properly terminated with effect from 30th September, 1947. He granted both the prayers of the plaintiffs and decreed the suit. The defendant is the appellant.

The only question which falls to be considered in this appeal is whether the defendant was in the position of a lessee from plaintiffs 1 to 3 as regards the right to tap the coconut trees in the two properties for toddy, or whether he was in the position of a mere licensee. Both Mr. Ramachandra Aiyar for the appellant and Mr. Narasimha Ayyar for the contesting respondents attempted to raise other alternative pleas, but we are convinced that these really do not arise and they will be dealt with later briefly.

As the nature of the relationship between the defendant and plaintiffs 1 to 3 really depends on a construction of the terms of the agreement dated 1st March, 1935, Ex. P. 1, it is necessary to extract the material portions from this document. It purports to be an agreement of rent in respect of the toddy yield of coconut trees executed in favour of Jagadambal Ammal by the defendant. The following portions of the document are material for this appeal :

"I have agreed with you that I will act in accordance with the undermentioned conditions for the sake of my enjoying for a period of three years from October 1934 to the 30th of September 1937, the produce only of the coconut trees situate in the coconut garden . . . . . . In case you lease the aforesaid trees to any other person on the expiry of the aforesaid stipulated period I have

no objection whatever to such lessee entering into the garden even a month previously and commencing and doing before hand itself the acts which he may require to do. I shall have the trees in the aforesaid garden marked and enjoy the toddy yield. I shall safeguard the said trees from damage of any kind. You shall yourself enjoy the coconuts, etc.. . . . . from 12 trees of your choice in the garden aforesaid. I shall have no interest whatever in the produce thereof. For enjoying the usufruct of the trees leased out to me I shall pay a monthly rent of Rs. 150 (rupees one hundred and fifty) in cash, on or before the 15th of every month either to you or to your order and obtain receipt. I shall have nothing whatever to do with the leaves, the spathe and the pannadai (fibrous webs) etc., falling (from the trees) in the aforesaid garden. You shall yourself at your cost bale water etc., for the trees in the aforesaid garden and keep (the same) in good condition . . . .

You shall yourself with your men and at your expense do all the acts of bettering or improving the vacant land in the said garden or baling out water, etc., and keep the garden in good condition . . . .

I shall deliver possession to you of your garden in the condition in which you delivered possession (to me). To this effect is the agreement of rent in respect of toddy yield of coconut trees executed by me with my consent. I have nothing to do with the land. Only the toddy."

On a plain reading of the document, it is clear that the rights which the defendant obtained thereunder were (1) the right to enjoy the toddy yield from the trees, and (2) the right to enter upon the land for the said purpose. It is quite clear that the defendant did not obtain any right in and to the land. He was not entitled to the exclusive possession of the land as such. The owner was entitled to make such use of the vacant land as she wanted to and she was expected , at her cost, to water the trees and keep the garden in good condition. The defendant cannot, therefore, be held to be a lessee of the garden as such. So far as the land was concerned, he was only a licensee and his right to enter upon the land and to use the land was only so long as he had the right to enjoy the toddy yield from the trees. The next question is whether this right to take the toddy yield from the trees to which certainly the defendant was entitled under the document was a right in the nature of a licence or was it a lease of immoveable property? Section 105 of the Transfer of Property Act defines a lease thus :

"A lease of immoveable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money . . . . . ."

A licence is defined in the Indian Easements Act, in section 52 as follows :—

"Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immoveable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a license."

According to section 3 of the Transfer of Property Act, immoveable property does not include standing timber, growing crops or grass. But there is nothing in that Act otherwise defining immoveable property. We have therefore to refer to the definition in section 3 (25) of the General Clauses Act which runs thus :

"'Immovable property' shall include land, benefits to arise out of land and things attached to the earth, or permanently fastened to anything attached to the earth."

Now, can the right to tap the coconut trees for toddy be said to be a benefit to arise out of land? If it can be, then the right which the defendant obtained under Ex. P. 1 would be immoveable property. To decide this question, it is useful to refer to the leading case of *Marshall* v. *Green*[1], for the statement of the law with regard to this subject, which is contained in the judgment of Lord Coleridge, C.J., He cites the following passage from the notes of Sir Edward Vaughan William to the case of *Duppa* v. *Mayo* :

"The principle of these decisions appears to be this, that wherever at the time of the contrac it is contemplated that the purchaser should derive a benefit from the further growth of the thing sold, from further vegetation and from the nutriment to be afforded by the land, the contract is to be considered as for an interest in land ; but where the process of vegetation is over, or the parties agree that the thing sold shall be immediately withdrawn from the land, the land is to be considered as a mere warehouse of the thing sold, and the contract is for goods."

This proposition has been applied again and again, because it affords a clear and intelligible rule. It was applied in the Full Bench decision of this Court in *Seeni*

1. (1875) L.R. 1 C.P.D. 35.

Chettiar v. *Santhanathan Chettiar*[1], where it was decided that a document which assigned a right to cut and enjoy trees etc., standing in the village tank for a period of four years from its date conveyed an interest in immoveable property, because it was contemplated that the assignee should derive a benefit from the further growth of the things sold, from further vegetation and from the nutriment to be afforded by the land. That an application of this test to a case like the present inevitably leads to the conclusion that the right covered by the document, Ex. P. 1, in the case, is a right to an interest in immoveable property is brought out by the observations in the decision in *Natesa Gramani* v. *Tangavelu Gramani*[2]. No doubt that was a case the decision in which depended upon the language in the Indian Registration Act. The learned Judges there had to deal with a document which conferred on the transferee the right to enjoy the produce of the palmyra trees in the garden including toddy, fruits, etc. White, C.J., said that under that document the person who is entitled to take the toddy was entitled to an interest in land, because as he put it, " without land there would be no tree and without tree there would be no toddy ". Oldfield, J., observed thus :

> " No doubt in the present case, in which plaintiff's right was to draw palmyra juice, cut such leaves as his doing so involved and take the fruits of the trees, his right to do so for two reasons entitled that he should benefit to adopt an expression from *Marshall* v. *Green*[3], by ' the nutriment afforded by the land'."

The decision in that case eventually turned on the definition of moveable property in the Registration Act which included " standing timber, growing crops and grass, fruit upon and juice in trees."

Applying the same test, it was held by a learned Judge of the Allahabad High Court in *Shiv Dayal* v. *Puttu Lal*[4], that a mortgage of a fruit-bearing tree is a mortgage of immoveable property.

Applying this test, there can be no doubt that the right to tap the coconut trees and obtain toddy is in the nature of immoveable property because it is a benefit which arises out of land.

In this view, it is unnecessary to deal with the contention of Mr. Ramachandra Aiyar for the appellant that exclusive possession was given to the defendant under Ex. P. 1 which he continued to have to the date of the suit and therefore he was in the position of a lessee. Having regard to the circumstances which we set out at the opening, it cannot be said that exclusive possession of the entire garden was conveyed to the defendant. So far as the land itself was concerned, he was only in the position of licensee, but so far as the trees in the garden were concerned, excepting 12 trees which had been reserved for the use of the owner, as regards the rest of the trees and his right to tap them for toddy, the defendant was entitled to an exclusive right. Kunhi Raman, J., after referring to the decisions in *Seeni Chettiar* v. *Santhanathan Chettiar*[1], and *Natesa Gramani* v. *Thangavelu Gramani*[2], and referring to the terms of Exs. P. 1 and P. 2 took the view that these two documents created only a licence in favour of the defendant to enjoy the yield of toddy from the trees in the two gardens. We think that evidently this aspect which we have just dealt with, namely, that the right to enjoy the yield of toddy from the trees would be in the nature of immoveable property and therefore the right conveyed under Exs. P. 1 and P. 2 would be in the nature of a leasehold right, was not stressed before the learned Judge.

It was not seriously disputed at the trial that if the defendant was a lessee, the plaintiffs' suit must fail. But before us, Mr. Narasimha Aiyar contended that even if the defendant was a lessee he was holding under a specific lease for one year ending with 30th September, 1947, and therefore the lease in his favour came to an end by efflux of time. On the evidence, we do not think it can be said that the

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1. (1897) 6 M.L.J. 281 : I.L.R. 20 Mad. 58 (F.B.).
2. (1914) I.L.R. 38 Mad 883.
3. (1875) L.R. 1 C.P.D. 35.
4. (1931) I.L.R. 54 All. 437.

plaintiffs 1 to 3 have established the case set out in the plaint that there was an oral lease for one year commencing from 1st October, 1946, and terminating on 30th September, 1947. It was therefore necessary for plaintiffs 1 to 3 to legally determine the lease in favour of the defendant which may be presumed to be from year to year. The notice issued on 5th September 1947 cannot be treated as a proper and valid notice. We are also inclined to think that the lease of the toddy yield is a lease for agricultural purposes and therefore a sufficiently reasonable notice should be given before it could be properly terminated. The principle underlying section 106 of the Transfer of Property Act has been applied in several cases in this Court to agricultural leases, though the provisions of the Transfer of Property Act might not be applicable to them.

In the view we have taken, it is unnecessary to deal with the alternative contention of Mr. Ramachandra Ayyar for the appellant that, even if the appellant was a licensee the licence could not be validly terminated.

As the lease in favour of the defendant had not been validly terminated on the date of the suit, plaintiffs 1 to 3 and the fourth plaintiff in their right were not entitled to obtain a permanent injunction restraining the defendant from enjoying the rights to which he was entitled under the lease. The appeal is therefore allowed and the suit is dismissed with costs throughout.

V.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. P. V. RAJAMANNAR, *Officiating Chief Justice* AND MR. JUSTICE RAJAGOPALAN.

T. Radhakrishna Chettiar .. *Appellant**

v.

The Province of Madras, represented by the Collector of Tanjore .. *Respondent.*

Land Acquisition Act (I of 1894), section 23—Acquisition of house and ground situated in a municipality—Compensation—Market value—Computation—Criterion for arriving at number of years' purchase.

The proper method of valuation to be adopted in a case of compulsory acquisition relating to a house and ground situated in a municipality and fetching regular income is to assess the value on the basis of capitalisation of the net annual income. The number of years' purchase to be adopted for capitalisation has to be arrived at by taking into account the interest yielded by Government securities at the time of the notification under section 4 (1) of the Land Acquisition Act.

Where the gilt-edged securities were carrying interest at three per cent. at the time of the notification under section 4 (1) of the Land Acquisition Act, the annual rental value must be capitalised at 33 1/3 years' purchase.

Appeal against the decree of the Court of the Subordinate Judge, Kumbakonam dated 14th August, 1945, in O.P. No. 18 of 1944.

A. Seshachariar and *K. Raghavan* for Appellant.

The Government Pleader (*K. Kutti Krishna Menon*) for Respondent.

The Judgment of the Court was delivered by

The Officiating Chief Justice.—This appeal arises out of a reference made to the Subordinate Judge of Kumbakonam under section 18 of the Land Acquisition Act in respect of the valuation of the property belongting to the appellant which was acquired under the Act. The date of the notification under section 4 (1) of the Act was 24th November, 1942. The property acquired is a site measuring 7156 sq. ft. with a building thereon and wells and trees, situated in Town survey No. 2202 of the second ward of the Kumbakonam municipality. The Land Acquisition Officer valued the site separately at Rs. 2236-4-0 calculating at the rate of

* Appeal No. 612 of 1945. 7th April, 1948.

five annas per sq. ft. He valued the house, compound wall, latrine and two wells at Rs. 1041 and the trees at Rs. 132-8-0. On the aggregate of Rs. 3409-12-0 he allowed the statutory allowance of 15 per cent. and awarded a total compensation of Rs. 3921-3-5. The learned Subordinate Judge confirmed the award in toto.

In appeal it is conceded on behalf of the appellant that the proper method of valuation to be adopted in a case like the present relating to house and ground situated in a municipality and fetching regular income is to asseess the value on the basis of capitalisation of the net annual income. The learned Government Pleader did not seriously contest that this was the proper method.

It was common ground in the lower Court that the gross annual rental value of the property may be taken to bé Rs. 233-12-0 and the net annual rental may be fixed at Rs. 154-12-4. The only question remaining for determination was as to the number of years' purchase to be adopted for capitalisation. Several decisions were cited to us on this point by both the learned counsel for the appellant and the learned Government pleader. As all these decisions do not go the same way, it is necessary to examine each decision to find out the principle, if any, which was enunciated in each of these cases.

Taking first the earliest case in *The Collector of Kistna* v. *Zamindar of Challapalli*[1], the property which had to be valued was the melwaram interest in certain zamindari land. Of the two learned Judges who decided the case, Newsam, J., approached the question from the following standpoint. It is first necessary to ascertain the gross income from the acquired land. The next step should be to ascertain the net income. Having ascertained the net annual income it must be capitalised by computing the number of years' purchase. This must depend upon the rate of interest prevailing on gilt-edged securities at the time of the acquisition *i.e.*, on the date of the notification under section 4 of the Act. To the figure thus arrived must of course be added 15 per cent. for compulsory acquisition. Applying these principles, having regard to the rate of interest on gilt-edged securities at the time of the notification which was $3\frac{1}{2}$ per cent. the learned Judge arrived at 30 years' purchase. The other learned Judge, Venkatasubba Rao, J., agreed with Newsam, J. He observed as follows :

> "The return from landed property, generally speaking, reflects the prevalent rate of interest on money investments . . . . In the present cases, the relevant notifications were published towards the end of 1933 and the beginning of 1934. The Government of India loan at that time took the form of a three and a half per cent. issue liable to income tax. . . . . When there is definite evidence that the actual return on investments is three and a half per cent., it would be wrong to adopt the arbitrary rule of the twenty years' purchase. The return having been ascertained, the years' purchase is arrived at by dividing 100 by the figure of such return. In the present cases. the return is about three and a half per cent. and the number of years' purchase which it would be right to allow would therefore be about thirty."

It is true that the learned Judge earlier in his judgment observed that the rule of the number of years' purchase is not a theoretical or legal rule but depends upon economic factors. The most important of such economic factors is, as pointed out by him in illustration, the prevailing rate of interest. In the *Land Acquisition Officer, Calicut* v. *Subba Rao*[2], another Division Bench consisting of King and Patanjali Sastri, JJ., adopted this principle in arriving at the proper value of a site with building thereon. The learned Judges understood the decision in *Collector of Kistna* v. *Zamindar of Challapalli*[1], to have laid down that it has long been the practice of the Courts in this Presidency to calculate the profits from any form of landed property as equal to the profits made by investing money in gilt-edged securities. It is important to notice that in this case the property which had to be valued was a site with building exactly similar to the property concerned in this appeal which is also a site with building. In the *Sub-Collector, Rajahmundry* v. *Parthasarathi*[3], the property acquired was a site of 648 sq.ft. in the town of Rajahmundry. The learned Judges adopted the basis of the capitalisation of the net annual rental value. The lower

1. (1937) 2 M.L.J. 744 : I.L.R. (1938) Mad. 431.
2. (1941) 2 M.L.J. 75.
3. (1942) 2 M.L.J. 512 : I.L.R. (1943) Mad. 127.

Court in that case had adopted 12 years' purchase whereas the claimant wanted the calculation to be made upon 30 years' purchase. The learned Judge, Krishnaswami Aiyangar, J., who delivered the judgment of the Bench, after observing that the number of years' purchase which should be adopted in a given case must vary with individual cases and will have to be decided upon the material placed before the Court, thought that 20 years' purchase should be adopted in that case as the basis for fixing the market value. The learned Judge went on to say :

> "This is ordinarily adopted as the basis and we see no reason to depart from the rule of ordinary practice."

The attention of the learned Judges was drawn to *The Collector of Kistna* v. *Zamindar of Challapalli*[1], and *Land Acquisition Officer, Calicut* v. *Subba Rao*[2], But they do not express any dissent from the decision in either of those cases. Krishnaswami Aiyangar, J., points out, and if we may say so with all respect rightly, that the first of these cases dealt with the compensation awardable in respect of the melwaram right of a zamindar on zamindari property and the second of the cases had reference to a site with a building thereon in the town of Calicut. The learned Judge was evidently distinguishing these two cases from the case before him which related to a vacant site. Reference was made to the dictum of Venkatasubba Rao, J., that there is no uniform or rigid practice in regard to the number of years' purchase. We do not understand this case to lay down that the ordinary rule is to adopt twenty years' purchase as the basis for fixing the market value of any kind of property. If that were so, the learned Judges should have expressly dissented from the two earlier decisions, but they nowhere expressly dissent from them. In *Revenue Divisional Officer, Trichinopoly* v. *Varadachari*[3], the subject matter of the of the acquisition was ryotwari land. Horwill, J., who delivered the judgment Bench dealt with the two decisions in *The Collector of Kistna* v. *Zamindar of Challapalli*[1], and *Land Acquisition Officer, Calicut* v. *Subba Rao*[2]. Referring to the latter decision, the learned Judge said as follows :

> "In *Land Acquisition Officer, Calicut,* v. *Subba Rao*[2], the learned Judges, as already stated, were considering the value of a site in Calicut. It is not necessary for us to express any view on this departure from past practice ; for whatever may be said with regard to a melwaram interest in a zamindari land or a vacant site, it is difficult to accept the current rate of interest on gilt-edged securities as a safe guide to the multiple to be applied to the annual profits on ryotwari land."

He then gives reasons for his conclusion with which we are not now directly concerned. Krishnaswami Aiyangar, J., was the other Judge who formed the Bench. The learned Judges did not understand the case in *Sub-Collector, Rajahmundry* v. *Parthasarathi*[4], to have laid down any general rule of valuation, because Horwill, J., says with reference to that case,

> "In a case that has been decided since *Land Acquisition Officer, Calicut* v. *Subba Rao*[2], to which one of us was a party, namely, *Sub-Collector, Rajahmundry* v. *Parthasarathy*[4], it was held that thirty years' purchase did not give the probable value of the land. It was found on the facts of that case that twenty years' purchase gave the nearest practical approach to the value of the land."

Besides these reported cases, the learned Government pleader drew our attention to three unreported decisions of Division Benches of this Court. In *The Revenue Divisional Officer, Tuticorin* v. *Arumugham Pillai*[5], decided by Sir Lionel Leach, C.J, and Lakshmana Rao, J., the lower Court had awarded compensation capitalising the annual rental value on the basis of 13 years' purchase. After referring to the case in the *Sub-Collector, Rajahmundry* v. *Parthasarathi*[4], the learned Judges say that twenty years' purchase would be the proper basis for the assessment of the value. There is no discussion of any principle nor does it appear that there was any contention that the number of years for capitalisation should be fixed with reference to the yield of Government securities. In *Bibi Rukia* v. *The Revenue Divisional Officer, Mangalore*[6], Krishnaswami Aiyangar and Somayya, JJ., arrived at the basis of 20 years' purchase but why they did so is made clear from the following words :

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1. (1937) 2 M.L.J. 744 : I.L.R. (1938) Mad. 431.
2. (1941) 2 M.L.J. 75.
3. (1944) 1 M.L.J. 142.
4. (1942) 2 M.L.J. 512 : I.L.R. (1943) Mad. 127.
5. Appeal No. 345 of 1941.
6. Appeal 289 of 1941.

"As things stand and taking the facts which appear in this case, we shall not be justified in awarding anything more than the value to be arrived at on the basis of 20 years' purchase, the annual rental value being taken to be Rs. 1,000."

In *Venkatachalapathi Iyer* v. *Revenue Divisional Officer, Kumbakonam*[1], Sir Lionel Leach, C. J. and Shahabuddin, J., in a short judgment without any discussion held that ten years' purchase adopted by the lower Court was wrong and that when property values are fixed on the basis of net annual rental, it is usual to give 20 years' purchase. It does not appear that the decisions in *Collector of Kistna* v. *Zamindar of Challapalli*[2], and *Land Acquisition Officer, Calicut* v. *Subba Rao*[3], were brought to the notice of the learned Judges.

After a consideration of all these cases, it appears to us that both on principle and on account of the similarity of facts, the valuation in this case should follow the basis adopted by King and Patanjali Sastri, JJ., in *Land Acquisition Officer, Calicut* v. *Subbarao*[3]. There, as here, the property acquired was land with building thereon. The number of years' purchase was arrived at by taking into account the interest yielded by Government securities at the time of the notification under section 4 (1) of the Act. In the present case it appears from the judgment of the lower Court that it was not disputed that gilt-edged securities were carrying interest at three per cent. at the time of the acquisition. The annual rental value must therefore be capitalised at $33\frac{1}{3}$ years' purchase. To the value thus arrived, the statutory allowance of 15 per cent. must be added. The appeal is allowed as indicated above with proportionate costs both here and in the Courts below.

V.S. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL AND MR. JUSTICE GOVINDARAJACHARI.

Meerasa Rowther .. *Appellant**

Criminal Procedure Code (V of 1898), section 401 and Criminal Rules of Practice and Orders, Part I, rule 259—Accused convicted for murder of his child—Great attachment to the child and expression of remorse after the stabbing—Not extenuating circumstances warranting recommendation for mercy.

The appellant was convicted of the murder of his child and sentenced to transportation for life with a recommendation for mercy. The evidence disclosed that he was fond of his child and had never injured it previously, and that immediately after stabbing the child he regretted having done so.

Held, these are not extenuating circumstances; on the other hand, the murder of an innocent child is something even graver than the attack on a person against whom the accused has some spite, and would not warrant a recommendation for mercy.

Appeal against the judgment of the Court of Session of Tinnevelly Division dated 1st December, 1947, in C.C. No. 111 of 1947.

G. Gopinath (amicus curiae) for the Appellant.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Judgment of the Court was delivered by

Govindarajachari, J.—This is an unfortunate case. The appellant has been convicted of the murder of his only child, Pakkiri Meeral, aged 5 by stabbing it in the abdomen with a knife and has been sentenced to transportation for life.

The prosecution case may be shortly stated. The appellant was married to P. W. 6 ten years ago. Their married life was none too happy. There were frequent quarrels, the last being about 20 days prior to the murder. As a consequence of this quarrel, P.W. 6 went away to the house of her brothers, which is very near to the appellant's house. The child, Pakkiri Meeral, was spending part of its time in the appellant's house and part of its time in the house of her

1. Appeal No. 29 of 1942.
2. (1937) 2 M.L.J. 744 : I.L.R. (1938) Mad. 431.
3. (1941) 2 M.L.J. 75.

* Crl. Appeal No. 679 of 1947. 16th March, 1948

maternal uncles. On the 17th of September, 1947, at about 8 a.m. the appellant went to the house of his brothers-in-law and asked that his wife should be sent to his house. The brothers-in-law suggested a panchayat. P.W. 6 who was inside the house heard this conversation and shouted out that she would not, under any circumstances, go back to the appellant. The appellant immediately whipped out a knife and stabbed the child who had gone with him from his house to the house of his brothers-in-law. According to the medical evidence and the *post mortem* certificates—Ex. P-1—the child had two injuries, one a necessarily fatal injury on the abdomen and the other an incised injury one inch by half inch by half inch deep above the right iliac crest over the back. According to the doctor, P.W. 1, this last injury could not in any way have contributed to the death of the child. The injury on the abdomen was a very serious one. The abdominal cavity was penetrated to a depth of an inch and a half. The attack is spoken to by P.Ws. 4 and 5, two brothers-in-law of the appellant, and P.W. 7 his brother-in-law. P.W. 6 speaks to quarrels between her and her husband and how when she heard her husband asking her brothers to send her back to him she cried out from within the house that she had had enough of him and that she would never again live with him. Immediately thereafter she heard another cry out that the appellant was stabbing the child. She opened the door and came out of the house and found P.W. 5, her brother wresting a knife from the hands of the appellant.

The appellant's case has throughout been that the child was injured in an accident. In his statement in the Committing Magistrate's Court the appellant stated that the child hit on a corrugated iron sheet in the lane adjacent to the house of his brothers-in-law and it fell on his hand. He was there cutting out some cocoanut kernel for the child. When the child fell on his hand the knife in his hand got pierced in the child's abdomen. Though the appellant put forward this case even in the Court of the Committing Magistrate it is somewhat significant that his brother, P.W. 8, to whom the appellant rushed up with his child in his arms shortly after it was stabbed did not say in the course of his deposition in the Committing Magistrate's Court that the appellant mentioned to him that the injury was the result of an accident. P.W. 8 was cross-examined in the Sessions Court and could not explain why he did not say in the Court of the Committing Magistrate that the accused told him that the child had fallen on a knife. The witnesses for the prosecution are frank enough to state that they did not know how the child came to sustain the injury in the back. It is likely that that injury was sustained in consequence of the body of the child coming into contact with the corrugated iron sheet which admittedly was standing on the ground close to the house of P.Ws. 4, 5 and 7. It is possible that the injury on the back was received when the child fell back after it was stabbed by the appellant. It seems to us that this theory of accident is an after-thought and that it is merely an attempt to utilise the injury which the child undoubtedly sustained in the back for the purpose of supporting a theory which is not true. We have anxiously considered the entire evidence in the case and we see no reason to doubt that the injury on the abdomen was not the result of any accident and that the appellant stabbed the child in the manner deposed to by P.Ws. 4, 5 and 7.

It is true that almost every one of the prosecution witnesses says that the appellant was fond of the child and that even when he was quarrelling with his wife he never injured the child previously. The prosecution evidence also discloses that the appellant immediately after stabbing the child regretted having done so but there is, in our opinion, no reason to doubt the testimony of P. Ws. 4, 5 and 7. The conviction of the appellant for murder must therefore be confirmed.

The learned Sessions Judge has sentenced the appellant to transportation for life and he has also made a recommendation to the Government under section 401 of the Criminal Procedure Code and rule 259 of the Criminal Rules of Practice and Orders, Part I, for exercising its prerogative of mercy. The learned Sessions Judge says that the minimum punishment prescribed by law, namely, transportation

for life, is, in his opinion, more rigorous than the circumstances of the case warrant. We regret we are unable to support this recommendation. That the appellant murdered his own child to whom he was evidently attached is, in our opinion, no extenuating circumstance whatever. On the other hand, the murder of an innocent child should be regarded as something graver even than the attack on a person against whom the accused had some spite. The appellant showed his remorse immediately after he stabbed the child; he is stated to have wept aloud and carried the child in his arms to his own house. This too, in our opinion, is no extenuating circumstance at all. The appeal is dismissed.

V.P.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HAPPELL.

Vepa Nagasurya Venkata Joga Kusuma Harnath being minor by his mother Bepu Seethamma .. *Petitioner**

v.

Chakka Bhavanarayana and others .. *Respondents.*

Madras Agriculturists' Relief Act (IV of 1938), sections 19 and 20—Mortgage decree against joint family—Subsequently born member of the family, whether can apply under section 20.

A member of a Hindu joint family petitioned the Court under section 20, Madras Agriculturists' Relief Act and the lower Court dismissed the application on the ground that the petitioner not having been born when the mortgage decree in question was passed, he could not maintain an application under section 20 of the Act. In revision,

Held, that section 20 is ancillary to section 19 of the Act and that being so the expression " on application " should be construed as meaning " on an application by a person entitled to the benefits of section 19 ". Therefore the petitioner's application was maintainable.

Sankaran Nambisan v. *Thachuthayya Kaimal*, (1945) 2 M.L.J. 535, applied.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order in O. P. No. 39 of 1946 on the file of the Subordinate Judge's Court of Vizagapatam, dated 20th January, 1947.

T. S. Narasingha Rao and *M. Balachandrudu* for Petitioner.

Respondent not represented.

The Court delivered the following

JUDGMENT.—The order out of which this civil revision petition arises was passed by the Subordinate Judge of Vizagapatam on an application made by the petitioner under section 20 of the Agriculturists' Relief Act. A mortgage decree had been passed against the joint family to which the petitioner now belongs, but on the date when the decree was passed the petitioner was not born. Section 20 of the Agriculturists' Relief Act provides that :

" Every Court executing a decree passed against a person entitled to the benefits of this Act, shall, on application, stay the proceedings until the Court which passed the decree has passed orders on an application made or to be made under section 19."

The learned Subordinate Judge dismissed the application on the ground that as the petitioner was not born when the decree was passed, he could not be regarded as a person against whom the decree is passed as to be able to maintain the application under section 20. Section 19 of the Agriculturists' Relief Act provides that a member of the family against whom a decree for repayment of a debt has been passed can apply for an amendment of the decree. Notwithstanding the provisions of section 19, however, the learned Subordinate Judge was of opinion that the petitioner could not maintain an application for stay under section 20, because an order of stay could be given only to a person against whom the decree sought to be executed was passed. Section 20 does not say precisely that stay

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* C. R. P. No. 159 of 1947. 19th April, 1948.

can only be given to a person against whom the decree was passed. It says that every Court executing a decree passed against the person entitled to the benefits of the Act shall on application stay the proceedings.

It is argued by learned counsel for the petitioners that the application need not be necessarily by a person against whom a decree was passed but by a person entitled to the benefits of section 19 to which section 20 of the Agriculturists' Relief Act is ancillary. In support of this petition he has referred me to a decision of Patanjali Sastri and Koman, JJ., in *Sankaran Nambisan* v. *Thachuthayya Kaimal*[1]. In that case the question whether a person entitled to the benefits of section 19 but against whom a decree had not actually been passed was entitled to obtain a stay under section 20 was not directly in issue. It was, however, observed by Patanjali Sastri, J., in his judgment that section 19 of the Act :

> " expressly empowers, in the case of a debt due by a joint Hindu family, any member of the family, whether or not he is the judgment-debtor to apply for relief under that section, and as the relief of stay under section 20 is only ancillary to the application for the relief obtainable under section 19, it must follow that any member of a joint family in the case of a family debt, must also have the power to apply for stay under section 20."

No doubt, as already observed, the question in *Sankaran Nambisan* v. *Thachuthayya Kaimal*[1] was whether the proviso to section 20 would apply so as to bind the family even though the application under section 20 was made by a junior member of the family. Patanjali Sastri, J., however has pointed out that section 20 is ancillary to section 19 and that being so, it seems to me the expression " on application " should be construed as meaning " on an application by a person entitled to the benefits of section 19."

In this view the petition is allowed with costs.

K.C. *Petition allowed.*

[SPECIAL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction.)

PRESENT :—MR. P. V. RAJAMANNAR, *Officiating Chief Justice*, MR. JUSTICE SATYANARAYANA RAO AND MR. JUSTICE GOVINDA MENON.

In the matter of The Indian Press (Emergency Powers) Act (XXIII of 1931)

and

In the matter of The " Prajasakti " a Daily Newspaper published at Bezwada within the Province of Madras.

Katragadda Rajagopala Rao, publisher of the abovesaid newspaper "Prajasakti" .. *Petitioner**

v.

The Province of Madras .. *Respondent.*

Indian Press (Emergency Powers) Act (XXIII of 1931, as amended by the Criminal Law Amendment Act, 1932), sections 4 (1) (d), 7 (3) and 23—Scope and applicability—Applicability of section 4 (1) (d)—Test—Violent criticism of party in power by rival party—Attack on actions of police force—No allegation of Government's approval of such acts—Action under section 7 (3) if justified—Truth or falsity of impugned matter—Relevancy—Failure to take action against other newspapers for similar articles—If a good plea in defence.

Before it can be held that the words of the impugned matter have the tendency set out in clause (*d*) of section 4 (1) of the Indian Press (Emergency Powers) Act it must be clear to the Court that this tendency must be felt by the ordinary man in the street. It would not be sufficient that a member of a particular party on reading the matter in question will entertain feelings of enmity or hatred against the Government to bring the words within the mischief of the enactment. It will be really a dangerous doctrine to hold that any adverse opinion of the action of a particular party, then in power, by an organ or member of an opposite party should by itself be held to fall within the enactment.

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1. (1945) 2 M.L.J. 535.

* O. P. No. 8 of 1948. 11th February, 1948.

But if the language used is so violent and exciting as to lead to violence, insurrection or disturbance, it may fall within other provisions under which appropriate action might be taken against the authors of such writing. Where the utmost that could be said against an article is that it described the action of the Government as being definitely against a rival party and that it was inspired by capitalistic tendencies, such criticism of the action of the Government, even if the disapprobation is expressed in strong language, would not fall within section 4 (1) (*d*) of the Act. For the purpose of section 4 (1) (*d*), the cabinet of Ministers belonging to the particular party in power and administering the Government of the Province is Government established by law in British India.

The truth or falsity of the impugned matter is immaterial for a determination of the question arising under section 23 of the Act.

The fact that the Government failed to take action against other newspapers which published matter similar to the impugned one cannot be a good plea in defence to action taken by Government if the impugned matter is such that it would fall within any of the clauses of section 4.

Where in an article criticising the acts of the police, there is nothing to suggest that the alleged high-handed and atrocious acts were committed under the orders of the Government or with their approval express or tacit, action under section 7 (3) would not be justified.

A. Ramachandran for *Row and Reddy* and *G. Gopalakrishnan* for Petitioner.

The Advocate-General (*K. Rajah Aiyar*) instructed by the Crown Solicitor for Respondent.

The Judgment of the Court was delivered by

The Officiating Chief Justice.—This is an application under section 23 of the Indian Press (Emergency Powers) Act, 1931, as amended by the Criminal Law Amendment Act, 1932, to set aside the order of the Provincial Government, dated 7th August, 1947, passed under section 7 (3) of the said Act, directing the petitioner who is the publisher of a newspaper entitled, "*Prajasakthi*" to deposit with the District Magistrate of Kistna on or before 25th August, 1947, security to the amount of Rs. 2,000. The ground on which the order was passed is contained in the preamble to the order of the Government which runs thus :—

"Whereas it appears to the Government of Madras that the issues, dated 7th, 12th March, and 8th, 26th and 28th July, 1947, of the newspaper entitled "Prajasakthi" published at the "Prajasakthi Press", Bezwada and in respect of which newspaper security under the provisions of the Indian Press (Emergency Powers) Act, 1931, has not been required, contained matter of which a translation in English is appended hereto, of the nature described in section 4 (1) (*d*) and (*i*) of the said Act;"

The enclosure contained five extracts from the issues of the above dates.

Section 4 (1) (*d*) and (*i*) run as follows :—

"4. (1) Whenever it appears to the Provincial Government that any printing press in respect of which any security has been ordered to be deposited under section 3 is used for the purpose of printing or publishing any newspaper, book or other document containing any words, signs or visible representations which tend directly or indirectly;

(*d*) to bring into hatred or contempt His Majesty or the Government established by law in British India or the administration of justice in British India or any class or section of His Majesty's subjects in British India, or to excite disaffection towards His Majesty or the said Government, or

(*i*) to prejudice the recruiting of persons to serve in any of His Majesty's forces, or in any police force, or to prejudice the training, discipline or administration of any such force;"

It is necessary also to refer to two explanations to this section :

"*Explanation* 2.—Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means without exciting or attempting to excite hatred, contempt or disaffection shall not be deemed to be of the nature described in clause (*d*) of this sub-section.

Explanation 3.—Comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection shall not be deemed to be of the nature described in clause (*d*) of this sub-section."

It may be mentioned at the outset that in our opinion there is nothing in any of the passages appended to the order of the Government which would fall within clause (i) of section 4, sub-section (1). The clause appears to be wholly inapplicable to the articles in question as they do not have any reference to recruiting of persons to serve in any of His Majesty's forces or in any police

force, nor have they any prejudicial effect on the discipline or administration of any such force. The question therefore for determination is whether the passages in question contain any words which bring into hatred or contempt the Government established by law in British India, or any class or section of His Majesty's subjects in British India, or excite disaffection towards the said Government.

This clause has been considered recently in two decisions of Special Benches of this Court, namely, in O. P. No. 171 of 1947, and in O. P. No. 249 of 1947, (published as footnotes below) and we have derived considerable assistance from these two decisions.

Judgment of the Special Bench in O. P. No. 171 of 1947 dated 29th August, 1947 :

The Judgment of the Court was delivered by

The Chief Justice.—The applicant is the publisher of a Weekly Tamil Newspaper "Janasakthi". Pursuant to section 7 (3) of the Indian Press (Emergency Powers) Act, 1931, by notice in writing dated February 4, 1947, the Provincial Government ordered the applicant to deposit the sum of Rs. 2,000 with the Chief Presidency Magistrate, Madras, as security, on the ground that an issue of the newspaper, published on September 11, 1946, contained matter of the nature described in section 4 (1) (*d*) of the Act, appended to the notice. The amount of the security was duly deposited as directed by the order. This is an application under section 23 (1) of the Act to set aside the order.

Clause (*d*) of sub-section (1) of section 4 provides :

". . . . . any newspaper, book or other document containing any words, signs or visible representations which . . . . . . tend, directly or indirectly—

(*d*) to bring into hatred or contempt His Majesty or the Government established by law in British India or the administration of justice in British India, or any class or section of His Majesty's subjects in British India or to excite disaffection towards His Majesty or the said Government . . . ."

The applicant contends that the newspaper matter, in respect of which the order by the Provincial Government was made, does not come within clause (*d*).

Before the impugned newspaper matter is considered it is convenient to refer to some relevant authorities. The intention of the author of an impugned article or matter is immaterial and has not to be taken into account—*vide* In re *Anandabazar Patrika*[1] and the truth or falsity is also immaterial —vide In re *Pothan Joseph*[2]. In *Emperor* v. *Sadashiv Narayan Balerao*[3], the Board considered the provisions of rule 34 (6) of the Defence of India Rules in which the words "intended or is likely" are used ; their Lordships appear to have been of the opinion that those words are wider than the words "brings or attempts to bring" used in section 124-A of the Indian Penal Code, and at page 84, the language of Strachey, J., at page 135 in *Queen-Empress* v. *Bal Gangadhar Tilak*[4] was adopted where he said :

"But even if he neither excited nor intended to excite any rebellion or outbreak or forcible resistance to the authority of the Government, still if he tried to excite feelings of enmity to the Government, that is sufficient to make him guilty under the section (section 124-A, Indian Penal Code)."

In sub-section (1) of section 4 of the Press Act, a newspaper article is brought within the purview of the legislation if it tends, directly or indirectly, to do the things set out in clause (*d*), the language of which goes beyond section 124-A—*vide* In re *Pothan Joseph*[2].

The police form part of "the Government established by law in British India"—*vide* In the matter of *The Zamindar Newspaper, Lahore*[5]. In the matter of the *Janasakthi*[6], a newspaper article criticised the action of nine police officers but it was held not to fall within section 4 (1) of the Press Act as there was no suggestion, in the article, that the conduct of the officers was approved by the administration and, hence, it was not with relation to established Government in British India. "Government established by law in British India" means the various Governments constituted by Statutes and denotes the persons authorised by law to administer executive Government—vide *Bal Gangadhar Tilak* v. *Emperor*[7]. Abuse of Government officials, as officials, is to make an endeavour to bring into hatred or contempt the Government established by law in British India—per Rankin, J., at page 1089 in *Emperor* v. *Satya Ranjan Bakshi*[8].

Now to return to the impugned article in the "Janasakthi" newspaper. At the date of its publication Mr. T. Prakasam was the Prime Minister in a Cabinet of Congress Ministers. It is beyond doubt that that ministry was authorised by law to administer executive Government in the Presidency of Madras and was Government established by law in British India. There were two

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1. (1932) I.L.R. 60 Cal. 408 at 419.
2. (1932) I.L.R. 56 Bom. 472 at 486 and 487.
3. (1947) 1 M.L.J. 343 : L.R. 74 I.A. 89 : A.I.R. 1947 P.C. 82 (P.C.).
4. (1897) I.L.R. 22 Bom. 112.
5. A.I.R. 1934 Lah. 219 (S.B.).
6. (1932) 36 C.W.N. 962.
7. A.I.R. 1926 Bom. 9 at 47.
8. (1929) I.L.R. 56 Cal. 1085.

The learned advocate for the petitioner wanted to rely upon certain affidavits filed by persons not parties to this petition deposing to certain events

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articles in the impugned publication, one relating to a strike on the South Indian Railway at Trichinopoly and the other to strikes at Salem and Madras. The first article is headed " A Jallianwallabagh at Golden Rock (Trichinopoly)." The word "Jallianwallabagh" implies the use of unnecessary and excessive force by the authorities. The article speaks, and purports to give details, of force used by the police against men, women and children by which death and injury were caused ; the police are called " murderous villains " and are alleged to have beaten and tortured women and children, boys and girls, and beaten and threatened a maistry ; many persons, it is said, were arrested and women and children were kept in detention without food and drink. The last statement is headed " Hitlerism " and, at its conclusion, it is stated that :

" We have heard of the torture that took place during Hitler's regime. These women experienced it at Trichy."

The article, elsewhere, states that none of the Nazi cruelties remained unperpetrated ; that people were threatened and abused in vulgar language and " the reign of the devil set in " and that,

" The police, the pivot of the administration, behaved frenziedly like a drunkard pilot navigating a leaky ship in the face of a whirlwind."

References to proceedings in a Court of law are made thus :

" the trial that took place was a big farce ; the magistrate was seated in the Court of (injustice)"; it is suggested that the Magistrate would not allow witnesses to be called for the defence ; that a Special Magistrate's Court had come into being at Golden Rock (Trichinopoly), and that its function was to enforce police orders then and there. The article mentions Mr. Prakasam and his ministers in several places in these ways : The communiques of Ministers and the false propaganda of subsidised newspapers were inadequate to wean away the public from the labourers ; after referring to 1942 (the disorders and their repression following the resolution of the Congress in Bombay in that year) when :

" Our sisters were disgraced . . . . The country rose in anger in condemnation of it. But in the congress reign (Mr. Prakasam's ministry) there is the rule of the same wrongdoers " ;

After mentioning the shooting of 10 labourers, the article proceeds : " That is a Police Durbar in Prakasam's Government." The second article states that Mr. Prakasam had given an assurance of protection to the police and had shamelessly said the police and himself had become one.

For the purpose of the present consideration it is immaterial whether the statements are true or false ; the sole question is whether the articles come within clause (*d*). The language and mode of expression are superlative and exaggerated ; that alone does not bring the subject-matter within the mischief of the Press Act but the language and mode of expression must be borne in mind when considering the substance of the statements. The use of the word" Jallianwallabagh " in the heading of the article, is an offensive method of suggesting indiscriminate and excessive display of violence and force. The details and accounts of the alleged wrongful acts committed by the police are not confined to plain descriptive record and sane condemnation. The article states that the police inflicted the same tortures as were practised by the Nazis of Germany during the Hitler regime and that their behaviour was that of a frenzied pilot in charge of a leaky ship. The conduct of the police is called the setting in of the reign of the devil. In regard to Mr. Prakasam and his ministry, who were the executive government of the day, they are alleged to have been responsible for false statements of the affair which were published in newspapers subsidised by them ; their rule, it is stated, was the same as that which, as members of the Congress party, they condemned in 1942, when members of that party were the object of police action; and that the many alleged police violences and excesses were sanctioned by Mr. Prakasam who assured protection to the police in regard to those matters and identified himself with them. In the latter connection, the present article is to be distinguished from that in the Janasakthi case in Calcutta in which it was not alleged that the administration had approved of the action of some police officers whose conduct was criticised and condemned. The statements relating to the Court (called a Court of Injustice), which tried some, if not all, of the persons arrested by the police, characterise it as one where trial was a farce and it was brought into existence for the purpose of carrying out orders given to it by the police, that is to say, its trials were a travesty of justice. In my view, the words in the impugned newspaper indubitably tend to bring into hatred or contempt the police and the Prakasam ministry which, at the date of publication, were government established by law in British India and also tend to bring the administration of justice in British India into hatred and contempt.

Mr. Rajagopal, for the applicant, placed considerable reliance upon a statement that the Trade Union Congress had demanded an impartial public enquiry. I am unable to accept that this alleviates in any way the mischief committed elsewhere, more particularly as that part of the article is followed by a further statement that, should there be a public enquiry, the decision would only be that " Harrison should be impaled." Harrison is a police officer whose conduct receives special reference in several places and the result of the impartial enquiry, according to the article, would be a foregone conclusion.

In my opinion, for the reasons given, this application should be dismissed with costs.

Bell, J. :—I agree.

Govindarajachari, J. :—I agree.

alleged to have happened in the villages to which they belong. These affidavits were obviously filed to support a contention that the facts alleged in

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Judgment of the Special Bench In O.P. No. 249 of 1947 dated 25th September, 1947 :

The Judgment of the Court was delivered by

The Chief Justice.—The applicant is the publisher of a Malayalam daily newspaper called the "Deshabhimani." In December, 1946, the applicant deposited the sum of Rs. 4,000 as security, pursuant to section 9 (1) of the Indian Press (Emergency Powers) Act, 1931 (hereinafter called "the Act"). Under section 10 (1), by notice in writing dated 20th June, 1947, the Provincial Government declared the amount of the security and all copies of the issue of the newspapr dated 26th February, 1947, wherever found in British India, to be forfeited since in the opinion of the Government, that issue contained matter of the nature described in clauses (*a*) and (*d*) of sub-section (1) of section 4 of the Act, as appended to the notice. This is an application under section 23 (1) of the Act to set aside the declaration of the forfeiture.

The learned Advocate-General, appearing for the Government of Madras, conceded that the impugned article does not contain matter described in clause (*a*) of sub-section (1) of section 4 ; it is, therefore, necessary only to consider whether the article offends clause (*d*) of sub-section.

The relevant provisions of that sub-section and clause are :

" . . . . . any newspaper, book or other document containing any words, signs, or visible representations which . . . . . tend, directly or indirectly—

(*d*) to bring into hatred or contempt His Majesty or the Government established by law in British India or the administration of justice in British India or, any class or section of His Majesty's subjects in British India or, to excite disaffection towards His Majesty or the said Government. . . . ."

"*Explanation* 2.—Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means without exciting or attempting to excite hatred, contempt or disaffection shall not be deemed to be of the nature described in clause (*d*) of this sub-section.

Explanation 3.—Comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, shall not be deemed to be of the nature described in clause (*d*) of this sub-section."

If the words in a newspaper tend, directly or indirectly to bring into hatred or contempt the Government established by law in British India, the newspaper contains matter of the nature described in clause (*d*) unless the words are comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means or expressing disapprobation of the administrative or other action of the Government, as provided in Explanations 2 and 3 ; but, in that event, the words must not excite or attempt to excite hatred, contempt or disaffection.

Mr. Rajagopalan, for the applicant, sought to place before us a number of documents which, he said, were in the possession of the author of the impugned article at the time when it was written and would reflect the truth of the statements in the article. They purport to be the statements by various persons, certified copies of proceedings in Magistrates' Court and an American Magazine, " The Readers Digest." All of them are later in date than the issue of the " Deshabhimani " in which the impugned article appeared ; the six written statements are dated four months later ; the certified copies relate to proceedings which took place, in one case four months, and, in the other case nearly six months, after the above issue ; and the magazine is dated August, 1947, six months thereafter. Upon this being pointed out to learned counsel he then sought to read them on the ground that they relate to events and happenings anterior to the article. We refused to allow reference to be made to them. Next it was sought to refer to an affidavit containing matter alleged to have occurred before the publication of the impugned article and relative to a statement in it ; the affidavit was affirmed on 15th September, 1947, some eight days before the hearing of the application ; a copy was not supplied to the learned Advocate-General until shortly before the hearing commenced. We refused to allow the affidavit to be read.

During some months prior to, and at the date of the publication of the impugned article, the government of the Province of Madras was administered by a Cabinet of Ministers belonging to the Congress Party and it is beyond doubt that that Ministry was authorised by law to administer executive government in the Presidency and was government established by law in British India. The police form part of the Government established by law in British India (In the matter of *The Zamindari Newspaper, Lahore*[1]). But a newspaper article criticising the action of nine police officers was held not to fall within section 4 (1) of the Act when it was not suggested that their conduct was approved by the administration (In the matter of *The Janasakthi*[2]). When considering whether words in a newspaper contain matter of the nature described in clause (*d*) their truth or falsity and the intention of the author are immaterial (In re *Pothan Joesph*[3], In re : *Janasakthi, Ramamurthi,* v. *The Government of Madras*[4], (unreported) and In re *Anandabazar Patriko*[5]).

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1. A.I.R. 1934 Lah. 219 (S,B.).
2. (1932) 36 C.W.N. 962.
3. (1932) I.L.R. 56 Bom. 472 at 486 (S.B.).
4. O.P. No. 171 of 1947 : (1948) 2 M.L.J. 166 (F.N.).
5. (1932) I.L.R. 60 Cal. 408 at 419.

some of the articles in question were true or in any event the writer or writers of the articles had material before them which justified the articles. We have

The impugned article is headed "To cause re-call of the M.S.P.; to strengthen the march o achievement of liberty; to cause restoration of the Civic Liberties of citizens and to bury the ordinance." The letters M.S.P. indicate the Malabar Special Police; the ordinance, referred to, is the Madras Public Safety Maintenance Order, 1947. The article commences "The atrocities of the M.S.P. and of those traitorous wretches who spy for them in Malabar have exceeded all bounds." It proceeds that, in Chirakkal Taluk offences of beating, shooting and stabbing persons to death, seizing and severally belabouring them, taking bribes, setting fire to and destroying houses and materials, looting and filching samans, trespassing on property and intimidating, starving and hunting down people had all become matters of very ordinary occurrence. On that account black-marketeers stalked about unchecked in the height of pride and self-importance; jenmies who were out to harass common folk were staging a regular infernal dance; plundering capitalists were making jolly over their oppoutunities to make more money; bribe takers, self-appointed aristocrats and officials drunk mad with the wine of authority, were staging their frenzied dance in the height of their influence and power. In short, under cover of having placed the Congress in authority and under jugglery stunt of opposing Communists, British Imperialism had begun stalking across the whole country in a nude fascist hunt for their victims. The article continues by referring to industrial workers, agricultural labourers and other sincerely patriotic persons, who earnestly desired freedom, who were being roasted in a seething death-spelling furnace of fire; those who worked against food scarcity, black-market activity, hoarding and usurious gains were liable to be prosecuted for theft, robbery, plunder, misbehaviour and to be jailed and directed to furnish security. Everything done for the good of the people and to further the cause of the country's independence was regarded as an offence against the law and the country. And, as if that were not enough, British Imperialism had begotten an omnibus ordinance which threatened to crush all kinds of activities left open to lovers of freedom; and the Congress Ministers' Cabinet was seeking to feed with milk and rear that satanic offspring. As a result of the promulgation of the ordinance, there were countless arrests and confiscations of property all over the country; the very existence of freedom lovers and their property had become repugnant rocks of offence in the eye of the law. By reason of the acts and conduct of the police a peasant had said: "Is there any Government functioning here at all?" Everything belonging to some peoples, workers and to the innocent members of their families, had been forcibly seized by the emissaries (the M.S.P.) of the Britishers and carried away. Special reference is made to the seizure of married women's talis by the roughened mean, bribe-stained hands of the shameless, hard-hearted police officials (elsewhere described as the hunting hounds of British Imperialism). The violation of the chastity of three peasant women by the M.S.P. and their wretched emissaries is stated to have occurred. The article proceeds that those acts of high-handedness and injustice should be inveterately opposed and ended by the people of the country acting in concert as one man, to break down the bars to progress. A call is made to students, comrades, lion-hearted youngmen, venerable aged folk, peasants, industrial workers, respectable businessmen, enthusiastic co-workers for freedom, friends and esteemed sisters to unite to put an end to the high-handedness and to let the skies shake with their cries of protest, voiced unitedly by their hostile demonstrations. The article concludes "Save the country by forcing the withdrawal of the M.S.P. Bury deep the ordinance which deals death to all kinds of liberties in the country and help to restore the civic liberties of the citizens."

The article is couched in vitriolic language but that, in itself, does not bring it within clause (*d*) of sub-section (1) of section 4 of the Act; but the language and mode of expression must be borne in mind when considering the substance of the statements.

In so far as it is material in the present instance, the language of section 124-A of the Indian Penal Code, defining the crime of sedition, and Explanations 2 and 3 to that section is the same as the language of clause (*d*) and Explanations 2 and 3 of sub-section (1) of section 4 of the Press Act. The offence of sedition is committed by written words which bring into hatred or contempt the Government established by law in British India. In *Emperor* v. *Sadashiv Narayan Bhalerao*[1], the Board considered the meaning and effect of rule 34 (6) of the Defence of India Rules, which is similarly phrased as section 124-A of the Indian Penal Code. At page 84 of the report it was observed, in regard to that section, that "the acts or words complained of must either incite to disorder or must be such as to satisfy reasonable men that that is their intention or tendency." Later, their Lordships expressed approval and adopted the language of Strachey, J., in *Queen-Empress* v. *Bal Gangadhar Tilak*[2], as correctly expressing their view; in the course of his summing up to a jury trying an offence under section 124-A Strachey, J., said: "If he tried to excite feelings of enmity to the Government that is sufficient to make him guilty under the section."

Now to return to the impugned article to examine what it really says and means. It commences with the police (M.S.P.) "atrocities" and details their acts, in that connection, including taking bribes, causing death, using violence against people, starving people and looting which, it states, had become matters of very ordinary occurrence. It adds that on account of the conduct and action of the police black-marketeers, bribe takers, officials and others were free to pursue their wrongdoings and those who opposed their activities were liable to prosecution. Elsewhere the police

1. (1947) 1 M.L.J. 343, L.R. 74 I.A. 89: A.I.R. 1947 P.C. 82 (P.C.).
2. (1897) I.L.R. 22 Bom. 112.

excluded these affidavits from consideration, because it has been ruled in the two Special Bench decisions referred to above that the truth or falsity of the impugned matter is immaterial for a determination of the question arising under section 23 of the Act.

We have also refused to take into account two articles which appeared in two other Telugu newspapers which, according to the petitioner, contained matter more or less similar to the matter contained in the impugned articles. The contention evidently is that as the Government have not taken any action under the Act against the said two newspapers the action taken by the Government against the petitioner was not justified. In our opinion, this argument is based upon a fallacy. If the impugned matter is such that it would fall within any of the clauses of section 4, then the fact that the Government failed to take action against other newspapers which published such matter cannot be a plea in defence to action taken by the Government against the petitioner. Further, we are unable to hold that extracts from other newspapers would be admissible evidence under any section of the Evidence Act.

It is convenient to deal with the passages extracted in the appendix to the Government order according to the dates. The first is from the issue dated 7th March, 1947. The impugned article is headed "*Workers' Minimum Demands Day—Meeting and demonstrations to be Celebrated on March* 18, 1947." The sub-heading runs :—"Andra Trade Union's call to the Workers." The particular passage on which special emphasis was laid by the learned Advocate-General may be reproduced. It runs thus :—

"The Congress leaders who have become ministers at the Centre and the Provinces, have been trying to put down this movement having fallen victims to the capitalistic and imperialistic pressure. The cruel policy of repression of the Imperialists is to-day being adopted by the Congress Ministers over these movements. The Madras Ministry abandoned the election manifesto and has taken recourse to the Public Safety Ordinance resulting in detentions and opening of fire by the police. It has intended to crush down the communists who are conducting the workers' fight. On the other side the Workers' Dispute bill intended to destroy the workers' right to strike is being enforced.

The workers and trade unions are taking the primary place in these peoples' fight facing the repressive policy of Government . . . . The sacrifices made and the courage exhibited by the workers with an ultimate idea of crushing down the Imperial and Capitalists' lootings can never be forgotten. So it is incumbent on us to take up the fight with the united strength and revolutionary spirit on behalf of those who have sacrificed their lives for achieving their sacred ideals."

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are charged with wringing (which must mean taking by violence) talis from the possession of married women (a grave insult and wrong committed upon Hindu ladies) and violation of women, *i.e.*, committing the crime of rape upon them. Few acts are more likely to excite condemnation of and resentment, hatred and anger against any men, more particularly policemen, than the last two allegations. The statements in the article are not confined to the acts of a few members of the police but are made in respect of the force as a body.

As regards the Cabinet, comprised of Congress Ministers which the article suggests is a cover for British Imperialism ; they are charged with seeking to feed and rear, that is to say, to strengthen and enforce the provisions of, the satanic offspring of the British Imperialism, the Madras Public Safety Maintenance Order of 1947. That order was promulgated during the time when that Ministry was in office. By reason of the ordinance it is stated, countless people had been arrested and their property confiscated and lovers of freedom and their possessions had become repugnant rocks of offence in the eye of the law ; and, by reason of the acts and conduct of the police (of which the Cabinet is the superior executive authority) no government was functioning. The suggestion made is that the Ministry was no more than the complacent nominees of British Imperialism ; it did not take any step to prevent wrongs being committed by the police or to interfere by aiding persons who sought to prevent those wrongs but allowed such persons to be subjected to prosecution ; the Ministry was completely ineffective as the government of the Province.

As pointed out previously, the Congress Ministry, which was in office on the date of the publication of the impugned article, was government established by law, as also was the Police. The many statements in the article, to which reference has been made, and the article read as a whole, are not confined to comments expressing disapprobation of the government's measures and actions without exciting hatred or contempt but the things said, the manner in which they are stated and the language used could have effect only to excite hatred or contempt towards both the Ministry and the Police and to bring them into hatred or contempt. Mr. Rajagopalan placed considerable reliance on the closing part of the impugned article, where a call is made to and the alleged misdoings and malpractices. It was argued that this portion of the article shows that the intention was to have remedied what was thought to be wrong. The sole question for consideration is whether the

It has been held by a Special Bench of this Court that the Cabinet of Ministers belonging to the Congress party which was administering the Government of the Province of Madras must be held to be the Government established by law in British India within the meaning of those words in section 4 (1) (*d*). The question then is whether there is any tendency, direct or indirect, in these words to bring into hatred or contempt this Government established by law, or to excite disaffection towards the said Government. The gravamen of the charge made in the article in question is that the Congress party in power has taken a capitalistic attitude and has an intention of crushing down the communists. It is this policy of the Ministry and the action taken in pursuance of this policy that come in for criticism. Now it is quite clear that before we can hold that the words in question have the tendency set out in clause (*d*) of section 4 (1) of the Act it must be clear to us that this tendency must be felt by the ordinary man in the street. In our opinion, it would not be sufficient that a member of the Communist party, on reading the article in question, will entertain feelings of enmity or hatred against the Government, to bring the words within the mischief of the enactment. It will be indeed a dangerous doctrine to hold that any adverse expression of opinion of the action of a particular party then in power by an organ or member of an opposite party should by itself be held to fall within the enactment. No doubt if the language used is so violent and exciting as to lead to violence, insurrection or disturbance, it may fall within other provisions under which appropriate action might be taken against the authors of such writing. Taking the present article, there is nothing to suggest that the Government was guilty of any lootings. The utmost that can be said is that the action of the Government is described as being definitely anti-communist and that it is inspired by capitalistic tendencies. In our opinion, this criticism of the action of the Government, even if the disapprobation is expressed in strong language, would not fall within section 4 (1) (*d*) of the Act.

The passage is from the issue, dated 12th March, 1947, entitled "*New Criminal Tribes Act—Public Destruction Act—Worse than C. T. Act.*" This article is, in its entirety, a criticism of the Public Safety Act. Comparison is made between the alleged drastic provisions in the two Acts impinging on the freedom of the citizen, and it is said that the new Act, namely, the Public Safety Act, is in some respects, worse than the Criminal Tribes Act and that it may be styled the Public Destruction Act. Some of the provisions of the new Act are severely attacked, and the article ends with these words :—

> "It is the duty of the public to agitate for the repeal of the Act which crushes the civil liberties. The patriots should bring pressure over the Ministry for the release of the detenus suffering under this Act."

We have no hesitation in holding that this article would fall within Explanation 2 as being in the nature of an expression of disapprobation of the measure of the Government with a view to obtain their alteration by lawful means. There is here no exciting or attempting to excite hatred, contempt or disaffection. As has been held in one of the Special Bench cases, mere use of even vitriolic language is not by itself sufficient to bring the words within section 4 (1) (*d*) of the Act. (*Vide* O. P. No. 249 of 1947[1]).

The three extracts from the issues of 8th, 26th and 28th July, 1947, go together. They relate to alleged atrocities committed by the police in certain villages, namely,

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article contains words which offend the clause. Whilst there is nothing in this part of the article which is covered by the clause, its inclusion does not detract from the mischief in the early part. Under a cloak of a purported righteous appeal, words coming within the clause cannot be used or excused.

In my opinion the impugned article contains words of the nature described in section 4 (1) (*d*), which are not excepted by the two Explanations to the sub-section. The action by the Government of Madras under section 10 of the Act was justified and it follows that this application must be dismissed with costs.

Rajamannar, J. :—I agree entirely.

Tyagarajan, J. :—I am in entire agreement and have nothing to add.

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1. (1948) 2 M.L.J. 169 (F.N.).

Munagala, Karivarala and Kolakova. The acts which the police are alleged to have committed are certainly high-handed, cruel and indecent. But there is little or no comment in any of these three articles besides a statement of events alleged to have occurred.

It has been held that the police force as such forms part of the Government established by law in British India, *vide* In the matter of *The Zamindar Newspaper, Lahore*[1] and O. P. No. 249 of 1947[2]. In In re *Janasakthi, Sylhet*[3], it was held by a Special Bench of the Calcutta High Court that when accusations were directed at nine police officers but there was no suggestion that the misconduct of these officers was approved of by the administration or was part of a deliberate policy of repression, the words were not of the nature described in section 4 (1). This statement of the law was apparently approved by the learned Judges who took part in the two Special Bench decisions referred to above. The learned Judges say that a newspaper article criticising the action of nine police officers was held not to fall within section 4 (1) of the Act when it was not suggested that their conduct was approved of by the administration (*vide* O. P. No. 249 of 1947[2]). We have carefully examined the three articles. There is nothing in any of them to suggest that the high-handed and atrocious acts alleged to have been committed by the police were committed under the orders or at the instance of the Government or with the approval express or tacit of the Government. On the other hand, the last of the articles dated 28th July, 1947, concludes with an appeal to the Government. The article which appears to be a statement issued by the Munagala Ryots' Association and the Communist committee ends with these words :

> "We can prove the atrocities of the police if you personally visit the place and enquire into the matter. The police should be withdrawn so that the people can approach you direct and present the matter. We request that the police who are responsible for the cruel acts should be punished and they should be withdrawn from the estate."

These words certainly do not indicate that in the opinion of the writer the acts of the police complained of were at the instance or with the approval of the Government. In O. P. No. 171 of 1947[4] in which the learned Judges held that the articles fell within section 4 (1) (*d*) there was an express imputation that the atrocities committed by the police were with the approval of the Government. In one of the impugned articles it was stated that Mr. Prakasam, the then Prime Minister, had given an assurance of protection to the police and had shamelessly said that the police and himself had become one. In the other case, in O. P. No. 249 of 1947[2], the learned Judges held that there was a clear suggestion that the Ministry did not take any steps to prevent the wrongs being committed by the police and that, on account of the conduct and action of the police, black-marketeers, bribe-takers and others were free to pursue their wrong-doings, and those who opposed their activities were liable to prosecution. As we have said, there is nothing in any of the last three articles similar to such suggestions. These also will therefore not come within the mischief of section 4 (1) (*d*) of the Act.

The petition is therefore allowed and the order of the Government is set aside. The amount deposited as security shall be refunded to the petitioner. The petitioner will be entitled to the costs of this petition.

V.S. *Petition allowed.*

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1. A.I.R. 1934 Lah. 219 (S.B.).
2. (1948) 2 M.L.J. 169 (F.N.).
3. A.I.R. 1932 Cal. 649 (S.B.).
4. (1948) 2 M.L.J. 167 (F.N.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Officiating Chief Justice* AND MR. JUSTICE SATYANARAYANA RAO.

K. Kannabhiran Mudaliar .. *Appellant**

v.

Mullangi Lakshmana Perumal Chetty, Trustee of Mullangi Charities. *Respondent.*

Madras Buildings (Lease and Rent Control) Act (XV of 1946), *section* 18 (1)—*Construction*—"*Subject to the provisions of the Act*"—"*So far as may be.*"

The words "subject to the provisions of the Act" occurring in section 18 (1) of the Madras Buildings (Lease and Rent Control) Act of 1946 cannot mean that an order validly obtained under the provisions of the Madras House Rent Control Order, 1945, could be attacked retrospectively in proceedings taken to execute such an order. It is only the further continuance of the proceedings pending on the date of the commencement of the Act that the provisions of the Act would govern. Nor is there anything in the words "so far as may be" to prevent valid execution proceedings from being continued.

Hence, where there is a valid execution application to execute an order of eviction pending before the City Civil Judge when the Madras Buildings (Lease and Rent Control) Act, 1946, came into force, it could be continued after the Act came into force.

Appeals under clause 15, Letters Patent, against the judgment of Yahya Ali, J., dated 11th July, 1947, in A. A. O. No. 24 of 1947, preferred to the High Court against the orders of the City Civil Court, dated 15th January, 1947, and made in E. P. No. 1257 of 1946 and in E. A. No. 2530 of 1946 in the said E. P. No. 1257 of 1946, respectively in H. R. C. No. 1715 of 1946 on the file of the House Rent Controller, Madras.

Ch. Raghava Rao and *P. S. Kothandapani* for Appellant.

C. S. Varadachari for Respondent.

The Judgment of Mr. Justice Yahya Ali was as follows :—

JUDGMENT.—These are two connected appeals against two orders made in E.P. No. 1257 of 1946 and in E.A. No. 2530 of 1946 by the Principal City Civil Judge, Madras. Until 1st October, 1946, the Madras House Rent Control Order, 1945, was in force. From that date its place was taken by the Madras Buildings (Lease and Rent Control) Act (XV of 1946). The date when the prior order expired and the new enactment came into force is of importance in this case having regard to the contentions raised both in the lower Court and before me on behalf of the appellant in respect of a shop No. 339, Esplanade, G.T., Madras, which belongs to a charitable trust the trustee of which is Mullangi Lakshmana Perumal Chetti, the petitioner in E.P. No. 1257 of 1946. The petitioner filed an application before the Rent Controller under section 7-A (2) (*iii*) (*a*) of the Madras House Rent Control Order, 1945, on the ground that the appellant had sublet the premises without the written consent of the landlord and that consequently under the provision cited above he was liable to be evicted. Upon that application an order of eviction was made on the 27th May, 1946, by the Rent Controller against the respondent in favour of the petitioner. Time was given in that order until 22nd August, 1946. The respondent filed an appeal to the Collector of Madras which was dismissed on 22nd July, 1946. Since the order of eviction thus became final under the terms of the Rent Control Order, the petitioner filed E.P. No. 1257 of 1946 on 6th September, 1946, in the City Civil Court to evict the respondent from the premises by executing the order of eviction which has the effect of a decree enforceable by that Court. To this application the respondent filed a counter on 11th October, 1946, urging that his sub-tenant who was in the premises had not yet vacated and wanted two months further time to get him to quit the premises and to deliver possession. It must be noted that by this time the House Rent Control Order had been substituted by the new Act which came into force on 1st October, 1946. On the same date, 11th October, 1946, the City Civil Court Judge directed the issue of a warrant for the delivery of possession of the premises to the landlord but, as it seems to me, according to the practice in that Court he gave a further direction that the warrant was to be issued after 28th October, 1946, returnable by 12th November, 1946. It is significant to note that on the very same date, 11th October, 1946, the respondent was able to get delivery of the non-residential premises from his sub-tenant Singaravelu and appears to have himself got into it in order apparently to surmount in that manner the objection upon which the tenancy had been sought to be terminated and the order of eviction had been made.

In the meantime some other proceedings for review, etc., seem to have gone on before the Rent Controller as well as before the Chief Judge of the Court of Small Causes and in those proceedings orders of stay had been obtained by the respondent. The result was that on 28th November, 1946, the City

*L.P.A. Nos. 29 and 30 of 1947. 23rd March, 1948

Civil Judge adjourned E.P. No. 1257 of 1946 to 20th December, 1946, pending final orders upon those petitions which had been filed before the Rent Controller and the Chief Judge of the Court of Small Causes. By 29th November, 1946, however, all obstructions were removed by the dissolution of orders of stay so that there was no further impediment in the matter of enforcing execution of the order of eviction. At this stage, having exhausted all conceivable venues, the respondent took the step of filing E.A. No. 2530 of 1946 on the 30th November, 1946, praying under section 47 of the Civil Procedure Code that E.P. No. 1257 of 1946 should be rejected on certain legal grounds which have been developed both in the lower Court and in this Court by his counsel. On 15th January, 1947, the learned City Civil Judge allowed E.P. No. 1257 of 1946 directing delivery of possession by 22nd January, 1947, and dismissed E.A. No. 2530 of 1946. C.M.A. No. 24 of 1947 is against the order allowing E.P. No. 1257 of 1946 and C.M.A. No. 25 of 1947 is an appeal against the order dismissing E.A. No. 2530 of 1946.

Mr. Ch. Raghava Rao raised the legal contention based upon the language of Madras Buildings (Lease and Rent Control) Act (XV of 1946) that the appellant is a tenant within the meaning of that Act and that under that Act since there was no sub-tenant any longer in the premises it was necessary for the respondent landlord to file a fresh application for eviction under the new Act as both E.P. No. 1257 of 1946 and all proceedings taken prior thereto by the Rent Controller under the House Rent Control Order of 1945 had lapsed, and there was no execution proceeding, legally speaking, after 1st October, 1946, in which the tenant could be ejected. The learned City Civil Judge went into this contention with reference to the language of the relevant provisions of the Act and held that in spite of the Act having come into effect on 1st October, 1946, the prior proceedings including the order of eviction dated 27th May, 1946, were in force and could be executed by the City Civil Court. He also pointed out with reference to what transpired subsequent to 1st October, 1946, itself in his Court that on the 11th October, 1946, an order had been passed in the presence of both parties directing the issue of a warrant for delivery of possession within a certain time and this was based on the counter filed by the appellant on the same date saying that he wanted two months' time to get the premises vacated by his sub-tenant and to deliver vacant possession thereof to the landlord. The learned City Civil Judge held that this order had become final between the parties and the appellant could not go behind it. In answer to this finding Mr. Raghava Rao has put forward the same legal objection which I have set out above that there being no legally enforceable order of eviction and the execution petition itself having lapsed there was no proceeding before the Court in which any eviction could be ordered and that being so all proceedings which were subsequently taken in that execution petition were nugatory.

To deal with these contentions it is necessary to appreciate the general scheme of Madras Buildings (Lease and Rent Control) Act. The expression "tenant" is defined in section 2 (4) as meaning any person by whom or on whose account rent is payable for a building and includes a person continuing in possession after the termination of the tenancy in his favour. We need not pause to examine the question whether the appellant is a tenant within the meaning of this definition as he is a person who admittedly has continued by sufferance of party as well as by sufferance of the Court in occupation of the premises asking on each occasion more and more time for vacating it. In fact although the eviction order was passed on 27th May, 1946, he is still occupying the premises. The most important sections for the purpose of these appeals are sections 7 and 18. Sub-section (2) of section 7 so far as is material to this case runs thus :

"A landlord who seeks to evict his tenant shall apply to the Controller for a direction in tha behalf. If the Controller, after giving the tenant a reasonable opportunity of showing cause against the application, is satisfied . . . . .

(*ii*) that the tenant has after the commencement of this Act without the written consent of the landlord—(*a*) transferred his right under the lease or sub-let the entire building or any portion thereof, ..."

The rest of the section is not of importance here. Section 18 is in these words :

"(1) All proceedings commenced and action taken under the Madras House Rent Control Order, 1945 and the Madras Non-Residential Building Rent Control Order, 1945, and pending at the commencement of this Act shall, so far as may be, be deemed to have been commenced or taken under the corresponding provisions of this Act and be continued subject to the provisions of this Act.

(2) All orders passed or deemed to have been passed under the Madras House Rent Control Order, 1945, and the Madras Non-Residential Building Rent Control Order, 1945, and in which fair rent has been fixed, shall continue in force until they are superseded or modified under this Act by the authority competent to do so."

The point of Mr. Raghava Rao's argument based upon these sections is that under section 18 which provides for the continuing in force of existing proceedings, orders, etc., it is enacted that those proceedings pending at the commencement of the Act shall be deemed to have been commenced or taken under the corresponding provisions of this Act subject to two important qualifications, (1) "so far as may be" (the concise scope of this qualification was however not expatiated upon by the learned advocate) and (2) their continuance will be "subject to the provisions of this Act." As far as I am able to see these two restrictive expressions occurring in the section do not have on a true interpretation of the section, the effect or result of altogether wiping out all prior proceedings which were in existence before the commencement of the Act.

Then, asks Mr. Raghava Rao, why introduce the condition "subject to the provisions of this Act" in section 18 (1). For this purpose it is necessary to refer to certain other provisions of the Act as well as the Madras House Rent Control Order. It would be seen that while under the House Rent Control Order the authorities constituted for entertaining appeals and revision applications were respectively the Collector of Madras and the Provincial Government, under the present Act appeals lie to the Chief Judge of the Court of Small Causes and no further revision lies to this Court as it has been held by this Court that the appellate powers were conferred upon the Chief Judge of the Court of Small Causes as a *persona designata*. Unless there was a restriction in section 18 to the effect that the continuance of the proceedings shall be subject to the provisions of this Act there would be an anomaly with regard to this matter. To cite another instance the House Rent Control Order applied to the whole Province but the Act applies only to the City of Madras, the Municipalities and certain notified areas. To indicate the limited territorial application again it was necessary to insert such a qualification. Possibly such instances can be multiplied.

Apart from this general argument what appears to me to be a clinching way of looking at the matter is this. Under section 18 (1) the language employed is that proceedings commenced and action taken, etc., pending at the commencement of this Act shall be deemed to have been commenced or taken under the corresponding provisions of this Act. It is a settled doctrine that when the expression "deemed to have been commenced or taken" is used in statutory enactments it is not to be read as if it was in actual fact commenced or taken under that new provision but must by a fiction be for the purpose of the statute deemed to have been so commenced or taken under the corresponding provisions of this Act. Now the order of eviction was passed under section 7-A (2-A) of the Madras House Rent Control Order and it was continued by the City Civil Court under section 7-A, 2-A (*iii*) for purpose of execution. When we reach that position it will be necessary to give effect to the language of section 18 (1) which says that proceedings commenced and action taken under the House Rent Control Order (and these were proceedings commenced and action taken under that order) and which were pending at the commencement of this Act (admittedly the execution petition was pending at the commencement of this Act) shall be deemed to have been commenced or taken under the corresponding provisions of this Act, these corresponding provisions being section 7 for passing an order of eviction and section 9 for execution of that order. The expression "so far as may be" and "subject to the provisions of this Act" as I have already discussed above do not affect this interpretation. The construction sought to be placed upon this section by Mr. Raghava Rao would, in my opinion, virtually render section 18 (1) altogether ineffective. He draws attenion to the phrase "after the commencement of this Act" occurring in section 7 (2) (*ii*) of the Act where it is stated that the tenant should have transferred his right under the sub-lease after the commencement of this Act without the consent of the landlord and upon the strength of this expression it is urged that the sub-letting ought to be after the commencement and that section 18 (1) does not in any manner affect the scope and effect of the expression "after the commencement of this Act" in that provision. The only answer to this contention is that section 18 (1) must in the context be held to override section 7 (2) (*ii*).

Another argument advanced by Mr. Raghava Rao is that the object of the Act was to retain in force only such orders as had been passed for the determination of fair rent under the House Rent Control Order. That case is however provided for under section 18 (2) specifically and it is clear that while section 18 (2) applies to orders which had become final under the operation of section 10, section 18 (1) deals with proceedings commenced and action taken and pending at the commencement of the Act. If this view is correct it must be held that the order of eviction, dated 27th May, 1946 and E.P. No. 1257 of 1946 which was filed on 6th July, 1946, must be deemed to have been passed or filed respectively under this Act after the commencement of this Act. It follows from this conclusion that the order, dated 11th October, 1946, directing the issue of a warrant for delivery of possession is one which is binding upon the appellant and it is not open to him to go behind it. The order of the Principal Judge of the City Civil Court is upheld and these civil miscellaneous appeals are dismissed with costs—two sets.

The Judgment of the Court was delivered by

The Officiating Chief Justice.—The facts which give rise to these two connected appeals are fully set out in the judgment of Yahya Ali, J., and therefore need not be repeated. On the date when Madras Act XV of 1946 came into force, *i.e.*, on the 1st October, 1946, there was a valid execution application pending before the Principal Judge of the Madras City Civil Court to execute an order for eviction obtained by the respondent. Under section 18, sub-section (1) of the Act:

> "all proceedings commenced and action taken under the Madras House Rent Control Order, 1945, and the Madras Non-Residential Buildings Rent Control Order, 1945, and pending at the commencement of this Act, shall so far as may be, be deemed to have been commenced or taken under the corresponding provisions of this Act and be continued subject to the provisions of this Act."

The execution filed by the respondent was certainly a proceeding which was so pending and must be deemed to have been commenced or taken under section 9 of the Act. Mr. Raghava Rao, the learned advocate for the appellant, sought to call to his aid the words "so far as may be" and "subject to the provisions of this Act" which occur in section 18 (1) of the Act to support a contention that

by the time the execution application came to be finally disposed of, the ground on which the original order of eviction was passed, *viz.*, that the tenant had sub-let the premises without the consent of the landlord, had disappeared. We do not consider that there are any facts in this case to prevent the proceeding in execution which had been commenced by the respondent from being continued subject to any of the provisions of the Act. The words "subject to the provisions of this Act" cannot mean that an order validly obtained under the provisions of the Madras House Rent Control Order, 1945, could be attacked retrospectively in proceedings taken to execute such an order. It is only the further continuance of the proceedings pending on the date of the commencement of the Act that the provisions of the Act would govern. Nor is there anything in the words "so far as may be" to prevent the execution proceedings from being continued.

Reliance was placed on sub-section (2) of section 18 and section 9 of the Act and the decision in *Banmul Soanmul* v. *Harackshand Roopchand*[1] in which these provisions were construed. What follows from these provisions as construed by the learned Judges in that decision is only this : If there is a final order of eviction passed under the Madras House Rent Control Order, 1945, but no proceedings had been taken to execute that order and no proceeding in execution was pending on the date when Madras Act XV of 1946 came into force, then, after the commencement of the Act, no action can be taken to execute the order so obtained. This appears to follow inevitably from the language of section 9, because under that section it is only an order under section 7 or section 8 or an order passed on appeal under section 12 of the Act that can be executed. The effect of section 18 (2) is that except an order for fair rent, other orders including orders for eviction, will not continue in force after the coming into force of Madras Act XV of 1946. But in this case the feature which distinguishes it from the case in *Banmul Soanmul* v. *Harackchand Roopchand*[1] is that a valid proceeding in execution of the order obtained under the Madras House Rent Control Order, 1945, was pending at the commencement of the Act. We therefore agree with the judgment of Yahya Ali, J., and dismiss the appeals with costs (one set).

V.S. *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO.

Chandu Kunhan Panikker .. *Appellant**

v.

Ukkappan and others .. *Respondents.*

Madras Debt Conciliation Act (XI of 1936 as amended), sections 4 and 25—Application under section 25—Dismissal—Execution sale—Appeal against order on application under section 25—Dismissal as not pressed—Subsequent suit to set aside execution sale—Bar under section 47, Civil Procedure Code (V of 1908).

The creditor first obtained a decree on foot of a mortgage and the judgment-debtor subsequently filed an application under section 4 of the Madras Debt Conciliation Act for conciliation of his debts. The decree-holder then filed an execution petition and the judgment-debtor thereupon filed in the executing Court an application under section 25 of the Debt Conciliation Act. The latter application was however dismissed on two grounds, namely, first that the decree-holder was a creditor to whom more than fifty per cent. of the total amount of the debts was owing and without him there could be no amicable settlement through the intervention of the Board, and secondly that the decree-holder was also a secured creditor and if he did not agree to the settlement there was no prospect of any settlement and that the filing of the execution application was evidence of an intention not to agree. After the dismissal of the petition the property was sold in execution and the decree-holder became the purchaser. There was an appeal against the order on the application under section 25 but the same was dismissed as not pressed. Ultimately, the application under S. 4 was also dismissed. The judgment-debtor then filed the present suit for a declaration that the sale in pursuance of the decree was a nullity since after the filing of an application under S. 4, the court had no jurisdiction to proceed with the execution of the decree and it was not therefore binding on him.

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1. (1948) 1 M.L.J. 256.

* A.A. A.O. No. 25 of 1946. 31st March, 1948.

Held, that the execution sale was not a nullity for want of jurisdiction and that by reason of the prior adjudication the plaintiff judgment-debtor was precluded from reagitating the question under S. 47, Civil Procedure Code.

Held further, that in such a case the fact that the previous order was confirmed in the appeal on the ground that the appeal was not pressed would not make any difference.

Appeal against the order of the District Court of South Malabar in A. S. No. 395 of 1944, preferred against the order of the Court of the Subordinate Judge of Calicut in O. S. No. 52 of 1943.

D. A. Krishna Variar and *V. P. K. Nambiar* for Appellant.

L. V. Krishnaswami Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—The first defendant is the appellant. This appeal arises out of a suit instituted by the 1st respondent for a declaration that the decree in O. S. No. 45 of 1935 and the sale in E. P. No. 296 of 1940 on the file of the Subordinate Judge, South Malabar, are void and do not bind the plaintiff. The 1st defendant obtained the decree in O. S. No. 45 of 1935 on foot of a mortgage. The final decree was passed on 28th January, 1938. The present 1st respondent was the judgment-debtor and he on 12th August, 1940, filed an application under section 4 of the Madras Debt Conciliation Act of 1936 for conciliation of his debts. The decree-holder filed execution petition No. 792 of 1940 and the judgment-debtor filed in the executing Court an application under section 25 of the Debt Conciliation Act, on 15th August, 1940. The application after due notice to the decree-holder was heard by the learned Subordinate Judge and disposed of by him on 4th September, 1940. The application was dismissed by the learned Subordinate Judge on two grounds : firstly that the decree-holder was a creditor to whom more than 50 per cent. of the total amount of the debts was owing and without him there could be no amicable settlement through the intervention of the Board. Secondly, that the decree-holder was also a secured creditor and if he did not agree to the settlement there was no prospect of any settlement and that the filing of the execution petition was evidence of an intention not to agree.

After the dismissal of this petition the property was sold in execution of the decree on 2nd December, 1940 and the decree-holder, the appellant, became the purchaser. Against the order of the learned Subordinate Judge under section 25 there was an appeal, C. M. A. No. 97 of 1941, to this Court. The appeal was dismissed on 7th April, 1941, on the ground that there was nothing to be stayed and that the appeal was not pressed. Ultimately on 2nd July, 1941, the petition under section 4 of the Debt Conciliation Act was also dismissed. The judgment-debtor having failed in his attempts to thwart the execution of the decree filed the suit out of which this present appeal arises contending that the sale in pursuance of the decree was a nullity since after the filing of an application under section 4 of the Debt Conciliation Act, the Court had no jurisdiction to proceed with the execution of the decree. The 1st defendant, *i.e.*, the decree-holder-purchaser raised various objections by way of defence to the suit two of which alone are material for the purpose of this appeal. He contended that the suit was incompetent as it was barred under section 47 of the Code of Civil Procedure and that in any event as the sale was not vitiated by any irregularity or fraud and as the application under section 25 of the Debt Conciliation Act was dismissed the sale was valid but not void. These two contentions of the decree-holder were upheld by the learned Subordinate Judge and the suit was dismissed.

The plaintiff preferred an appeal to the District Court. In the Court of the learned District Judge it was practically conceded that the suit was not maintainable and that section 47, Civil Procedure Code, was a bar. The learned District Judge, however, in exercise of his discretion converted the plaint into an application under section 47. Following the decisions of this Court, he, however, held that in view of the language of section 25 of the Debt Conciliation Act, the sale was a nullity and set aside the order of the learned Subordinate Judge after allowing

the appeal. The first defendant was made liable for costs in both the Courts even though the plaintiff persisted till the last moment in his contention that the suit was the only proper remedy and not an application under section 47, Civil Procedure Code.

This civil miscellaneous second appeal is against the judgment of the learned District Judge. The learned District Judge, in my opinion, was correct in his view that section 47, Civil Procedure Code, was a bar to the suit and he was also right in permitting the plaintiff to convert the suit into an application. The learned Judge, however, was wrong in allowing the plaint to be converted into an application unconditionally without making the plaintiff pay all the costs as he persisted in his contention that the suit was the only proper remedy notwithstanding the fact that the 1st defendant raised this objection and pointed out the defect even in the written statement. Even after the decision of the learned Subordinate Judge that the suit was not maintainable the plaintiff did not express his intention and ask the leave of the Court to convert the suit into an application under section 47, Civil Procedure Code. He filed an appeal against the decree and it was only at the time of arguments that the advocate who appeared for him conceded that the application was the only proper remedy.

In my opinion, the learned District Judge was wrong in holding that the sale was a nullity. Section 25 of the Debt Conciliation Act reads as follows :—

> "When an application has been made to a board under section 4, any suit or other proceedings then pending before a Civil Court in respect of any debt for the settlement of which application has been made shall not be proceeded with until the board has dismissed the application."

This was construed by a Bench of this Court as prohibiting the sale of the property after the executing Court was appraised of the fact of filing an application under section 4 of the Debt Conciliation Act. It is unnecessary to refer to all the decisions on the point as the question had been finally decided by a Bench in *Rathnasabapathy Aiyar* v. *Subramania Pillai*[1]. The earlier decisions of this Court were all considered and the conclusion reached was that the act of presenting a petition under section 4 takes away the jurisdiction of the Civil Court to execute the decree and sell the property until the application is dismissed. But for the fact that the case before me stands on a different footing in one important respect I would have thought that that decision really concluded this case. The distinguishing feature is that in the present case the judgment-debtor himself moved the executing Court under section 25 for stay. The Court after notice to the decree-holder passed an order refusing stay and claiming in effect to exercise its jurisdiction to sell the property. There was an appeal against that order and that appeal was dismissed ultimately as not having been pressed. There was, therefore, a binding adjudication between the parties by which the executing Court decided at an earlier stage that it had jurisdiction to proceed with the execution. The question, therefore, is, is it open to the judgment-debtor now to reagitate that very question of jurisdiction of the executing Court to sell the property in an application under section 47, in that very Court? This is not a case where the Court had no inherent jurisdiction to deal with the matter or to sell the property. The executing Court, it cannot be doubted, had the right to sell but for the prohibition under section 25 of the Debt Conciliation Act. It had also the right and jurisdiction to consider the question whether it was a case for stay under section 25. Its decision on the question may be right or wrong but when once that decision had become final and binding between the parties, in my view, it is not open to impugn its validity and binding nature in a subsequent stage. Of course, if the Court lacked inherent jurisdiction as in the cases under the Madras Estates Land Act where the revenue Court alone possesses exclusive jurisdiction to adjudicate upon questions relating to rent and other matters in respect of ryoti lands or where there is a conflict between an Agency Court and an ordinary civil Court as in *Maharajah of Jeypore* v. *Gunupuram Deenabandhu Patnaick*[2], the matter may be different. In a case where the Court did not

1. (1946) 1 M.L.J. 193. 2. (1904) L.R. 32 I.A. 45 : I.L.R. 28 Mad. 42 (P.C.).

lack inherent jurisdiction but there was a statutory prohibition from proceeding with execution and the Court considers the question at the outset and decides that it had jurisdiction to sell, that decision is binding on the parties, however, erroneous that decision may be. This distinction between the lack of inherent jurisdiction and statutory restriction on the exercise of jurisdiction was considered in *Chinnappa Reddi* v. *Official Receiver, Guntur*[1], where the question was whether the executing Court could deal with the properties which were vested under section 37 of the Provincial Insolvency Act in the Official Receiver. The executing Court at an earlier stage decided that very question against the Official Receiver and in favour of its own jurisdiction. The question was whether in any subsequent proceeding the prior order would operate as *res judicata*. It was pointed that the word *jurisdiction* is used in more than one sense and that a distinction should be drawn between inherent want of jurisdiction and a want of jurisdiction which can be discovered only after the decision of an issue by the very Court whose jurisdiction is attacked by the defendant. If the case falls under the former category the decision being a nullity would not operate as *res judicata* ; if on the other hand it comes under the latter category it would operate as *res judicata*. In that case also it was held that notwithstanding the provision under section 37 of the Provincial Insolvency Act which vested the property of the insolvent in the Official Receiver there was no inherent lack of jurisdiction in the executing Court to entertain and deal with the matter. The decision may be wrong but all the same as it was a decision of a competent Court it became final between the parties and was binding on them. Section 25 of the Debt Conciliation Act, in my view, does not prohibit the Court from considering the question whether the proceeding should be stayed or not. The prohibition is from proceeding with the matter until the Board dismisses the application under section 4. It cannot be said that in deciding the question of the applicability of the bar the Court was proceeding with the matter. The decisions in *Makhan Lal* v. *Bhagwan Singh*[2], *Prakashchandra Chakrabarti* v. *Baradakishore Chakrabarti*[3] and in *K. L. Gauba* v. *Punjab Cotton Press Co., Ltd.*[4] are also to the same effect.

The Privy Council also seem to indicate that even a decision that a Court had no jurisdiction would operate as *res judicata* in a subsequent proceeding where the same question was raised, vide *Upendra Nath* v. *Lall*[5]. In *Bikan Mahuri* v. *Mt. Bibi Walian*[6], one of the decisions relied on, on behalf of the respondent there was an earlier suit in which a certain sum was claimed as representing rent and also tax. There was a decree in that suit in 1872. The landlord claimed later an amount which was in substance and in effect a tax within the meaning of Bengal Regulation (XXVII of 1793). One of the contentions urged was that the prior decision of 1872 operated as *res judicata*. It was held that that decision did not operate as *res judicata* as there was no adjudication regarding title but there was only a decision upon that particular liability. There, it was also contended that to claim the amount in the subsequent action was contrary to the provisions of the Regulation and that, therefore (as the plea of *res judicata* was only a form of estoppel) there could be no estoppel against statute. The answer to that is given by the learned Judge in column 2 at page 636 in these words :—

> " If the Regulation prohibits the recovery of this sum, the previous judgment entitling the plaintiff to recover the sum cannot stand in the way of defence of the defendants in this case with one exception which has been pointed out by Mr. Hussain in the course of his argument. If the previous case of 1872 had decided not only the liability of the defendants, but that the nature of the imposition was not such as to bring it within the mischief of the Regulation, the matter would have been concluded. But there was no such decision and, in order to rely upon the plea of *res judicata* Mr. Hussain falls back on what is ordinarily known as constructive *res judicata*."

If, therefore, the very question was considered and decided on the previous occasion by the Court in favour or against the jurisdiction of the Court that decision would certainly be *res judicata* in a subsequent proceeding and there could be no question

1. (1935) 69 M.L.J. 196 : I.L.R. 59 Mad. 62.
2. (1938) I.L.R. 17 Pat. 201.
3. (1933) I.L.R. 61 Cal. 234.
4. I.L.R. 1941 Lah. 524 (F.B.).
5. I.L.R. (1940) Kar.P.C. 460 : A.I.R. 1940 P.C. 222 (P.C.).
6. A.I.R. 1939 Pat. 633 at 636.

of estoppel against a statute. I think, therefore, the decision in *Bikan Mahuri* v. *Mt. Bibi Walian*[1] does not help the contention urged on behalf of the respondent. The other cases relied on, *viz.*, *Maharajah of Jeypore* v. *Gunupuram Deenabandhu Patnaick*[2], *Subramania Aiyar* v. *Swaminatha Chettiar*[3] and *Lakhmi Chand* v. *Madho Rao*[4], are all cases where the prior adjudication was by a Court which was not competent to deal with the matter and so the earlier decision in those cases could not operate as *res judicata* in subsequent proceedings. For these reasons I am of opinion that the sale in the present case is not a nullity and that by reason of the prior adjudication the plaintiff is precluded from reagitating the question under section 47, Civil Procedure Code.

There is also a minor point raised in the course of the argument by the respondent, namely, that as there was an appeal against the order of the learned Subordinate Judge to the High Court the order of the Subordinate Judge could no longer be treated as final as the appeal was not pressed. I am unable to agree with this contention. Whether the appeal was dismissed on the merits after hearing arguments or whether it was dismissed because it was not pressed the result in both the cases is the same. The order of the Court below was confirmed and therefore became final. The decisions relied on in support of the contention do not at all help the respondent. In *Abdullah Ashgar Ali Khan* v. *Ganesh Dass*[5], the suit was ultimately dismissed on the ground that it was not maintainable and therefore, there was no final adjudication on the material issue in the case.

In *Munshi Muhammad Abdul Aziz* v. *Gulam Julani*[6], the Subordinate Judge expressly stated in his judgment that he did not decide a particular issue. In the face of that statement it is impossible to contend that that issue was heard and finally disposed of.

For these reasons the appeal is allowed, the order of the learned District Judge is set aside the application of the plaintiff is dismissed with costs throughout. (Leave refused.)

B.V.V. ——— *Appeal allowed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

Nalluri Subbarayudu .. *Appellant**

v.

Ranpati Ramanaiah and others .. *Respondents.*

Hindu Law—Alienation by way of lease of joint family property—Different alienees from coparceners—Suit for partial partition and possession—Maintainability.

A suit for partial partition and possession is maintainable as between strangers who have taken on lease different parcels of family property from different coparceners in the joint family.

Iburamsa Rowthan v. *Thiruvenkatasami Naick*, (1910) 20 M.L.J. 743 : I.L.R. 34 Mad. 269 (F.B.), relied on.

Appeal against the decree of the Court of the Subordinate Judge, Bapatla, in A. S. No. 13 of 1945, preferred against the decree of the Court of the District Munsiff of Ongole in O. S. No. 429 of 1943.

D. Munikanniah for Appellant.

M. S. Ramachandra Rao, V. Rangachari and *K. Mangachari* for Respondents.

The Court delivered the following

JUDGMENT.—The suit out of which this appeal arises was filed by the first respondent for a permanent injunction, but subsequently the plaint was amended so as to convert it into one for possession and in the alternative for partition and

1. A.I.R. 1939 Pat. 633.
2. (1904) L.R. 32 I.A. 45 : I.L.R. 28 Mad. 42 (P.C.).
3. A.I.R. 1928 Mad. 746.
4. (1930) I.L.R. 52 All. 868.
5. (1917) 34 M.L.J. 12 : L.R. 44 I.A. 213 : I.L.R. 45 Cal. 442 (P.C.)
6. A.I.R. 1937 Mad. 709.

* S. A. No. 213 of 1946. 2nd December, 1947.

separate possession of the suit property. The facts that have been found by the Courts below are these. The second and third defendants are brothers who owned, among other properties, land measuring 8 acres and 96 cents. The second defendant is the elder of the two and he was residing in the village. The third defendant was employed in Government service and at the material time he was the Head Accountant in the Revenue Department at Guntur. They constituted an undivided family, although at one time an attempt was made to set up a case that they were divided. The senior brother, the second defendant, was the manager, although, here again, an attempt was made to claim that the younger brother, the third defendant, was managing the properties. In 1936, the entire plot of 8 acres and 96 cents. referred to above was leased to the first defendant, who is the appellant here, for a period of seven years and the lease was to expire at the end of the year Chitrabanu, corresponding to 1942-43. Before the expiry of that lease, the appellant obtained a further extension of the period of lease for ten years under letter, Ex. D-1, dated 21st March, 1942. This lease purports to have been given by both the brothers, but the letter, Ex. D-1, was actually executed by the third defendant alone and, as a matter of fact, the second defendant has disowned any connection with it. The third defendant came forward with the version that he was approached by Burra Venkayya, D.W. 2 on behalf of the first defendant for the extension of the term of the lease and that the third defendant agreed on payment of the arrears of rent and of a further sum of Rs. 500 by way of advance for the extended lease. But he says that he stipulated that the lease was subject to the consent of the second defendant to comprise his share in the land also therein. His case was that subsequently the second defendant did not agree, and consequently he stated in his reply to the notice sent by the appellant that he was prepared to confine the lease to his half share. This version was not countenanced by the trial Court. On 22nd June, 1942, the second defendant in turn executed a registered lease for half the extent of the suit land in favour of the plaintiff, the first respondent, for a period of ten years. Both the Courts have found that the third defendant was also behind this lease and that both the brothers combined to bring about this transaction as there was an attractive offer of advance rent of Rs. 1,000 from the plaintiff. The finding of fact is that the third defendant was aware of this transaction, having regard particularly to the fact that the document was executed and registered at Guntur, where the third defendant was employed, instead of at Ongole. The further case was adumbrated by the plaintiff-first respondent to the effect that possession of $4\frac{1}{2}$ acres, which was the subject-matter of the registered lease, Ex. P-1 was actually delivered to him and it is on that footing that the present suit was filed for a permanent injunction. Both the Courts have concurrently found the case of delivery of possession to the plaintiff to be in time and held that as a matter of fact, possession continued with the appellant. The present suit was filed on 7th September, 1943, and along with it an application was made for temporary injunction. The application was dismissed and promptly the plaintiff applied for the amendment of the plaint, seeking possession of the B Schedule property and, in the alternative, partition of the entire plot of 8 acres and 96 cents and delivery to him of one half thereof, subject to the terms of the lease, Ex. P-1. As a result of this amendment, the third defendant who was until then not a party to this suit was impleaded as a party-defendant. The trial Court decreed the suit for partition of the entire holding into two shares for separate possession of one share to the plaintiff, holding that the lease from the second defendant gave the plaintiff sufficient title to demand partition from the other lessee who must be held to be entitled to only the interest of the third defendant. An appeal brought by the first defendant-appellant was dismissed by the Subordinate Judge of Bapatla. The learned appellate Judge agreed with the conclusion of the trial Court that Ex. D-1 was not binding on the second defendant and held that the second defendant was competent to lease his own share of the property under Ex. P-1. He also agreed with the view taken by the learned District Munsiff that the alternative relief of partition alone could be granted in favour of the plaintiff and that the suit was not bad for partial partition as it was a dispute between alienees from different coparceners.

Mr. D. Munikanniah, the learned advocate for the appellant, has raised two contentions before me. The first is that the amendment of the plaint which was ordered by the trial Court had the effect of altering the nature and complexion of the suit, and that hence the amendment should not have been granted. The second argument is that the suit is virtually one for partial partition and that according to well-settled principles such a suit is not maintainable in the absence of a prayer for general partition. It is curious that the objection relating to the effect of the amendment of the plaint was not raised in the lower appellate Court. The order of amendment indicated that the amendment would be permitted to be made only on payment of the costs specially awarded. From the fact that the amendment was carried out, it is clear that those costs were paid and received by the appellant and it does not appear that the costs were received under protest. Attention was drawn to the plea taken in the additional written statement that was filed after the amendment of the plaint ; but apparently this objection was not pressed either at the trial as I find no discussion with regard to it in the judgment of the trial Court or at the appellate stage in the lower appellate Court.

The second is the more important point as it involves the consideration of the question whether when a suit is brought by an alienee from a coparcener of a Hindu family it must be one for complete partition or whether it is open to him to limit it to his share in the particular parcel of the family property which has been sold to him. Whatever the position might have been at one time, it seems to be well settled now, so far, at any rate, as this High Court is concerned, that such a suit is maintainable when it is brought against another alienee similarly situated. The principle applicable to such cases was laid down by this Court as early as in *Chinna Sanyasi* v. *Suriya*[1] and it has been followed subsequently in a number of decisions : *Subramania Chettiar* v. *Padmanabha Chetti*[2], *Palani Konan* v. *Masakonan*[3] and *Iburamsa Rowthan* v. *Thiruvenkatasami Naick*[4]. That view has also been adopted by the Allahabad and Bombay High Courts, but dissented from in the Calcutta High Court. Where the dispute is wholly between strangers to the family, each of whom claims against the other an interest in the family property, it has been held that they can sue to obtain possession of their own interest without claiming a general partition (*Subbarazu* v. *Venkataratnam*[5], *Iburamsa Rowthan* v. *Thiruvenkatasami Naick*[4] and *Kandasami Goundan* v. *Venkatarama Goundan*[6]). Broadly speaking, the matter has been considered in the authorities in four different categories. The first class of cases arises between members of a family *inter se*. With regard to such suits, the consensus of judicial opinion is that one coparcener cannot sue another for partial partition of the family property held in coparcenership. This rule is not actually supported by any textual authority, but is in the nature of judge-made law, which as Ramesam, J., pointed out in *Kandasami Goundan* v. *Venkatarama Goundan*[6], has been acted upon for a considerably long time and it is too late to examine whether the foundation of that rule is sound or unsound. The second group of cases is between a member of the family and a stranger. The same principle applies to that class also, and a transferee from a coparcener is in the same position as the coparcener from whom he purchased the parcel of family properties, namely, that he cannot sue a member of the joint family for partition of a portion only of the coparcenership property. The third class of cases arises between a coparcener and a stranger, who has purchased a portion of the family property from one of the coparceners. It has been held with regard to such actions that it is competent for any coparcener to sue for partition of his own share in the alienated property, the principle being that the connection of the stranger with any property belonging to the family may be severed. There is a volume of authority in support of this position. In addition to the cases already cited, there are two other decisions referred to by the Full Bench in its judgment in *Iburamsa Rowthan* v. *Thiruvenkatasami Naick*[4]. The fourth and the last category relates to suits

1. (1882) I.L.R. 5 Mad. 196.
2. (1896) I.L.R. 19 Mad. 267.
3. (1896) I.L.R. 20 Mad. 243.
4. (1910) 20 M.L.J. 743 : I.L.R. 34 Mad. 269 (F.B.).
5. (1892) I.L.R. 15 Mad. 234.
6. (1933) 65 M.L.J. 696.

between strangers who have purchased different parcels of family property from respective coparceners. That such suits are maintainable has been held to flow as a corollary from the position that a coparcener may maintain a suit against a stranger alienee, —the position that was considered in connection with the third group of cases. In *Iburamsa Rowthan* v. *Thiruvenkatasami Naick*[1], the then Advocate-General, the Honourable Mr. P. S. Sivaswami Iyer (as he then was) conceded that if a coparcener could file a suit for partition against a stranger-alienee, an alienee from that coparcener could also maintain a suit against the alienee fro n other coparceners, unless the alienation bound the entire family interest. The reasoning in *Subbarazu* v. *Venkataratnam*[2] and *Kadegan* v. *Periya Munusami*[3], fully supports the concession made by the then Advocate-General. It is not necessary to discuss all the old cases ; it would be sufficient to refer to the two leading cases on the subject, and they are the Full Bench decision in *Iburamsa Rowthan* v. *Thiruvenkatasami Naick*[1], and the Bench decision in *Kandasami Goundan* v. *Venkatarama Goundan*[4]. The facts of the Full Bench case are very similar to the facts of the present case. The first and second defendants therein were the only members of the joint family. Some items were sold by the first defendant to a stranger, the third defendant, and the second defendant's interest in the same items were sold by him to the plaintiff. The trial Court dismissed the suit as one for partial partition. The case came up on appeal before Benson and Krishnaswami Iyer, JJ., who referred to the Full Bench, and upon those facts it was held, by the Full Bench after reviewing all the decisions bearing upon the point that the suit by an alienee against another alienee is maintainable. It was observed that the existence of any equities in favour of the purchaser did not entitle him to resist the claim of the members not bound by the alienation to possession. And the judgment ended with the following observation :

"In Madras where the share of the members not affected by the alienation has been allowed to be recovered there is no reason for refusing the more limited prayer for possession of that share."

If, in such circumstances, a coparcener is entitled to maintain a suit against an alienee to recover a portion of the property alienated to him, an alienee from that coparcener can also maintain a similar suit. In *Kandasami Goundan* v. *Venkatarama Goundan*[4], an attempt was made to explain away the decision in *Iburamsa Rowthan* v. *Thiruvenkatasami Naick*[1], on the ground that both alienations in *Iburamsa Rowthan* v. *Thiruvenkatasami Naick*[1], were of the same property and that that was a case between the first alienee and the second alienee. The learned Judges found no merit in that distinction and as Ramesam, J., pointed out, that was only an accident, and the principle applicable would, in any event, be the same when two different parcels of property were sold by two coparceners to different strangers. The facts in *Kandasami Goundan* v. *Venkatarama Goundan*[4] are also very similar to those of the present case. After setting out all the facts, Ramesam, J., said this :

"Mr. Padmanabha Aiyangar contended that the suit for a share of the Alasandapuram lands is not maintainable because it is a suit for partial partition. Now, cases establish two or three well recognised principles. Firstly, as between members of a joint family, no suit for partial partition lies. Secondly, a member or members of a joint family may sue an alienee from a member or members of the joint family for his or their share of the property alienated without suing for a general partition. In so doing, they affirm the sale by the other member or members but the real basis of the rule is that as the rule against partial partition is a rule for the protection of the joint family against being harassed by multiplicity of suits at the instance of alienees from recalcitrant members, they can waive the benefit of it and they can bring a suit to separate themselves from the undesirable stranger. The remarks in *Iburamsa Rowthan* v. *Thiruvenkatasami Naick*[1] show that the rule is recognised on the ground that it has been acted upon in a series of cases, and it is too late to examine whether the foundation of the rule is sound or unsound. So it is unnecessary to analyse the reasons for the rule. It is enough to say that the rule exists as between members of a joint family and an alienee from a member or members. We have got the actual decision in *Iburamsa Rowthan* v. *Thiruvenkatasami Naick*[1], where the plaintiff is an alienee from one member and the defendant is an alienee from another member of the joint family. The suit was held to be maintainable."

1. (1910) 20 M.L.J. 743 : I.L.R. 34 Mad. 269 (F.B.).
2. (1892) I.L.R. 15 Mad. 234.
3. (1903) 13 M.L.J. 477.
4. (1933) 65 M.L.J. 696.

Mr. D. Munikanniah endeavoured to distinguish this decision on three grounds: that most of the observations are in the nature of *obiter dicta*, that the decision proceeded on the ground that there was waiver of the right to general partition by the coparceners and, that in actual fact there was no coparcenary in existence but the defendants were in the position of tenants-in-common. If this case had stood by itself, possibly on these grounds of distinction something could have been said but, as I have endeavoured to show, this case was only following the Full Bench decision in *Iburamsa Rowthan* v. *Thiruvenkatasami Naick*[1], which itself was a decision based upon a series of cases that preceded it, laying down the same proposition. All that Ramesam, J., did was to distinguish a number of cases that were cited before him and to reiterate the principle.

Finally, one other ground of distinction was put forward by the learned advocate for the appellant that in the present case, far from there being a waiver by the coparceners, the third defendant specifically objected to the suit on the ground that, being one for partial partition, it was not maintainable. The objection is not found in the written statement filed by him in the suit, but it was raised only in the memorandum of cross-objections that was filed in the appeal in the lower appellate Court which was directed exclusively against the order of costs made against him. No plea or argument on that ground appears, however, to have been actually advanced at the hearing of the appeal before the lower appellate Court. As it was strenuously contended as a special point of distinction that in *Iburamsa Rowthan* v. *Thiruvenkatasami Naick*[1], no such objection as to partial partition was raised by any of the coparceners, I sent for the records in that case and examined the pleadings. Although no specific objection was taken in that form by either the first defendant or the second defendant in that case, the second defendant filed a written statement in which he expressly stated that the family was joint and owned properties other than those conveyed to the plaintiff and the third defendant. Those averments must have been made only for the purpose of bringing to the notice of the Court the fact that it was a suit for partial partition. As a matter of fact, the trial Court dismissed the suit on that ground alone. It is therefore futile to contend that the plea of partial partition was not prominently brought forward in *Iburamsa Rowthan* v. *Thiruvenkatasami Naick*[1]. Despite the objection of the contesting coparcener and the absence of a waiver, the rule was none the less affirmed and enforced in that case by the Full Bench.

The appeal fails and is dismissed with costs of the first respondent.

In the circumstances of the case, I do not consider that respondents 2 and 3 are entitled to any costs. No leave.

B.V.V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDARAJACHARI.

Kannuri Venkata Chalapathi Rao .. *Appellant**

v.

Devineni Kanchayya .. *Respondent.*

Civil Procedure Code (V of 1908), *Order* 34, *rules* 5 *and* 15—*Applicability—Property given to Court as security for decree that may be passed—Passing of money decree—Execution—Sale of security—Whether Order* 34, *rule* 5 *could be availed of by the judgment-debtor.*

In a suit for money a decree was obtained. But as it was obtained *ex parte*, on an application to set it aside, as a condition for setting aside of the *ex parte* decree, the judgment-debtor (appellant) was directed to give security of immoveable property for the satisfaction of any decree which might be ultimately passed. The appellant provided the security, but the suit which was tried went against him. The respondent though he did not attach the property executed his decree against the property

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1. (1910) 20 M.L.J. 743 : I.L.R. 34 Mad. 269 (F.B.).

* A. A. A. O. No. 205 of 1946. 12th September, 1947.

which was given as security. It was sold and purchased by the respondent himself. An application was made by appellant under Order 21, rule 90 which was dismissed. Again the appellant applied to set aside the sale under Order 34, rule 5, Civil Procedure Code, after depositing the amount required to be deposited.

Held, it could not be said that there was a decree based on a charge and execution in pursuance of such a decree resulting in the sale of the property which is charged and that therefore the procedure laid down in Order 34, rule 5 should be available to the judgment-debtor. Nor could it be said that there was such a decree as is necessary for the application of Order 34, rule 5 read with Order 34, rule 15 or that the sale was in execution of such a decree. In the circumstances, the provisions of Order 34, rule 5 cannot be availed of by the appellant-Judgment-debtor.

Appeal against the order of the Court of the Additional Subordinate Judge, Masulipatam, dated 24th June, 1946, in A.S. No. 123 of 1945 preferred against the order of the Court of the District Munsiff, Gudivada, in E.A. No. 1076 of 1943 in O.S. No. 354 of 1936.

M. Appa Rao for Appellant.

A. Sambasiva Rao for Respondent.

The Court delivered the following

JUDGMENT.—The appellant was the judgment-debtor in O.S. No. 354 of 1936 on the file of the Court of the District Munsiff of Gudivada. That was a suit for money. There was first an *ex parte* decree on 16th July, 1937, but on the application of the appellant the *ex parte* decree was set aside. As a condition of the setting aside of the *ex parte* decree the judgment-debtor was directed to give security of immoveable property for the satisfaction of any decree which may be passed in the suit after trial. The appellant accordingly executed a security bond on 5th November, 1937, giving the prescribed security. The suit was then tried and again resulted in a decree in favour of the plaintiff, who is the respondent in this civil miscellaneous second appeal, on 15th December, 1937. The respondent executed his decree against the property which was given as security. He did not attach that property and it is fairly clear from the execution record that he was intending to and believed that he could enforce his security in the course of the execution proceedings themselves. The property which was given as security was sold on 22nd April, 1940, the respondent himself being the purchaser for a sum of Rs. 1,855. There was an application by the appellant under Order 21, rule 90 which was dismissed.

On 12th November, 1943, the appellant applied in E.A. No. 1076 of 1943 under Order 34, rule 5 of the Civil Procedure Code for the setting aside of the sale. He deposited the amount required to be deposited under that rule. The application was dismissed by the District Munsiff of Gudivada and an appeal against that order was also unsuccessful. Hence the present civil miscellaneous second appeal.

The main point that arises for determination is whether the appellant can avail himself of the provisions of Order 34, rule 5. That rule provides that before the confirmation of a sale made in pursuance of a final decree passed in a mortgagee's suit for sale the mortgagor-defendant may deposit into Court the amount mentioned in the decree together with 5 per cent. of the amount of the purchase money and have the sale set aside. Order 34, rule 5 applies no doubt only to a mortgage, but under Order 34, rule 15 all the provisions contained in the Order which apply to a simple mortgage are made applicable *inter alia* to a charge falling under section 100 of the Transfer of Property Act " so far as may be." The appellant's counsel argues that this is a charge within the meaning of section 100 of the Transfer of Property Act and that by the combined operation of Order 34, rules 5 and 15 his client can have the benefit of the procedure laid down in the former rule. There is no doubt that the security bond created a charge over the immoveable property.

There has been considerable argument before me as to whether the charge had to be enforced by a suit as required by Order 34, rule 14 or could be enforced in execution. It is unnecessary to refer to the several decisions which have been cited on both sides. The distinction seems to be fairly well established between

a charge created before a decree is passed and a charge created either by the decree itself or after the decree. In the former case the remedy of the person in whose favour the charge is created is by way of a suit, while in the latter case the charge can be enforced in execution. This matter has been elaborately discussed in *Narottan Dass* v. *Krishna Prasad*[1]. To the same effect is the decision in *Ramaswami Naidu* v. *Subbaraya Tevar*[2]. Mr. Krishnamurthi, the respondent's counsel, referred me to the decision in *Jagannatha* v. *Ramachandra*[3], as establishing that a charge given before decree is also enforceable in execution. It is true that the charge given in that case was before decree. It would be observed however that the security bond that was executed in that case was in favour of the Court, just like the security bond which was executed in *Raj Raghubar Singh* v. *Jai Indra Bahadur Singh*[4] and in *Kunhi Moidin* v. *Koman Nair*[5]. When a security bond is executed in favour of the Court it is well established that it does not create a mortgage as the Court is not a juridical person and cannot take property and that if it cannot take property it cannot assign it. In such a situation where there is an unquestioned liability created by a security bond the procedure which has been adopted in *Raj Raghubar Singh* v. *Jai Indra Bahadur Singh*[4] and the cases which subsequently followed it, is for the Court to make an order in the suit upon an application to which the sureties are parties to the effect that the property charged would be sold unless before a date named the sureties pay the money.

I may at once point out that the security bond in this case is not, like the security bond in *Raj Raghubar Singh* v. *Jai Indra Bahadur Singh*[4] and the other two cases which I have just now mentioned, addressed to or executed in favour of the Court and that the security bond follows a form which was promulgated after and in consequence of the decision of the Judicial Committee in *Raj Raghubar Singh* v. *Jai Indra Bahadur Singh*[4]. It creates a charge in favour of the decree-holder and therefore avoids the difficulty which had to be faced in *Raj Raghubur Singh* v. *Jai Indra Bahadur Singh*[4]. I am therefore unable to accept the argument that this charge can be enforced in execution. If there is a valid charge in favour of the decree-holder created before the decree was passed, it seems to me that according to the decision in *Narottan Dass* v. *Krishna Prasad*[1] and *Ramaswami Naidu* v. *Subbaraya Tevar*[2], the charge-holder can enforce his charge only by filing a suit and cannot seek to enforce it in execution of a money decree in his favour. In this view therefore Order 34, rule 14 will apply.

But this, however, does not touch the question which I am called upon to decide. Having regard to the provisions of Order 34, rule 15 making the rest of the order applicable to charges " so far as it may be," it may be quite open to a person who is bound by a charge and whose property is sold in execution of a decree obtained on foot of that charge to ask that he should be permitted to deposit the amount specified in Order 34, rule 5 and seek a cancellation of the sale, provided he does so before that sale is confirmed. Here however there was no suit on foot of the charge and there was no decree such as we would have when a charge is sued upon, fixing a date before which the amount for which the charge is created is made payable and ordering that in default of such payment the property charged should be sold in execution of the decree.

As stated, the decree that was passed in the suit was a money decree. The decree-holder no doubt thought that he could enforce the charge in the course of execution. His failure to attach the property as also his statements in the execution proceedings that the property, the sale of which he was seeking was charged for his decree indubitably indicate that he was seeking to enforce the charge; but notwithstanding all these it is impossible to say that there was a decree based on a charge and execution in pursuance of such a decree resulting in the sale of the property which is charged and that therefore the procedure laid down in Order 34,

1. (1936) I.L.R. 15 Pat. 545.
2. (1925) 49 M.L.J. 490.
3. A.I.R. 1936 Mad. 589.
4. (1919) 38 M.L.J. 302 : L.R. 46 I.A. 228 : I.L.R. 42 All. 158 (P.C.).
5. (1933) 65 M.L.J. 342 : I.L.R. 56 Mad. 989.

rule 5 should be available to the judgment-debtor. In my opinion such a supposition runs counter to the established facts of the case and it is not possible for the Court to imagine that there was such a decree as is necessary for the application of Order 34, rule 5 read with Order 34, rule 15 or that the sale was in execution of such a decree.

The appellant's counsel placed considerable reliance on *Ashutosh* v. *Behari Lal*[1], but that case only decided that if property is sold in contravention of Order 34, rule 14, Civil Procedure Code or more precisely in contravention of section 99 of the Transfer of Property Act which corresponded to Order 34, rule 14, the sale is not void but is only voidable at the instance of the mortgagor. The present application is not one for setting aside the sale on the ground that Order 34, rule 14 has been violated. *Ashutosh* v. *Behari Lal*[1] is no authority for saying that such a sale would have the effect of rendering all the provisions of Order 34 applicable.

In the circumstances therefore I do not see how the provisions of Order 34, rule 5 can be availed of by the appellant. The second appeal therefore fails and is dismissed with costs. Leave refused.

K.C. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Officiating Chief Justice* AND MR. JUSTICE RAJAGOPALAN.

Subramanian and others .. *Appellants**

v.

Seetarama Aiyar .. *Respondent.*

Civil Procedure Code (V of 1908), Order 39, rule 2—Applicability—Execution of compromise decree which had not been set aside—If amounts to committing an injury—Inherent jurisdiction of Court to grant injunction apart from provisions of Order 39.

It cannot be said that proceedings in execution of a compromise decree which had not been set aside would amount to committing an injury within the meaning of Order 39, rule 2, Civil Procedure Code.

The Subordinate Courts and the High Court sitting as an appellate Court against the orders of the Subordinate Court have no inherent jurisdiction to issue an injunction apart from the provisions of Order 39, Civil Procedure Code.

Appeals under clause 15 of the Letters Patent against the judgment and order of Horwill, J., dated 19th February, 1948, in A.A.O. Nos. 603 and 602 of 1947 respectively preferred to the High Court of Madura, dated 10th December, 1947, in I.A. No. 533 of 1947 in A.S. No. 136 of 1947 and I.A. No. 532 of 1947 in A.S. No. 134 of 1947 respectively (O.S. No. 15 of 1944, Subordinate Judge's Court, Madura).

M. Appa Rao for Appellants.

V. Ramaswami Aiyar for Respondent.

The Judgment of the Court was delivered by

The Officiating Chief Justice.—These are appeals under the Letters Patent against the judgment of Horwill, J., dismissing two civil miscellaneous appeals, Nos. 602 and 603 of 1947. The two civil miscellaneous appeals were filed against two orders of the learned District Judge of Madura dismissing two applications for the issue of an interim injunction restraining the respondent from executing the decree for possession obtained by him in O.S. No. 15 of 1944 on the file of the Subordinate Judge's Court of Madura pending two appeals before him. That suit, namely, O.S. No. 15 of 1944 was a suit for partition to which the husband of the appellant in L.P.A. No. 14 who was the managing member of the joint family at the time and the father of the minor appellants in L.P.A. No. 13, a coparcener of the family, were parties. The suit ended in a compromise decree.

1. (1907) I.L.R. 35 Cal. 61 (F.B.).

* L. P. A. Nos. 13 and 14 of 1948. 5th April, 1948.

The applications were made under Order 39 of the Civil Procedure Code. Obviously, Order 39, rule 1 has no application to the facts of this case, nor was it contended before us that it had any application. Before the learned District Judge, apparently rule 2 of Order 39 was also relied on, but he held it would not apply in terms. In the appeals to this Court, the learned Judge held that from a perusal of Order 39, rule 1 the case would not come within that rule. But evidently it was not argued before him that Order 39, rule 2 would apply. Before us, it was contended that the case might be brought within Order 39, rule 2. Reliance was placed on the words, "restraining the defendant from committing—other injury of any kind." No authority has been cited to us that proceedings in execution of a compromise decree which had not been set aside would amount to committing an injury. It was said that the decree was not binding on the appellants before us, because they were not parties. We are not impressed with this argument. We hold that the respondent cannot be held to be committing any legal injury by executing the decree in O.S. No. 15 of 1944.

It was then contended that even if Order 39, rules 1 and 2 did not apply there was inherent power in the Court to issue an injunction in a proper case. It is true that it has been ruled in some decisions that apart from the powers under Order 39, rules 1 and 2, Civil Procedure Code, the High Court has powers inherited from the Supreme Court which would enable it to issue an injunction in circumstances not covered by Order 39 of the Civil Procedure Code. But surely that power cannot be invoked by the appellants in this case and all that we have to determine is the power of the lower Court to grant an injunction. None of the decisions relied on by the learned counsel for the appellants in *Singaravelu Mudaliar* v. *Balasubramania Mudaliar*[1], *Periakaruppan Chettiar* v. *Ramaswami Chettiar*[2] and *Govindarajulu Naidu* v. *Imperial Bank of India, Vellore*[3], has any application to the facts of this case. In the first of the three cases, the learned Judge held that the facts would justify the issue of an injunction under Order 39, rule 2. In the other two cases, it was clearly laid down that the extraordinary jurisdiction possessed by the High Court is not possessed by any of the subordinate Court. We agree with the learned Judge that the lower Court and this Court sitting as an appellate Court against the orders of the lower Court have no inherent jurisdiction to issue an injunction apart from the provisions of Order 39, Civil Procedure Code.

The appeals fail and are dismissed with costs.

V.S. *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR FREDERICK WILLIAM GENTLE, *Chief Justice* AND MR. JUSTICE RAJAMANNAR.

K. Ranganatham Chetty .. *Appellant**

v.

Koppulu Kanakaratnammah and others .. *Respondents.*

Specific Relief Act (I of 1877), *section* 27-*A—Agreement to grant lease—Lessee never in possession or occupation at all—Suit to enforce specific performance—Inadmissibility of unregistered agreement.*

A suit upon an unregistered agreement for enforcing a right to specific performance of a contract to grant a lease of a premises for 26 months on a rental of Rs. 85 per month where the plaintiff had never been in occupation of the premises at all was dismissed. On appeal,

Held, that as the agreement was not registered it became inadmissible in evidence under the provisions of the Registration Act and section 27-A of the Specific Relief Act could not help the plaintiff, as he had neither been in possession nor done any act in furtherance of the agreement to lease.

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1. (1926) 24 L.W. 421.
2. (1928) 27 L.W. 418.
3. (1931) 35 L.W. 168.

* O. S. A. No. 6 of 1947. 2nd December, 1947.

On appeal from the judgment and decree of Clark, J., dated 7th November, 1946 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C.S. No. 287 of 1945.

Srinivasaraghavan and *C. Vasudevan* for Appellant.

R. Thirumalai Thathachari, M. K. Harihara Aiyar and *S. V. Subramaniam* for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—The suit out of which this appeal arises was for specific performance of an agreement, dated the 12th August, 1943, to grant a lease of premises No. 1/90, Godown Street, Madras, for a period of 26 months at a monthly rental of Rs. 85. There was also a claim for damages which were alleged to amount to Rs. 10,000. The learned Judge dismissed the suit, and this is the plaintiff's appeal against the learned Judge's decision.

It is necessary to refer to a few facts, although our task has been greatly lightened by Mr. Narasimha Aiyar, learned counsel for the appellant, who has quite properly drawn our attention to the relevant provisions of law and has greatly shortened the time of disposal of this appeal.

The first defendant is the owner of the premises. By exchange of letters between them, each dated the 12th August, 1943, the first defendant agreed to lease to the plaintiff the premises in suit for a period of 26 months as soon as the second defendant, who was then the occupier, vacated the premises and handed over the keys. The plaintiff paid Rs. 500 as an advance towards the rent. A week later, the first defendant purported to give the second defendant one month's notice to terminate what was alleged to be a monthly tenancy of the premises. The reply, written on behalf of the second defendant to the notice to quit, asserted that the premises were occupied under a lease for three years, commencing in February, 1942, and not expiring until February, 1945, about 18 months thence forward. In December, the first and second defendants apparently got together and made an agreement, the terms of which are set out in a letter, dated the 15th December, 1943, written by the second defendant to the first defendant. That letter states that the second defendant was a tenant of the premises in suit for a period of eleven months at a rental of Rs. 80 monthly, terminating on the 15th November, 1944. There was a term that the second defendant should not sub-let the premises. About April, 1944, the second defendant sold his business to the third defendant and let him into occupation. A meeting took place, according to the correspondence, about that time, by which the rent of the premises pursuant to the agreement set out in the letter of the 15th December, 1943, was paid by the third defendant up to the termination of that agreement and was accepted by the first defendant. One matter requires reference ; these premises were subject to the Control Orders which were in force, and prevented any landlord recovering possession, save upon the terms set out in the Control Orders, which meant that as long as a tenant complied with the ordinary terms of his tenancy he could not be disturbed from occupation, however much the landlord might desire possession.

It is in those circumstances that the plaintiff instituted the suit, out of which this appeal arises, on the 14th December, 1945, and added the second and third defendants as parties, alleging, in effect, that all the defendants were conspiring together to prevent the plaintiff from obtaining possession.

In dismissing the suit, the learned Judge gave several grounds, which in his opinion disentitled the plaintiff from succeeding. It is necessary only to refer to one of them, since Mr. Narasimha Aiyar has frankly conceded that if he is unable to disturb the learned Judge's findings with regard to that matter, no purpose is served by an investigation and discussion upon the other aspects of the case, inasmuch as the appeal must fail.

It arises in this way. The agreement under which the plaintiff seeks to enforce a right to specific performance is a contract for the grant of a lease for a period of

26 months, and the plaintiff has never been in occupation of the premises at all. It is beyond doubt that that agreement requires registration pursuant to the provisions of the Registration Act. If, as in this case, the agreement is not registered, it is inadmissible in evidence and cannot be enforced. An exception to this inadmissibility in evidence is provided by section 27-A, Specific Relief Act, which enacts as follows :

" Subject to the provisions of this Chapter, where a contract to lease immoveable property is made in writing signed by the parties thereto or on their behalf, either party may, notwithstanding that the contract, though required to be registered, has not been registered, sue the other for specific performance of the contract, if,—

(*b*) where specific performance is claimed by the lessee, he has, in part performance of the contract, taken possession of the property, or, being already in possession, continues in possession in part performance of the contract, and has done some act in furtherance of the contract " ;

It is to be observed that an unregistered contract to lease property, which is required to be registered, can be admitted in evidence in very limited circumstances. So far as material, the potential lessee must be in occupation, either having taken occupation pursuant to the agreement or remained in occupation thereof, and, in addition, has done some act in furtherance of the agreement. Unless those circumstances exist, the agreement is one which cannot be admitted in evidence. Since those circumstances do not exist in the present case, it must follow that the agreement, which is the subject of the present suit, the one made between the parties on the 12th August, 1943, cannot be admitted, and it necessarily follows there cannot be, whatever other merits there may be, an order for specific performance in respect of it. It follows that the plaintiff cannot enforce his contract with the first defendant, is not entitled to an order for specific performance, and that the learned Judge's decision in that respect is correct, and this appeal must fail.

It was argued strenuously that, as regards costs, only one set should be awarded against the plaintiff. The learned trial Judge pointed out that it was essential and quite proper that the three parties should be separately represented, as their interests were not the same and, to some extent, they were in conflict. The three respondents, the first, second and third defendants in the suit have been brought here by the plaintiff. After giving every consideration to the arguments addressed on behalf of the plaintiff-appellant, it seems to me that, having brought the respondents here and having failed in the appeal, the only proper order is to direct that the appellant should respectively pay each of the respondent's costs.

Rajamannar, J. :—I agree entirely.

K.C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Officiating Chief Justice* AND MR. JUSTICE RAJAGOPALAN.

A.B.M.S. Mohamed Ali Maracoir and others .. *Appellants**

v.

P.S.N.S. Ambalavana Chettiar .. *Respondent.*

Letters Patent (Madras), clause 15—Judgment—Suit for recovery of damages for breach of contract—Appeal to High Court—Order of single Judge of the High Court directing findings to be submitted by the trial Court on the question of difference in the price of the goods on the date of receipt and the date of delivery—If appealable.

In an appeal against a decree of the City Civil Judge in a suit for recovery of damages for breach of contract, a single Judge of the High Court directed the trial Court to take fresh evidence that may be adduced by the parties on the issue as regards the difference in the price of the goods on the date of the receipt and the date of delivery and send up its findings on the evidence so recorded. In an appeal against that order under clause 15 of the Letters Patent, on a preliminary objection as to the maintainability of the appeal,

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* L. P. A. No. 62 of 1947. 7th April, 1948.

Held, the order calling for a finding was not a "judgment" within the meaning of clause 15 of the Letters Patent and the appeal was incompetent.

Punnayya v. *Parandamayya*, (1926) 25 L.W. 95, followed.

Appeal under clause 15 of the Letters Patent against the judgment of Chandrasekhara Aiyar, J., dated 28th October, 1947, in C.C.C.A. No. 25 of 1946 preferred against the decree of the City Civil Court, Madras, in O.S. No. 478 of 1944.

S. K. Ahmed Meeran for Appellants.

G. Ramakrishna Iyer for *T. Srinivasaraghavan* for Respondent.

The Judgment of the Court was delivered by

The Officiating Chief Justice.—A preliminary objection is taken by Mr. G. Ramakrishna Aiyar on behalf of the respondent to the maintainability of this Letters Patent Appeal. In an appeal against a decree of the learned City Civil Judge in O.S. No. 478 of 1944, which was for recovery of damages for breach of contract Chandrasekhara Aiyar, J., directed the trial Court to take fresh evidence that may be adduced by the parties on issue 7 in the case as regards the difference in the price of the goods on the date of receipt and the date of delivery and send up its findings on the evidence so recorded.

It was contended by Mr. Ahmed Meeran for the appellants that the appeal is competent because the learned Judge had decided that the plaintiff would be entitled to damages for breach of warranty and has only called for a finding to enable him to pass a decree and that that part of the learned Judge's order which decided his liability was a judgment within clause 15 of the Letters Patent and an appeal was therefore competent. He even went to the length of contending that if he did not come up in appeal against the order at this stage he would be precluded hereafter from challenging the correctness of the learned Judge's finding on liability.

He relied upon the observations in *Tuljaram Row* v. *Alagappa Chettiar*[1], the leading judgment of a Full Bench of this Court on the meaning of "judgment" in clause 15 of the Letters Patent. At page 14, Krishnaswami Aiyar, J., said :

> "But I do not think we shall be justified in confining the term 'judgment' to final disposal of suits, appeals or original petitions or proceedings in execution. Preliminary or interlocutory judgments which ascertain rights and direct further inquiries which determine liabilities though further directions are given for ascertaining the measure of those liabilities must be deemed to fall within clause 15."

These observations which are general in nature have, in our opinion, reference only to cases where there are decrees of the nature of preliminary decrees for accounts in a suit for dissolution of partnership or in a suit for partition or a preliminary decree for sale in a mortgage suit. The observations of White, C.J., at page 7 also relied upon by the learned advocate for the appellants bring out the implication of the rule laid down by the learned Judges in that case :

> "The test seems to me to be not what is the form of the adjudication but what is its effect in the suit or proceeding in which it is made. If its effect, whatever its form may be, and whatever may be the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, I think the adjudication is a judgment within the meaning of the clause. An adjudication on an application which is nothing more than a step towards obtaining a final adjudication in the suit is not, in my opinion, a judgment within the meaning of the Letters Patent."

Applying this test, we have no hesitation in holding that the order of Chandrasekhara Aiyar, J., calling for a finding on issue 7 is not a judgment within the meaning of clause 15 of the Letters Patent.

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1. (1910) 21 M.L.J. 1 : I.L.R. 35 Mad. 1 (F.B.).

Two decisions of the Judicial Committee in *Rahimbhoy Habibbhoy* v. *C. A. Turner*[1] and *Saiyid Muzhar Hossein* v. *Mussamat Bodha Bibi*[2] were relied upon by the learned advocate for the appellant. They deal with the construction of the word " final " which occurred in section 595 of the Civil Procedure Code then in force. In both the cases, the High Court had refused leave to appeal to Her Majesty in Council on the ground that a decree made by the High Court was not final within the meaning of that word in section 595 of the Civil Procedure Code and therefore a certificate should be refused under section 601 of the Code. Their Lordships granted special leave. Neither case has any application to the facts of the present case. They were not cases in which an appeal was kept pending and a finding had been called for on any particular issue, old or new. The decision in *Kannayalal Bhoya* v. *Balaram Paramasukdoss*[3] was also relied upon. The facts there were as follows : In a suit under Order VI-A of the Original Side Rules the defendant was directed to find security for the amount claimed. The result of not complying with that order was that the defendant would not be permitted to defend and a decree would follow, according to the terms of Order VI-A of the Original Side Rules. The defendant made a deposit. Then on the application of the defendant certain issues were set down for trial, one of them being whether the suit document was a negotiable instrument. That issue was tried as a preliminary issue and a decision was given thereon, the learned Judge holding that it was not a negotiable instrument. He thereupon ordered the security deposited to be repaid to the defendant and directed that the action should proceed as an ordinary suit. Against that order an appeal was held to be competent. The decision in that case cannot be of much assistance to the appellants in the present case, because in that case there was a final order directing the security to be repaid and that was certainly a final adjudication on the particular point which, in one sense, did not have reference to the other issues in the case. If that decision, however, was meant to lay down that the finding of the learned trial Judge on one of several issues in the case which did not put an end to the suit was a judgment subject to appeal under clause 15 of the Letters Patent, we respectfully express our dissent therefrom, as was done by a Division Bench of this Court, in *Punnayya* v. *Parandamayya*[4]. In our opinion, the present case is covered by the decision in the last mentioned case in *Punnayya* v. *Parandamayya*[4], where Devadoss and Sundaram Chetty, JJ., ruled that an order passed by a single Judge of the High Court calling for a finding from the lower Court on an issue, whether newly framed or not, was not a judgment under clause 15 of the Letters Patent and no appeal therefore lay. With respect, we follow this decision. The learned advocate for the appellants tried to distinguish this decision, but not successfully.

No authority was cited for the appellants to support the contention that if an order like the present is not challenged at once by way of Letters Patent appeal, the party aggrieved would be for ever precluded from challenging its correctness. Indeed, we did not expect any decision to have held that way. We consider that the appellants in this case, if they happen to be aggrieved by the final judgment of the learned Judge, disposing of the City Civil Court Appeal, can certainly challenge the correctness of the several findings contained in the judgment of the learned Judge now under appeal.

We uphold the preliminary objection and dismiss the appeal with costs.

V.S. *Appeal dismissed.*

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1. (1890) L.R. 18 I.A. 6 : I.L.R. 15 Bom. 155 (P.C.).
2. (1894) 5 M.L.J. 20 : L.R. 22 I.A. 1 : I.L.R. 17 All. 112 (P.C.).
3. (1922) 43 M.L.J. 480.
4. (1926) 25 L.W. 95.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE GOVINDARAJACHARI.

The Official Trustee of Madras as Receiver in O.S. No. 147 of 1947, High Court, Madras .. *Petitioner**

v.

S. V. L. L. Sethu Chettiar and others .. *Respondents.*

Provincial Insolvency Act (V of 1920), section 75—Mortgage as an act of insolvency—Mortgagee not impleaded—Adjudication—Setting aside with directions for mortgagee being impleaded—Order of adjudication and declaration that the mortgage was void—Mortgagee and his representatives if persons aggrieved—Appeal by them against order of adjudication—Maintainability.

An insolvency petition was filed by a creditor for the adjudication of two brothers on the ground that they committed an act of insolvency in executing a mortgage of their properties. Though the mortgagee was not impleaded, the adjudication was ordered and the Official Receiver in whom the properties vested applied to the Court for setting aside the mortgage. The application was dismissed, but on appeal it was remanded for further inquiry, giving the mortgagee an opportunity to appeal against the adjudication. Meanwhile, the mortgagee's interest passed into the hands of the Official Trustee and he filed an appeal against the order of adjudication of the mortgagors, which was allowed and the insolvency petition was also remanded for disposal after allowing the Official Trustee as the representative of the mortgagee to add himself as a respondent in the insolvency petition. Both the insolvency petition and the application for setting aside the mortgage were enquired into and the order of the adjudication was maintained and the mortgage was declared to be void. The order of adjudication, alone was appealed against but it was held that no appeal was maintainable as the mortgagee was neither a creditor nor a person aggrieved within the meaning of section 75 of the Provincial Insolvency Act. In revision,

Held, (*i*) that the mortgagee was a person aggrieved within the meaning of section 75 of the Act and that the Official Trustee representing him had sufficient *locus standi* to maintain the appeal.

(*ii*) The fact that no appeal was filed against the order setting aside the mortgage would not preclude the filing of an appeal against the order of adjudication.

Petition under section 75, clause (2) of Act V of 1920, praying that the High Court will be pleased to revise the order of the District Court, North Arcot at Vellore, dated 24th December, 1945, in C.M.A. No. 50 of 1945, preferred against the order of the Court of the Subordinate Judge, Vellore, in I.P. No. 11 of 1935.

E. R. Krishnan for Petitioner.

K. V. Ramachandra Aiyar, S. Vaidyanathan and *S. Ramachandra Aiyar* for Respondents.

The Court delivered the following

JUDGMENT.—Under section 9 of the Provincial Insolvency Act a creditor filed I.P. No. 11 of 1935 in the Court of the Subordinate Judge of Vellore to adjudge two brothers, Govindaraju Nadar and Duraiswami Nadar, as insolvents, naming as the act of insolvency a mortgage given by them to Nawab Abdul Hakim on 27th December, 1934. The mortgagee, however, was not impleaded. The insolvency petition passed through several vicissitudes but finally an order of adjudication was made in 1938. The Official Receiver of North Arcot in whom were vested the estates of the insolvents filed I.A. No. 1163 of 1942 under sections 53 and 54 of the Act for setting aside the mortgage. After enquiry the application was dismissed and the Official Receiver appealed from that order to the District Court of North Arcot in C.M.A. No. 40 of 1943.

Meanwhile Nawab Abdul Hakim died in January, 1938. In a suit for partition on the file of this Court, C.S. No. 36 of 1938, the mortgage was allotted to Abdul Salam, a lunatic son of Nawab Abdul Hakim, Abdul Salam being represented in that suit and in fact in all subsequent proceedings by the Official Trustee of Madras, who was appointed manager under the Indian Lunacy Act.

*C.R.P. No. 414 of 1946. 9th April, 1948.

By the time C.M.A. No. 40 of 1943 came on for hearing the decision of the Privy Council in *Mohamed Siddique Yousuf* v. *Official Assignee, Calcutta*[1], had been reported. Relying on that decision it was argued on behalf of the Official Receiver that since the mortgage had been found to be an act of insolvency in the order of adjudication as a transfer made with intent to prefer a creditor, the order of adjudication was conclusive and that the appeal had consequently to be allowed and the mortgage set aside. As the mortgagee was not a party to the insolvency petition the learned District Judge remanded I.A. No. 1163 of 1942 for further enquiry giving the mortgagee one month's time to prefer an appeal from the order in I.P. No. 11 of 1935 and certain other consequential directions. The Official Trustee accordingly filed C.M.A. No. 94 of 1943 in the District Court of North Arcot against the order of adjudication in I.P. No. 11 of 1935. In that appeal the learned District Judge set aside the order of adjudication and remanded the insolvency petition for disposal after allowing the Official Trustee as representative of the mortgagee to add himself as the third respondent in the insolvency petition. He allowed the parties to adduce further oral and documentary evidence. In pursuance of that order the Official Trustee got himself impleaded as the third respondent in I.P. No. 11 of 1935 by order, dated 3rd February, 1944.

I.P. No. 11 of 1935 and I.A. No. 1163 of 1942 were thereafter enquired into by the learned Subordinate Judge of Vellore who maintained the order of adjudication and declared the mortgage to be a void and fraudulent preference. There was no appeal against I.A No. 1163 of 1942, but the order of adjudication was appealed against by the Official Trustee in C.M.A. No. 50 of 1945 on the file of the District Court of North Arcot. Objection was taken to the maintainability of the appeal on the ground that the mortgagee was neither a creditor nor a person aggrieved within the meaning of section 75 of the Provincial Insolvency Act. The objection was upheld and the appeal was dismissed. The present civil revision petition is against that order of dismissal. It was filed by the Official Trustee of Madras as representing the estate of the lunatic. During the pendency of the civil revision petition the lunatic died and in C.S. No. 147 of 1947 on the file of this Court filed for partition of his estate among his heirs the Official Trustee was appointed receiver *inter alia* for continuing the civil revision petition. An order was made on the 15th September, 1947, bringing on record in the place of the original petitioner the Official Trustee in his capacity as receiver in C.S. No. 147 of 1947. It is said that notice of the civil miscellaneous petition on which this order was made was not given to the creditors-respondents in the civil revision petition.

The principal point which now arises is whether the Official Trustee of Madras had *locus standi* to file an appeal against the order of adjudication.

Before dealing with that, however, two subsidiary points may first be dealt with. Relying on *Harihar Mukherjee* v. *Harendranath Mukherjee*[2], it was contended by Mr. S. Ramachandra Aiyar, the learned Advocate for one of the creditors-respondents, that the order of 15th September, 1947, bringing on record the Official Trustee of Madras in his capacity as receiver in C.S. No. 147 of 1947 in the place of the deceased lunatic whose estate was being previously represented by the Official Trustee as manager was invalid. *Harihar Mukherjee* v. *Harendranath Mukherjee*[2], only decided that a receiver is not a person who "claims to be entitled to the effects of the deceased person" within the meaning of section 4 of the Succession Certificate Act (VII of 1889) and that a receiver appointed by Court is competent to take possession of the securities and moneys belonging to an intestate without producing a succession certificate. It cannot be and has not been denied that the heirs of the deceased lunatic could come on

1. (1943) 2 M.L.J. 160: L.R. 70 I.A. 93 (P.C.).

2. (1910) I.L.R. 37 Cal. 754.

record in the civil revision petition and continue it. I do not see why a receiver who represents the interests of those heirs and who has been authorised as receiver to institute and continue all suits and proceedings which they could themselves institute or continue cannot come on record in the civil revision petition.

The objection that the appeal to the lower appellate Court is not maintainable since no appeal had been filed against the order in I.A. No. 1163 of 1942 must also be overruled as the effect of setting aside the order of adjudication, if it should be set aside in C.M.A. No. 50 of 1945 would be to bring the insolvency proceedings to an end and thereby render ineffective the order made in I.A. No. 1163 of 1942. It is not suggested that the lower appellate Court is precluded by any doctrine of *res judicata* from deciding C.M.A. No. 50 of 1945 by reason of the fact that no appeal had been filed against the order in I.A. No. 1163 of 1942.

Reverting to the main question, Mr. Krishnan, the learned advocate for the Official Trustee, petitioner in the above civil revision petition, did not challenge the finding of the learned District Judge that his client, whom I shall hereafter describe as the mortgagee, is not entitled to maintain the appeal as "a creditor". The learned District Judge held that having regard to the definition of "creditor" and "secured creditor" in the Act and having regard also to the fact that the petitioner has not put forward any claim or contention common to himself and the other creditors of the insolvent he is not entitled to avail himself of the provision in section 75 of the Act enabling a creditor to file an appeal. Mr. Krishnan contended himself by saying that his client is a person aggrieved by the order of adjudication.

The *locus classicus* so far as this question is concerned is the judgment of James, L.J., in In re *Sidebotham*[1]. In a well-known passage in that judgment, the Lord Justice defined who is and who is not a person aggrieved within the meaning of the Bankruptcy Act, 1869 (32-33 Vict., Ch. 71) and that definition has been applied in all subsequent decisions in England and in India as governing the connotation of that expression wherever it may occur.

"The words 'person aggrieved' he said do not really mean a man who is disappointed of a benefit which he might have received if some other order had been made. A 'person aggrieved' must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something."

In illustration of the definition, he then went on to refer to Ex parte *Ellis*[2], wherein it was held,

"that where an adjudication of bankruptcy had been made, founded upon the execution of a bill of sale, as an act of bankruptcy, the holder of the bill of sale was 'a 'person aggrieved' by the adjudication, and was entitled to appeal from it because it affected his property."

In Ex parte *Ellis*[2], the argument of the counsel who maintained that the holder of the bill of sale was not entitled to appeal from the adjudication was that his right to enforce his bill of sale was not affected by the fact that it had been treated by the Court of bankruptcy as an act of bankruptcy and that if the trustee attempted to set it aside he would have an opportunity of trying the question. In dealing with this argument James, L.J., with whom Baggallay and Bramwell, L.Js. concurred, held that he had no doubt that the appellant was entitled to appeal and that though he may not be bound by the order of adjudication, still it may so embarrass him that he may properly be said to be aggrieved by it.

The matter was taken a step further by the Court of Appeal in Ex parte *Official Receiver*: In re *Reed Bowen & Co.*[3], where Lord Esher Master of the

1. (1879) 14 Ch.D. 458.
2. (1876) 2 Ch.D. 797.
3. (1887) 19 Q.B.D. 174.

Rolls set out the definition from Ex parte *Sidebotham*[1] already quoted and pointed out that it is not an exhaustive definition but is an affirmative definition of a person who may appeal and at all events it includes a person who has asked for a decision for which he had a right to ask and has been wrongfully refused. Lord Esher then quoted from the judgment of Bramwell, L.J., in In re *Sidebotham*[1], that "the general rule is that an appeal must be by the party" (that means one of the parties to the dispute which is brought before the Court for its decision) "who has endeavoured to maintain the contrary of that which has taken place". This, in Lord Esher's opinion, was to the same effect as part of the definition of James, L.J. Lord Esher then gave in his own words the effect of the judgments of James, L.J. and Bramwell, L.J.

"It means", he said, "that where there are two parties to the application—the one applying, the other asking that the application may be refused—one of them has endeavoured to maintain the contrary of that which has taken place, and according to this definition he is a party against whom a decision has been given, and according to both definitions, he has a right to appeal on the ground that he is legally "a person aggrieved" by the decision, being in the same position as a party to a litigation."

In a still later judgment of the Court of Appeal; In re *Lamb*: Ex parte *The Board of Trade*[2], Lord Esher interpreted the decision in Ex parte *Official Receiver*: In re *Reed Bowen & Co.*[3], in the following passage which may usefully be quoted,

"Any person who makes an application to a Court for a decision, or any person who is brought before a Court to submit to a decision, is, if the decision goes against him, thereby 'a person aggrieved' by that decision."

This last definition was quoted with approval by Mookerjee, J., in *Ketokey Churan Banerjee* v. *Sreemutty Sarat Kumari Dabee*[4], the facts of which however are somewhat obscure. The last case cited by Mr. Krishnan was that in *Banaker Basappa* v. *Hansaji Gulabchand Firm*[5], in which Wadsworth, J., held that an alienee whose alienation was one of the transactions challenged in an insolvency had a right to maintain an application for the setting aside of an *ex parte* order of adjudication. The learned Judge observed incidentally that the alienee might have a right appeal as the matter came under section 4 of the Provincial Insolvency Act. The decision does not directly bear on the question which now arises as the words of section 75 had not to be construed in it.

On behalf of the respondents-creditors, Mr. S. Ramachandra Aiyar cited *Hari Rao* v. *Official Assignee, Madras*[6], *Alagappa Chettiar* v. *Vellachami Servai*[7] and *Venkataramanayya* v. *Bangarayya*[8]. But these cases are clearly distinguishable. *Hari Rao* v. *Official Assignee, Madras*[6], only held that an insolvent is not entitled to appeal as an "aggrieved person" within section 8 (2) of the Presidency Towns Insolvency Act against an order of a Judge rejecting his opposition to a sale of his estate by the Official Assignee, the reason given being that the insolvent has no legal interest but has only a hope of an expectation. The mere fact that, if all the claims of the creditors who have proved, were set aside or discharged by payment he would have an interest in the surplus which might be left over, gave him no right to interfere with or embarrass the administration of the estate. He had nothing more than a contingent chance. *Venkataramanayya* v. *Bangarayya*[8] was similar on its facts and applied the rule laid down in *Hari Rao* v. *Official Assignee, Madras*[6], to a case which arose under the Provincial Insolvency Act. In *Alagappa Chettiar* v. *Vellachami Servai*[7], an alienee of an insolvent's property was held not to be a "person aggrieved" by an order admitting proof in a creditor's favour. It is difficult to see how the validity or otherwise of the alienation would depend on the acceptance or rejection of

1. (1879) 14 Ch.D. 458.
2. (1894) 2 Q.B.D. 805.
3. (1887) 19 Q.B.D. 174.
4. (1916) 20 C.W.N. 995.
5. (1935) 71 M.L.J. 333: I.L.R. 59 Mad. 1049.
6. (1926) 50 M.L.J. 358: I.L.R. 49 Mad. 461.
7. A.I.R. 1928 Mad. 981.
8. (1934) 67 M.L.J. 942.

proof of one of the several debts of the insolvent and it is not therefore surprising that the alienee was held to be very remotely affected, if affected at all, by the decision in favour of the creditor.

The learned District Judge relied principally on the decision of the Full Bench in the *Official Receiver, Guntur* v. *Gopalakrishniah*[1], which held that the ruling of the Privy Council in *Mohamed Siddique Yousuf* v. *Official Assignee, Calcutta*[2], does not apply to an order of adjudication under the Provincial Insolvency Act. From this the learned District Judge concluded that the mortgagee would, in no way, be affected by the order of adjudication being maintained.

In exactly similar circumstances, however, as already pointed out, the Court held in Ex parte *Ellis*[3] that the embarrassment which may result from the order of adjudication provides the alienee with a sufficient grievance and clothes him with the necessary status to question the order of adjudication in an appeal. The principle of In re *Lamb*: Ex parte *The Board of Trade*[4] would also seem to apply as the mortgagee was brought before the Court to submit to the decision in the insolvency petition and he had as a party to that petition a right to ask that it may be refused and this is, according to Ex parte *Official Receiver*: In re *Reed Bowen & Co.*[5] sufficient to give him a right of appeal.

Holding that the mortgagee had sufficient *locus standi* to maintain the appeal, I set aside the order of dismissal passed by the lower appellate Court and direct that the appeal should be restored to file and disposed of according to law.

The mortgagee brought all this trouble on himself by not filing an appeal against the order in I.A. No. 1163 of 1942 and I therefore disallow his costs in the civil revision petition. The Official Trustee may however take his costs from out of the estate.

V.P.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HAPPELL AND MR. JUSTICE PANCHAPAGESA SASTRI.

Puvvada Venkata Subbayya .. *Appellant**

v.

Attar Sheik Mastan .. *Respondent.*

Contract Act (IX of 1872), section 65—Agreement to take toddy shops in the name of one to be managed by another—Agreement for the taking of the profits by the person who was not a licensee—Legality—Breach—Right to damages—Relief under section 65, Contract Act—Availability—Madras Abkari Act (I of 1866), sections 15 and 55.

In a suit by the plaintiff-appellant for the recovery of a sum of money from defendants as damages, the foundation for the claim for damages was the breach of an agreement regarding the buying of three toddy shops in the name of the defendants but really bought for the plaintiff with the money advanced by him on condition that he should manage the shops and enjoy the profits from them. It was alleged that the plaintiff did manage the shops and take the profits for sometime but that thereafter the defendants refused to carry out their part of the agreement and ejected the plaintiff from the shops. He claimed the loss or damage suffered and asked for the return of the deposits made on the footing that they were made with money advanced by him in pursuance of the agreement which had been broken by the defendants. On the question of the legality of such an agreement and the right of the plaintiff to recover the money paid to the defendants under the provisions of section 65 of the Contract Act,

Held, that the agreement relied on was in contravention of the Madras Abkari Act and was illegal.

Held further, that section 65 of the Contract Act was inapplicable to the present case as the agreement was inherently illegal and opposed to public policy. The parties being *in pari delicto*, the Courts could not render any assistance in enforcing the contract.

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1. (1945) 1 M.L.J. 17.
2. (1943) 2 M.L.J. 160: L.R. 70 I.A. 93 (P.C.).
3. (1876) 2 Ch.D. 797.
4. (1894) 2 Q.B. 805.
5. (1887) 19 Q.B.D. 174.

*L.P.A. No. 18 of 1947. 7th April, 1948.

Appeal preferred under clause 15 of the Letters Patent against the judgment and decree of Shahabuddin, J., dated 25th October, 1946, in S.A. No. 338 of 1945, preferred against the decree of the Court of the Subordinate Judge, Bapatla, in A.S. No. 183 of 1943 (O.S. No. 219 of 1938, District Munsif Court, Ongole).

Konda Kotayya for Appellant.

M. S. Ramachandra Rao for Respondent.

The Judgment of the Court was delivered by

Happell, J.—The appellant filed the suit, from which this Letters Patent Appeal arises, for the recovery of a sum of Rs. 2,196-10-0 from the defendants. The first defendant has, however, throughout been the only contesting defendant. The learned Principal District Munsif of Ongole who tried the suit gave the appellant a decree for Rs. 1,227 and an appeal by the first defendant was dismissed by the Subordinate Judge of Bapatla. The first defendant then filed an appeal in this Court which was allowed by Shahabuddin, J., on the ground that the agreement on which the respondent's claim was based was unlawful and so void *ab initio*. Shahabuddin, J., however, gave leave to the plaintiff in this suit, the present appellant, to appeal from his decision.

It appears from a perusal of the plaint that the foundation of the suit claim is that three toddy shops bought in the name of the first defendant and four shops in the name of the second defendant in the Ongole Taluk for the year 1st October, 1937 to 30th September, 1938 were in fact bought for the plaintiff with money advanced by him subject to an agreement with the defendants that the plaintiff should manage the shops and enjoy the profits from them. Thereafter, the plaint recites, the plaintiff did manage the shops and take the profits until March, 1938. When, however, the plaintiff called on the defendants to transfer the shops in his name, the first defendant refused to execute a deed of transfer in respect of the three shops in his name and from the 11th March, 1938, ejected the plaintiff from them. At the end of the plaint the plaintiff prayed for a decree directing the defendants to pay to the plaintiff a sum of Rs. 2,196-10-0 as mentioned in the schedule filed with the plaint. The schedule when looked at causes some surprise. The body of the plaint would appear to be laying a foundation for a claim for damages for breach of the agreement based on the loss of profits from March 1938 to the termination of the lease. The schedule, however, discloses no such claim. There are 11 items of claim. The first four are in respect of deposits made as security for payments of the monthly rent for the shops and the other major items, although by no means explaining themselves, appear to be claims for damages for loss occasioned by the first defendant's interference with the tree-tapping leases and for loss of profits due to the first defendant's occupation of the shops from 11th March 1938 to 31st March 1938. The precise legal basis for these claims is by no means clear. But the plaintiff seems to have limited his claim to loss or damage suffered only upto 31st March, 1938, because he paid the cist for the shops up to the end of March, and not thereafter; and he appears to have asked for the return of deposits on the footing that they were made with money advanced by him in pursuance of an agreement which had been broken by the first defendant.

Both the lower Courts were of opinion that the agreement between the appellant and the defendants was not illegal, but except for the amounts deposited and certain admitted amounts they negatived the balance of the claim on the ground that the evidence was insufficient to assess the extent of the damage. In our opinion, apart from the question whether the arrangement was or was not illegal and so unenforceable, it may seriously be doubted on the facts whether a decree should have been given for any part of the claim. The suit was filed

in July, 1938 and it is difficult to see how on that date the appellant was entitled in any event to recover the deposits made by him in the first defendant's name when the first defendant himself could not have been repaid the deposits until the lease of the shops expired, *viz.*, on the 1st October, 1938. But, however, that may be, we can have no doubt that the view taken by Shahabuddin, J., that the agreement between the appellant and the defendants was illegal and not enforceable so that the appellant was not entitled to recover anything from the defendants is correct.

In the plaint it is made perfectly clear that the allegation was that the sale of the shops was to the first and second defendants *benami* for the plaintiff-appellant according to an arrangement previously entered into between them. It has been argued by learned counsel for the appellant that there was nothing illegal in the agreement between the parties that the shops should be transferred by the first defendant to the appellant as, according to the rules made under the Act, the transfer could be made with the permission of the Collector; and, in the present case, the permission of the Collector was sought and only refused for the reason that the first defendant himself was unwilling to agree that the transfer should be made. The suit, however, was not based on an agreement that the defendants should transfer the shops to the plaintiff when called upon to do so. It was based on the allegation that the sale of the shops to the defendants was *benami* for the plaintiff. The question of the transfer of the shops was merely consequential on the *benami* character of the sale of the shops, and the point at issue is not whether an agreement to transfer the shops is illegal but whether an agreement that the shops should be bought by the defendants *benami* for the plaintiff is illegal.

Learned counsel for the appellant argues that an agreement to buy the shops in the name of one person for another is not in contravention of the Abkari Act and that, in any case, even if the agreement is in contravention of the Act, and so void, he is entitled to recover the money used by the defendants for their benefit under section 65 of the Contract Act. With regard to the first part of the arguments we can have no doubt that the arrangement for the purchase of the shops in the names of the first and second defendants *benami* for the appellant was in contravention of the Abkari Act. Learned counsel has referred us to cases of an agreement among partners for the purchase of shops in the name of one of them, and contends that it has been held that an agreement of this kind prior to the sale is not illegal. We do not think that these cases are on all fours with a *benami* transaction like the present case. Moreover, Horwill, J., has dissented from the view that a prior agreement among partners for a shop to be bought in the name of one of them is legal (*Chennayya* v. *Janikamma*[1]) and his view seems to be supported by the decision of a Bench of this Court in *Italia* v. *Cowasjee*[2]. As was pointed out in the case of *Nalam Padmanabham* v. *Sait Badrinatt Sarda*[3], where the question related to a licence for the sale of opium, a licence is a personal privilege. The licensee must be known to and approved by the licensing authority, and it is manifest that a licence cannot be held by one person to whom it is granted for another who is unknown to the licensing authority. Section 15 of the Madras Abkari Act provides that "no liquor or intoxicating drug shall be sold without a licence from the Collector", and section 55 provides the penalty for any person who sells liquor or any intoxicating drug in contravention of the Act. It is clear that the agreement relied on by the appellant that he should manage the shops in respect of which the defendants held the licence was in contravention of the Act, and that by himself managing the shops which he admits in the plaint that he did, he rendered himself liable under section 55 of the Act. The agreement, in short, was illegal.

1. (1944) 1 M.L.J. 484.
2. (1944) 1 M.L.J. 97.
3. (1911) 21 M.L.J. 425: I.L.R. 35 Mad. 582.

The second part of the argument that the appellant is entitled in any case to recover the money paid to the defendants under the provisions of section 65 of the Contract Act was not put forward either in the trial Court or in the first or second appellate Courts. We are clear in any case that this argument cannot be accepted. The argument in effect is that, notwithstanding the fact that the agreement is void for any of the reasons stated in section 23 of the Contract Act, any party to the agreement is bound to restore any advantage which he has received under it, or to make compensation for it. No doubt it has been held that section 65 of the Contract Act may apply even though an agreement is void *ab initio* and even when it is unenforceable for want of fulfilment of a statutory requirement. In *Thangammal Ayyar* v. *Krishnan*[1] for instance it was held that a pleader could recover fees from his client under section 65 of the Contract Act on the basis of "quantum meruit" although the requirements of section 28 of the Legal Practitioners Act had not been complied with. But this was a case of the kind referred to by Abdur Rahman, J., in *Madura Municipality* v. *Alagirisami*[2] where agreements are held to be unenforceable on account of a failure to comply with certain forms or for want of giving expression to them in the manner prescribed by law. The present is in the other category of cases referred to by Abdur Rahman, J., which being inherently illegal and opposed to public policy the parties being in *pari delicto* the Courts can render no assistance in enforcing them. In our opinion, therefore, the decision of Shahabuddin, J., is correct; and, in that view, the appeal is dismissed with costs.

K.C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. P. V. RAJAMANNAR, *Officiating Chief Justice* AND MR. JUSTICE RAJAGOPALAN.

Chelamcherla Venkateswara Rao .. *Appellant**

Civil Procedure Code (V of 1908), Order 44, rule 1—Leave to appeal in forma pauperis *—If can be restricted to a part of the subject-matter of the appeal.*

Leave to appeal *in forma pauperis* cannot be restricted to a part of the subject-matter of the appeal. The decree sought to be appealed from cannot be severed, and the Court cannot treat the decree so far as a part of the subject-matter is concerned as notionally a separate decree in respect of which alone an order may be made.

Appeal under clause 15 of the Letters Patent against the Order of the Hon'ble Mr. Justice Govinda Menon dated 5th January, 1948 and made in C.M.P. No. 6700 of 1947 presented to the High Court under Order XLIV of Act V of 1908, for leave to appeal *in forma pauperis* against the decree of the Court of the Subordinate Judge of Bapatla in O.S. No. 24 of 1946.

G. Venkatarama Sastri for Appellant.

The Government Pleader (*K. Kuttikrishna Menon*) for the Crown.

The Judgment of the Court was delivered by

The Officiating Chief Justice.—This is an appeal against the order of Govinda Menon, J., granting to the appellant leave to appeal *in forma pauperis* against the decree and judgment in O.S. No. 24 of 1946 on the file of the Subordinate Judge's Court of Bapatla as regards items 4 and 5 of the plaint Schedule and dismissing the application as regards the other items. It is contended that the fact that the learned Judge was satisfied that the decision of the lower Court was contrary to law or otherwise erroneous or unjust as regards some of the items necessarily implies that the decree as such is contrary to law, or otherwise

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1. (1929) 57 M.L.J. 756: I.L.R. 53 Mad. 309.

2. I.L.R. (1939) Mad. 928.

*L.P.A. No. 15 of 1948. 7th April, 1948.

erroneous or unjust. Even if there is an error as regards a part of the subject-matter, the decree as passed must be deemed to be erroneous. The ruling of the Full Bench of this Court in *Eswariah* v. *Rameswarayya*[1] was relied on as supplying an apposite analogy. It was held in that case that under the terms of Order 41, rules 11 and 12 of the Code of Civil Procedure, this Court cannot direct a second appeal to be admitted in part only. The *ratio decidendi* of that decision was there was nothing in Order 41, rule 11 which permitted of severance of the decree. The appeal had to be either dismissed or admitted as a whole.

The language of the proviso to rule 1 of Order 44, Civil Procedure Code, in our view, supports the contention that leave to appeal in *forma pauperis* cannot be restricted to a part of the subject-matter of the appeal. The decree appealed from cannot be severed, and the Court cannot treat the decree so far as a part of the subject-matter is concerned as notionally a separate decree in respect of which alone an order may be made under that rule. Following the principle of the ruling in *Eswariah* v. *Rameswaryya*[1] we hold that the learned Judge erred in confining the leave to items 4 and 5 only. The application for leave to appeal *in forma pauperis* is granted in its entirety.

V.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL AND MR. JUSTICE GOVINDARAJACHARI.

D. Gnanambal and another .. *Appellants**

v.

Sreemathi Meenambal Sundaram and others .. *Respondents.*

Madras High Court Original Side Rules, Order 45, rule (1) (e) (f) & (g)—Application by legatee to direct executrix to sell property—Maintainability.

A will in dealing with a house after providing for several contingencies in regard to its management and enjoyment provided that "if the joint ownership and enjoyment became at any time impossible, I direct my executor or executors during the said time shall cause the said house to be sold away" and the profits distributed among the specified legatees. On an application by one of the legatees by an originating summons under rule 1 of Order 45 of the Original Side Rules to direct the executrix to sell the said house, on an objection as to the maintainability of such an application,

Held, that the clause empowering the executrix to sell the property was a clause which cut across the preceding sentences and the several contingencies contemplated therein and there was power in the executrix to sell and as the executrix had the power to sell, the technical objection as to the maintainability of the originating summon disappeared. Further, in view of Order 45, Rule (1) (*e*) and (*f*) there can be no objection to an application being made by a legatee for a direction that the executrix should sell the property. Even if there was any question as to whether the executrix had the requisite power or not the determination of this question would legitimately fall under clause (*g*) of rule 1 of O. 45 of the Original Side Rules.

On appeal from the judgment and decree of Chandrasekhara Aiyar, J., dated 26th August, 1947, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C.S. No. 72 of 1947.

C. A. Md. Ibrahim and *T S. Santhanam* for Appellants.

S. Suryaprakasam and *N. Rajeswara Rao* for 1st Respondent, *B. Jagannadha Das* for 2nd Respondent and *C. V. Dikshitulu* for 3rd to 10th Respondents.

The Judgment of the Court was delivered by

Govindarajachari, J.—This is an appeal against the judgment of Chandrasekhara Aiyar, J., in an originating summons converted into a suit.

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1. (1940) 1 M.L.J. 857 · I.L.R. (1940) Mad. 785 (F.B.).

*O.S.A. No. 59 of 1947. 18th March, 1948.

One Dr. Doraiswami Pillai died on 26th January, 1930, after having executed a will dated 9th September, 1929. Probate was issued to Nagammal, the widow of the testator and the sole executrix under his will. It is unnecessary to set out the terms of the will in any detail. By paragraph 7 of the will the testator bequeathed the house described as "Meena Lodge", No. 3, Audiappa Mudali Street, Vepery, to his daughter Meenambal Ammal for a one-fourth share, the remaining three-fourths share being bequeathed to his sons Ramalingam, Gopalaswami, Arunachalam and Rathnam and another daughter Gnanambal Ammal for their absolute use and benefit. Meenambal is the plaintiff in the suit. Nagammal is the first defendant while Gnanambal, Rathnam, Ramalingam and Gopalaswami are respectively the 2nd, 3rd, 4th and 5th defendants. Arunachalam survived the testator but subsequently died and defendants 6 to 11 are his legal representatives. The first defendant supported the originating summons while the third defendant opposed it.

The clause in the will bequeathing the house to Meenambal and to the testator's other children is declaredly subject to the limitations specifically mentioned later in the will. These limitations were occasioned by two considerations. At the time of the execution of the will the daughter Meenambal was unmarried and provision had, therefore, to be made for her education, maintenance, etc. Provision had also to be made for the maintenance of the testator's widow, Nagammal. In a desire to make this two-fold provision the testator gave directions in the subsequent sentences in paragraph 7 of the will as to how the property was to be managed and enjoyed. Without setting out these provisions with any particularity it may be stated that there were four contingencies which the testator thought of. The first contemplated the period during which Meenambal may remain unmarried, Nagammal being alive. Another contingency was that Nagammal may die and Meenambal may still remain unmarried. A third possible situation was that Meenambal may get married during the lifetime of Nagammal while the fourth contingency would arise after the death of Nagammal and the marriage of Meenambal.

It is common ground that Meenambal was married before the filing of the suit. It is also admitted on both sides that the state of things which existed at the time when the originating summons was filed, that is to say, the period after the marriage of Meenambal and during the lifetime of Nagammal, corresponds to the third of the contingencies mentioned above. The concerned clause of the will provided that after Meenambal's marriage the house should be let by Nagammal and that the rents should be divided by giving Meenambal one-fourth share and distributing the remaining three-fourth share among the five other children and the widow. After giving these several directions for the management and enjoyment of "Meena Lodge" during the four stages or periods already enumerated the testator provided in a separate sub-paragraph of clause 7 for the sale of the house and distribution of the sale proceeds. This sub-paragraph may be set out in full:

> "Again if the joint ownership and enjoyment become at any time impossible I direct my executor or executors during the said time shall cause the said 'Meena Lodge' to be sold away for the highest price and the proceeds thereof shall be similarly distributed among my said children and that they shall thereafter become the absolute owners of their several shares above mentioned".

The discussion before us principally centred round the construction of this provision. We may now state how the construction of this clause becomes material for the disposal of the appeal.

The contention of Mr. Viswanatha Sastri the learned advocate for defendants 2 and 3 who have filed this appeal is that in an originating summons the learned Judge had no power to direct, as he has done, a sale of the house. It is argued that the learned Judge should have first decided whether the executrix Nagammal has power to sell under the clause which has been quoted and

that it is only if the executrix has such power that the Court may order a sale. In support of this argument Mr. Viswanatha Sastri relied on a decision in In re *Robinson Pickard* v. *Wheater*[1], in which it was held by Pearson, J., that under rule 3 (*f*) of Order 55 of the Rules of the Supreme Court corresponding to Order 45, rule 1 (*f*) of the Original Side Rules of this Court the Court can approve of a sale only when the executors or trustees of a will or deed to which the originating summons relates could have made one themselves. Order 45, rule 1 of the O.S. Rules of this Court runs as follows:

"The executors or administrators of a deceased person, or any of them, and the trustees under any deed or instrument or any of them, and any person claiming to be interested in the relief sought as creditor, devisee, legatee heir, or legal representative or a *cestui que trust* under the trusts of any deed or instrument, or as claiming by assignment or otherwise, under any such creditor or other person as aforesaid, may take out, as of course, an originating summons returnable before the Judge sitting in Chambers for such relief of the nature or kind following, as may by the summons be specified and the circumstances of the case may require, (that is to say), the determination without an administration of the estate or trust, of any of the following questions or matters:..........

(*e*) Directing the executors, administrators, or trustees to do or abstain from doing, any particular act in their character as such executors, administrators or trustees;

(*f*) The approval of any sale, purchase, compromise or other transaction and,

(*g*) the determination of any question arising in the administration of the estate or trust."

If the executrix has no power to sell it must be taken under the ruling in In re *Robinson Pickard* v. *Wheater*[1] that it is not competent to the learned Judge to make the order now under appeal.

The real question, therefore, is whether the will provided for a sale of the house by the executrix in the circumstances existing on the date of the suit. The learned Judge has not considered this aspect of the case and has not recorded his opinion. But we have had a full discussion as to the true interpretation of the relevant clause and notwithstanding some obscurity in its language we have come to the conclusion that there is power in the executrix to sell and that it is now exercisable. It will be noticed that after providing for several contingencies in the first sub-paragraph of paragraph 7 of the will the testator goes on in the 2nd sub-paragraph to provide that if the joint ownership and enjoyment becomes *at any time* impossible his executor or executors should cause the house to be sold. There is no reason why full effect should not be given to the words "*at any time*" and why this clause should be read only as applying to the last of the contingencies contemplated by the will, namely, the marriage of Meenambal and the death of Nagammal. The very fact that the testator directed his executrix to sell the house is some indication that the power is exercisable during her lifetime and is therefore not restricted to the fourth stage which, as a matter of fact, arises only after the death of the executrix. Mr. Viswanatha Sastri laid some emphasis upon the direction in the clause that the proceeds of the sale shall be distributed among the children of the testator and argued that since the widow of the testator is not to participate in the distribution there is an indication that the sale should take place at a time when the widow is no longer alive. This argument is answered by the provision at the very commencement of the will whereby the devisees of the house are the testator's children alone to the exclusion of the widow. It is quite probable therefore that if the house came to be sold the testator intended that the sale proceeds should be distributed among the devisees alone and that his widow should have no share in them. The enjoyment of a portion of the rent of the house in certain contingencies by his widow is no doubt provided for but that enjoyment can be had only when the house is not sold. Moreover the right of enjoyment reserved to the widow in those contingencies cannot be terminated without her

1. (1885) 31 Ch. D. 247.

concurrence because the direction to sell is only to the executrix and it is only if the executrix is willing to sell the property and thereby extinguish her right of enjoyment, that the sale can take place. We have, therefore, no doubt that the clause empowering the executrix to sell the property is a clause which cuts across the preceding sentences and the several contingencies contemplated therein. If the executrix has power to sell, the technical objection as to the maintainability of the originating summons disappears.

It is not now disputed that owing to the many and frequent quarrels between the executrix and the legatees which the learned Judge has described, joint ownership and enjoyment of the house has become impossible.

As has been pointed out by Mr. Jagannatha Das learned advocate for the executrix, Meenambal as a devisee under the will can, under clause (*e*) of rule 1 of Order XLV of the O.S. Rules, ask for a direction to the executrix to do a particular act, namely, to sell the property. That in fact is what she asked for. It is not denied that the executrix can seek the approval of the Court to any contemplated sale which may be either by private treaty or by public auction so that if the executrix could have filed an application under Order XLV, rule 1 (*f*) there can be no objection to an application being made by a legatee for a direction that the executrix should sell the property.

The originating summons presumed a power in the executrix to sell the property in the circumstances existing at the time of its institution. This power no doubt is denied by defendants 2 and 3 but even if there is any question as to whether the executrix has the requisite power or not the determination of this question will legitimately fall under clause (*g*) of rule 1 of Order XLV of the O.S. Rules.

Whichever way we may look at it, therefore, there is in our opinion no objection to the first prayer in the originating summons. We are now confining ourselves merely to the direction which the learned Judge has given in regard to the sale of the property. It is unnecessary for us to say whether and how far the other prayers in the originating summons fall within the scope of an application made under Order XLV, rule 1.

It has, further, been pointed out by Mr. Jagannatha Das that the proceeding is maintainable also under section 302 of the Indian Succession Act which provides that where Probate or Letters of Administration in respect of any estate has or have been granted under the Act the High Court may, on application made to it, give to the executor or administrator any general or special directions in regard to the estate or in regard to the administration thereof. This provision too would *prima facie* seem to be applicable, but it is unnecessary to rest our judgment on section 302 of the Indian Succession Act as in our opinion the first prayer in the originating summons falls within the proper scope of an application under Order XLV, rule 1 of the O.S. Rules.

The result is that the appeal fails and is dismissed with costs.

V.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE GOVINDARAJACHARI.

Nadimpalli Chandrakantam and another .. *Appellants**

v.

Velavartipati Chandramowliprasada Rao and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 20, rule 12 and Limitation Act (IX of 1908), Article 181—Preliminary decree of 1937 in partition suit directing determination of mesne profits due to plaintiff on his application in execution—Application under Order 20, rule 12 in 1945—If barred.

A preliminary decree in a partition suit passed on 23rd December, 1937, directed "that the mesne profits due to the plaintiff.......be determined on a separate petition by the plaintiff in execution". The plaintiff filed an application under O. 20, rule 12, Civil Procedure Code, on 22nd February, 1945. On a question whether the application was barred by limitation,

Held, that the proper way to deal with the decree would be to treat it as a decree declaring the plaintiff's right to mesne profits coupled with the direction that the mesne profits might be subsequently ascertained in an application to be filed for that purpose and that the proper application could only be under O. 20, rule 12, Civil Procedure Code. In considering the question of limitation the principles of law that must be applied must be those governing an application under Order 20, rule 12. Hence, it cannot be held that the application comes under Article 181 of the Limitation Act and that it must be filed within three years from the date of the passing of the preliminary decree.

Kemgam Swamy v. *Subbamma,* (1929) 57 M.L.J. 728: I.L.R. 53 Mad. 838 and *Ramasubramanya Pattar* v. *Karimbil Pati,* (1940) 1 M.L.J. 54: I.L.R. (1940) Mad. 372 (F.B.), followed.

Appeal against the order of the Subordinate Judge's Court, Guntur, dated 21st November, 1946, in A.S. No. 73 of 1946 (C.M.P. No. 697 of 1945 in O.S. No. 731 of 1933, District Munsif Court, Guntur).

P. Satyanarayana Raju and *M. B. Rama Sarma* for Appellants.

K. Kotayya for Respondents.

The Court delivered the following

JUDGMENT.—This is an appeal by defendants 1 and 3 in O.S. No. 731 of 1933 on the file of the Court of the District Munsif of Guntur against an order of remand passed by the Subordinate Judge of Guntur in A.S. No. 73 of 1946. In O.S. No. 731 of 1933 which was a suit for partition, a preliminary decree was passed on 23rd December, 1937. The preliminary decree directed *inter alia.*

"that the mesne profits due to the plaintiff on his share mentioned above be determined on a separate petition by the plaintiff in execution."

The plaintiff filed C.M.P. No. 697 of 1945 out of which the present civil miscellaneous appeal arises on 22nd February, 1945. The application was filed under Order 20, rule 12 of the Civil Procedure Code. Defendants 1 and 2 contended that the petition was barred by limitation. They also raised objections as to the period for which mesne profits could be allowed and as to the amount claimed. The District Munsif dismissed the petition as barred by limitation and did not therefore enquire into the quantum of mesne profits allowable to the plaintiff. Nor did he record any finding as to the period for which mesne profits could be granted. On appeal by the plaintiff the Subordinate Judge of Guntur held that the application was not barred by limitation and remanded it to the District Munsif for enquiry and disposal.

The only point that arises in this appeal is one of limitation. It has first been argued by Mr. Satyanarayana Razu, the learned advocate for defendants 1 and 2 that since the application was made more than three years after the preliminary decree it is barred by limitation under Article 181 of the Limitation

*A.A.O. No. 10 of 1947. 1st April, 1948.

Act. This point however is directly covered by a decision of the Full Bench in *Ramasubramania Pattar* v. *Karimbil Pati*.[1] It was there pointed out that there is no need for a plaintiff in a partition suit to apply for the passing of a final decree as regards mesne profits. All that he need do is to remind the Court that the question of mesne profits remains to be disposed of. Order 20, rule 12, sub-rule (3) of the Civil Procedure Code as it stood when the Full Bench decision was given referred to an "application" by the decree-holder for an enquiry into mesne profits and the passing of a final decree in respect thereof. The Full Bench held that the word "application" in that sub-rule meant nothing more than a motion which is entirely free from the mischief of Article 181. In the light of the above decision sub-rule (3) has been subsequently amended. In view of the decision of the Full Bench it is impossible to hold that an application for the ascertainment of mesne profits and for the passing of a final decree comes under Article 181 of the Indian Limitation Act and that it must be filed within three years from the date of the passing of the preliminary decree.

The preliminary decree in the Full Bench case did not contain a direction like the one that is to be found in the preliminary decree in this case, namely, that the petition for ascertainment of mesne profits must be in execution. Relying on this direction the appellants' learned advocate has argued that the application for ascertainment of mesne profits must be one in execution and if it is an application in execution it would be barred by limitation. In *Lakshmibai* v. *Ravji*[2] which is one of the cases relied on in support of the argument, it was held with reference to a decree which directed that the mesne profits should be ascertained at the time of execution that there was no want of jurisdiction in the Court when it made that decree and that the decree could not therefore be treated as a nullity, the argument evidently being that since under the Civil Procedure Code of 1908, there can be no ascertainment of mesne profits in execution, the decree itself must be regarded as one passed without jurisdiction. The learned Judges held that there was no absence of jurisdiction in the Court which passed the decree but that it was merely an erroneous or irregular exercise of jurisdiction. They, therefore, overruled the contention that there was no valid decree at all for mesne profits. The Bombay case was concerned with a petition for execution. Whether or not a petition is maintainable in the execution department was not however considered by the Bombay Judges. Arguing from that case Mr. Razu says that once the Court decides, though irregularly, that mesne profits should be ascertained in execution, the parties are bound by it and the ascertainment can take place only in an execution petition. This may no doubt seem logical and may be said to be involved in the Bombay decision though, as already stated, the only argument addressed before the Bombay Bench was whether the decree was altogether a nullity or whether it could be relied upon by the plaintiff as a decree establishing his right to mesne profits. In *Kemgam Swamy* v. *Subbamma*[3], the other case cited on the appellant's behalf it was held by Venkatasubba Rao and Madhavan Nair, JJ., in regard to a decree similarly worded that it was not passed without jurisdiction and was, therefore, not void but was passed in irregular exercise of jurisdiction and could be given effect to. The decision in *Lakshmibai* v. *Ravji*[1] was cited with approval. A further question also arose in *Kemgam Swamy* v. *Subbamma*[3]. The application actually made was described as an execution petition. This was objected to and it was contended that an interlocutory application should have been filed under Order 20, rule 12. The learned Judges accepted the argument that the proper procedure was to apply

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1. (1940) 1 M.L.J. 54: I.L.R. 1940 Mad. 372 (F.B.).
2. (1928) 31 Bom.L.R. 400.
3. (1929) 57 M.L.J. 728: I.L.R. 53 Mad. 838.

under Order 20, rule 12, but they found no difficulty in treating the petition which had actually been filed as an application in the suit. They held it was merely a question of form. Venkatasubba Rao, J., incidentally pointed out that on the facts of the case before them there was no further point involved such as limitation. The learned Judges were evidently of the opinion that notwithstanding the direction in the decree that the mesne profits should be ascertained in execution, it is not permissible for the Courts which may have to deal with the subsequent proceedings to permit a departure from the normal procedure enjoined by the Code, namely, that of an application under Order 20, rule 12. That seems to me to be the ground on which the decision in *Kemgam Swamy* v. *Subbamma*[1] must be taken to have proceeded in so far as it laid down that even in the case of a decree like the one before me the application for the ascertainment of mesne profits must be one under Order 20, rule 12, and not an execution petition.

If the Bombay decision is to be followed to its logical end it would involve the conclusion firstly that the ascertainment of mesne profits must be in an execution petition and secondly that in regard to such a petition the period of limitation prescribed by Article 182 of the Limitation Act would apply.

This logic, however, as I have already pointed out, was broken into by the decision in *Kemgam Swamy* v. *Subbamma*[1] and once the position is reached that in spite of the direction in a decree of the kind I am called upon to deal with, the Court would and must insist on the proper procedure under Order 20, rule 12 being followed, it seems to me that the next step cannot be avoided, namely, that in dealing with the question of limitation the principles of law that must be applied must be those governing an application under Order 20, rule 12. In other words, the proper way of dealing with a decree which directs the ascertainment of mesne profits in execution is to treat it as a decree declaring the plaintiff's rights to mesne profits coupled with a direction that the mesne profits may subsequently be ascertained in an application to be filed for the purpose. In so far as the decree directs that the application must be one in execution, it is an unnecessary and incorrect addition and cannot be given effect to. Otherwise by an erroneous decree of the nature under discussion the Court would not only lay down a separate law of procedure for the parties which is entirely at variance with the law of the land but would also be curtailing the period within which an application can be made by a successful plaintiff. For instance, the argument on behalf of the appellant would in the present case, involve a curtailment of the period of limitation to three years from 1937 notwithstanding that according to the Full Bench decision in *Ramasubramanya Pattar* v. *Karimbil Pati*[2], there is no period of limitation at all.

I cannot say that the position is quite logical. I am bound however to follow the decision in *Kemgam Swamy* v. *Subbamma*[1] to the extent that it decided that the proper application can only be under Order 20, rule 12. It follows from this that the question of limitation must be viewed in this light on the footing that the application is one properly filed under Order 20, rule 12. I notice that the Allahabad High Court in *Narain Das* v. *Bhagavati Prasad*[3] held that a decree clothed in similarly defective language must be regarded as a decree passed in the manner contemplated by Order 20, rule 12.

In the result I hold that the point as to limitation cannot be accepted. The appeal, therefore, fails and is dismissed with costs.

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1. (1929) 57 M.L.J. 728: I.L.R. 53 Mad. 372 (F.B.).
2. (1940) 1 M.L.J. 54: I.L.R. (1940) Mad. 838.
3. A.I.R. 1934 All. 465.

No leave.

I may finally observe that it is highly regrettable that in 1937, after the present Civil Procedure Code had been in operation for 29 years, a decree of this kind should have been passed.

V.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE GOVINDA MENON.

Munia Servai .. *Petitioner**

v.

Thangaraya Onturiyar and others .. *Respondents.*

Criminal Procedure Code (V of 1898), section 145—Dispute between landlord and tenants—Tenants having same source and nature of possession—General evidence by tenants as to their possession—General finding in favour of the tenants—Details given in appendix to judgment—Legality of the order.

The property in dispute was under a mortgage, and the equity of redemption in them was purchased by C.P.W. 1 who claimed to have got possession and thereafter sold the property to *B* party and it was alleged that the possession which C.P.W. 1 had, also passed to the *B* party. The *A* party consisted of 34 tenants who alleged that they have been cultivating these properties and have been in actual possession for a long time even while the properties were with the mortgagee. Each one of them in his statement stated the parcel or parcels of land in his possession and the particular crops raised by him in each particular year. The Magistrate adjudged that possession was with *A* party, and passed orders accordingly. The lower Court appended to its judgment a schedule mentioning the list of disputed lands, stating the survey number, classification, area and the rank of the *A* party member who is in possession of each plot. On a contention that the order was bad as there was no separate findings as to each of the members of the *A* party,

Held, that in the circumstances, it could not be held that the Magistrate had not come to any definite decision as to the possession of the various plots by the various members of the *A* party when the whole matter was clearly stated as appendix to the judgment. As the members of the *A* party were in possession under one title and separate possession amongst them was a matter of arrangement, the order of the Magistrate upholding their possession would not be bad even though he had not considered the separate possession of each particular member of the party.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Additional First Class Magistrate, Kumbakonam, datd 31st December, 1946, in M.C. No. 14 of 1946.

T. R. Venkatarama Sastri and *M. Srinivasagopalan* for Petitioner.

A. V. Viswanatha Sastri for Respondents.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—The petitioner seeks to revise the order of the Additional First Class Magistrate of Kumbakonam passed under section 145 of the Code of Criminal Procedure under the following circumstances.

The property in dispute of an area of 66 acres and odd originally belonged to the Tanjore Palace estate. Subsequent to the decision of the Privy Council in the litigation which began with O.S. No. 3 of 1919 on the file of the District Court, Tanjore, various claimants got possession of portions of that estate. The subject-matter of this dispute as well as other properties were mortgaged by an executor of one of the claimants to a Yagappa Nadar and two others in 1932 for

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*Cr. Appeal No. 57 of 1947. (Cr.R.P. No. 51 of 1947). 11th September, 1947.

a sum of Rs. 30,000. The entire mortgage right subsequently vested in Yagappa Nadar and he thereby became the sole mortgagee. The equity of redemption in these and other properties was purchased by C.P.W. 1 on 14th July, 1945, who discharged the mortgage in favour of Yagappa Nadar and claimed to have got possession of these lands. C.P.W. 1 sold away these and other lands to the present petitioner who was the *B* party before the lower Court on 2nd July, 1946, and it is alleged that the possession which C.P.W. 1 had also passed to the petitioner. Disputes regarding the possession between the *A* party and C.P.W. 1 had already started even before the sale by C.P.W. 1 as a result of which on a report by the police the lower Court passed a preliminary order under section 145 (1) of the Code of Criminal Procedure on 3rd August, 1946 and served the same on both the parties. The learned Additional First Class Magistrate, thereafter enquired into the question of possession very elaborately, considered the large body of oral and documentary evidence produced before him on behalf of both the *A* and the *B* parties, and finally he came to the conclusion that the *B* party, the petitioner, or his predecessors-in-title were never in possession. He adjudged that possession was with the *A* party and passed orders accordingly.

The *A* party consists of 34 tenants who allege that they have been cultivating these properties and have been in actual possession for a long time even while the properties remained with the mortgagee. It is further contended that each of these 34 tenants was cultivating separate pieces of land, some of them a few acres, others less.

Therefore the question for decision is whether the learned Magistrate has applied the right principle of law in coming to the conclusion he did and whether he was given proper legal findings to justify the conclusion arrived at by him.

As stated already, the learned Magistrate has found that the petitioner or his predecessor-in-title including Yagappa Nadar were never in actual possession of the lands having pannai cultivation. He also found that all the members of the *A* party except one had been in possession and cultivating different parcels of land. The chief contention of Mr. T. R. Venkatarama Sastriar for the petitioner is that the learned Magistrate has based his finding solely on the evidence of five members of the *A* party, three village officers and two others who have advanced money to some of the members of the *A* party on the produce of the lands in their possession. It is therefore argued that the rest of the members of the *A* party have not adduced evidence as to the possession of each of one of them of different parcels of property and further that the learned Additional First Class Magistrate has not given separate and specific findings as to what piece or parcel of land each one of the members of the *A* party is actually in possession. In this connection it has to be pointed out that each one of the members of the *A* party has in his written statement stated what the parcel or parcels of land he was then in possession, the particular crops raised by him that year and the plot on which such crops were raised. So far as the evidence in the case was concerned, the *A* party adduced evidence jointly. Each of them had the same source and nature of possession. It was not as if any of them had a different fact to allege as to how he was in possession. The village officers and the other two witnesses were also clear and definite as to the persons cultivating the various plots. In addition the learned Magistrate has appended to the judgment schedule *B* mentioning the list of disputed lands and stating the survey number, classification, area and the rank of the *A* party member, who is in possession of each plot. Such being the case it cannot be successfully urged that the learned Magistrate has not come to any definite decision as to the possession of the various plots by the various members of the *A* party. Instead of giving a narrative in the body of the judgment, he has tabulated the area, definition and classification of the various plots in the possession of the various members

of the *A* party. I do not think that it is absolutely necessary that the lower Court should have devoted a paragraph or more of the judgment for describing the plots of land and the persons in possession when the whole matter is clearly stated as an appendix to the judgment.

Mr. Venkatarama Sastriar relies upon the decisions in *Chockalingam Pillai* v. *Nagalingam Pillai*[1], *Madhoosoodhan* v. *Bejoy Gobind Chowdhury*[2] and *Gulab Koer* v. *Ganouri Koer*[3], for the proposition that in cases of disputes between a landlord and different sets of tenants claiming different plots in their respective possession, a general enquiry is likely to prejudice the landlord in meeting the case set up by the tenants and therefore it is essential that the Magistrate should apply his mind and give definite findings regarding the case of each individual holding. A general finding that, as contrasted with the possession of the landlord, the tenants have been in possession, is, according to Mr. Sastriar, insufficient. These decisions do not apply to the present case, because there is no difference regarding the nature and character of the possession or the source of it between the claims of the respective members of the *A* party. In *Bindhyachal Prasad* v. *Madho Singh*[4], a Bench of the Patna High Court has held that where there is a dispute between two parties over some land and the members of one party were in possession under one title and separate possession amongst them was a matter of arrangement, the order of the Magistrate upholding their possession is not bad merely because he has not considered the separate possession of each particular member of the party. Therefore even if the Magistrate had only given a general finding regarding joint possession by the members of the *A* party, his order would not have been irregular. Moreover, after a detailed discussion of the evidence in its various aspects the Magistrate has clearly and definitely found that the petitioner or his predecessors-in-title did not at any time have actual possession of these lands. He has also found that the members of the *A* party were in possession, the details of such possession being given in the schedule appended to the judgment. Such being the case I am unable to hold that there is any illegality or irregularity in the procedure or conclusion arrived at by the lower Court. Since an enquiry under section 145 of the Code of Criminal Procedure is restricted to the possession on the date of the preliminary order and not to the title or the validity of it which is entirely within the purview of a Civil Court, the conclusion of the lower Court arrived at after fully and amply dealing with all the matters necessary for such an enquiry, is a correct one. I see no reason to dissent from the view taken by the lower Court and on the findings given by the Magistrate the authorities relied upon by Mr. Venkatarama Sastriar are inapplicable to the case.

The petition is therefore dismissed.

V.P.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. P. V. RAJAMANNAR, *Officiating Chief Justice* AND MR. JUSTICE MACK.

M. Narayanaswami Naidu (died) and others .. *Appellants**

v.

Parvati Bai and others .. *Respondents.*

Civil Procedure Code (V of 1908), section 11, Explanation 6—Applicability—Adjudication of title to property based on a settlement deed—Subsequent suit by children of one of the parties—Basis of claim in both suits same—Bar of res judicata.

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1. (1933) M.W.N. 192.
2. (1873) 21 W.R. (Crl.) 55.
3. A.I.R. 1938 Pat. 511.
4. (1946) I.L.R. 25 Pat. 19.

*O.S.A. No. 27 of 1946. 20th April, 1948.

O.P. No. 106 of 1924 was filed by the appellant herein for Letters of Administration to the estate of one *P*, deceased, and *A* the adoptive mother of the appellant filed affidavits admitting that the appellant was her adopted son and only heir and legal representative of the deceased *P*. More than four years later she (*A*) sought to set aside the grant of Letters of Administration claiming to be the sole legal representative of the deceased, alleging that her previous affidavits were obtained from her on false and fraudulent misrepresentations; but the contentions were overruled. No attempt was made to carry this on appeal. Nearly eleven years after this in 1943, *A* executed a deed of settlement in favour of *G* and his wife, conveying the suit property which was comprised in the estate of *P*, and in a suit filed by the appellant for recovery of possession of the suit property *G* and his wife *inter alia* contended that the property belonged to *A* and in the alternative raised the plea of adverse possession by *A*. Both of these contentions were overruled and the suit decreed. This decree was allowed to become final by *G* and his wife. The present suit was filed in 1945 by the children of *G* and his wife claiming title to the said property under the same settlement deed.

Held, the facts were covered by Explanation 6 to section 11 of the Civil Procedure Code and that the suit was barred by the rule of *res judicata* by reason of the decision in the prior suit. The parents of the plaintiffs in the prior case must be deemed to have represented not only their interests but also the interests of the children under the same deed.

On appeal against the judgment and decree of Kunhi Raman, J., dated 26th April, 1946, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C.S. No. 152 of 1945.

K. Krishnaswami Ayyangar and *N. C. Raghavachari* for Appellants.

G. A. Chellayya Nadar and *Robert Chellayya* for Respondents.

The Judgment of the Court was delivered by

The Offg. Chief Justice.—The only question which arises for decision in this appeal from the judgment of Kunhi Raman, J., sitting on the Original Side is whether one Ammani Ammal had any right to or interest in the suit property which is a house No. 65, Ashtabujam Street, Choolai, Madras. If she had, then the respondents who were the plaintiffs before Kunhi Raman, J., would be entitled to relief on the basis of a deed of settlement executed by Ammani Ammal on 1st June, 1943.

The property in suit was purchased on 14th December, 1922, by a deed of sale bearing that date executed in favour of the said Ammani Ammal and her brother, T. Perumal Naidu. The agreement of sale entered into before the completion of the sale was in favour of Perumal Naidu only. It appears from the evidence that Perumal Naidu was himself at Rangoon and he had executed a power of attorney in favour of his sister Ammani Ammal, Ex. D. 17, to manage his affairs. Perumal Naidu died on 16th June, 1924, unmarried and intestate. He left behind him surviving Ammani Ammal, his elder sister. He had a brother, one Ramaswami Naidu who had predeceased him leaving him surviving his widow Govindammal; Narayanaswami Naidu, the defendant, was Govindaswami's brother and was married to Govindammal's daughter. He appears to have been adopted to Ammani Ammal's husband. There was a dispute as regards this adoption. For the purposes of this litigation, it must be assumed that he was validly adopted. Immediately after the death of Perumal Naidu, Narayanaswami Naidu filed an application, O.P. No. 106 of 1924 for grant of Letters of Administration to the estate of the deceased Perumal Naidu which was stated to comprise the suit property. It then bore a different door number. Notice of this application went to Ammani Ammal. She thereupon filed an affidavit into Court (Ex. D. 4) in which she stated that Narayanaswami Naidu was the only heir and legal representative as nephew of the deceased Perumal Naidu and to the best of her knowledge and information, there was no other kith or kin left by the deceased except herself, Narayanaswami Naidu and Govindammal, the widow of Ramaswami Naidu. She therefore had no objection to the grant of Letters of Administration to the defendant. In this affidavit she made two further admissions which are important. She admitted that she was the adoptive mother of the defendant and that Perumal Naidu died possessed

of properties in the City of Madras of the value of Rs. 27,099-0-8, which was the value given in the defendant's application for Letters of Administration which included the value of the suit property. On the 6th April, 1926, she filed another affidavit in which she reiterated the admissions she had made in her prior affidavit that the defendant was her adopted son and that the suit property was one of the properties which belonged to the deceased Perumal Naidu. She stated in this affidavit also that she had no objection to the defendant enjoying the properties absolutely as the only heir and legal representative of the deceased Perumal Naidu. Letters of Administration were granted to the defendant on the 5th February, 1925.

More than four years after the grant of the Letters the defendant, Ammani Ammal filed an application in 1929, No. 2047 of 1929, for a revocation of the grant of the Letters of Administration to the defendant herein and for the grant of fresh Letters of Administration to her as the heir, and legal representative of the deceased Perumal Naidu. In the affidavit filed by her in support of this application on 17th August, 1929 (Ex. P. 4) she went back on the statement she had made in her previous affidavit and alleged that Perumal Naidu left no heirs except herself, his only sister. In that affidavit for the first time she also alleged that she had contributed a moiety of the sale price of the suit property, though the allegation is certainly confused. Paragraph 7 of the affidavit runs thus:

"My brother Perumal Naidu was earning about Rs. 200 a month until he retired. From and out of his arning he purchased the immovable properties in Madras constructed and improved them at a considerable cost. Out of them one of them was purchased jointly in my name and in the name of Perumal Naidu as I contributed a moiety of the sale price and we continued to be co-owners thereof."

She tried to get over her previous affidavits by saying that they were obtained from her on false and fraudulent misrepresentations and that she put her mark to them without clearly understanding their full significance. It may be mentioned that she even denied the adoption of the defendant. On account of this application O.P. No. 106 of 1924 was converted into a suit, T.O.S. No. 9 of 1929 and disposed of by Wallace, J., on 26th January, 1932, Ex. D. 12. He held that the defendant herein was the adopted son of Ammani Ammal and that there was no proof of any fraud having been played on her or on the Court. The learned Judge refused to accept Ammani Ammal's story that she swore to the affidavits without fully understanding their contents. In the result her application to revoke the Letters of Administration was dismissed. No attempt was made to carry this in appeal. Nearly eleven years after this judgment, Ammani Ammal executed a deed of settlement on the 1st June, 1943 (Ex. P. 9) purporting to convey the suit house to one Govindasami Naidu and his wife Krishnaveni Ammal *alias* Unnamalai Ammal for their lifetime and thereafter to their issue, male or female. This Govindasami is described in the settlement deed as the son of a sister of Ammani Ammal (referred to as Lakshmi Ammal in the evidence). There is a curious recital in this deed of settlement that it was being executed in accordance with the promise made by her at the time of the death of her brother, Perumal Naidu. The plaintiffs-respondents are the issues of Govindasami and Unnamalai and their claim to the suit property is based on the provisions of the deed.

The defendant in this suit filed O.S. No. 275 of 1943 on the Original Side of this Court against Govindasami Naidu and Unnamalai Ammal for recovery of possession of the suit property and for mesne profits. The defendants to that suit, the parents of the present plaintiffs, pleaded in defence their right under the settlement deed, Ex. P. 9. They alleged *inter alia* that the property belonged to Ammani Ammal and in the alternative they raised also a plea of adverse possession by Ammani Ammal. The suit was heard and disposed of

by Chandrasekhara Aiyar, J. The learned Judge held that Ammani Ammal had no title to the suit property and that she had not acquired any title by adverse possession. He therefore granted a decree for possession and for mesne profits in favour of the present defendant. This decree was allowed by the parents of the present plaintiffs to become final. On the 21st March, 1945, the present plaintiffs, children of the defendants in the prior suit, claiming under the same settlement deed, instituted this suit for a declaration that they were entitled to absolute rights of ownership in and to the suit property under the deed of settlement, dated the 1st June, 1943.

Among the pleas raised by the defendant, the most important was that the present suit was barred by the rule of *res judicata* by reason of the decision in C.S. No. 275 of 1943. Kunhi Raman, J., who tried the suit under appeal held that the suit was not barred by *res judicata.* On the question of title he held that Ammani Ammal was entitled to a moiety and the settlement deed was therefore valid in respect of that moiety. He overruled the plea of the plaintiffs that Ammani Ammal had acquired a title by adverse possession. He therefore granted a declaration to the plaintiffs that they were entitled after the death of their parents to a half share in the suit property under the deed of settlement executed by Ammani Ammal. The defendant has filed the present appeal and the plaintiffs have filed a memorandum of cross-objections. Pending the appeal in this Court the defendant died and his legal representatives have been brought on record as appellants 2 to 4.

Mr. K. Krishnaswami Aiyangar, learned counsel for the appellants, contended that the learned trial Judge erred in holding that the suit was not barred by the rule of *res judicata*, and he relied in particular on Explanation 6 to section 11, Civil Procedure Code, which runs as follows:

> "Where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall for the purposes of this section be deemed to claim under the person so litigating."

Kunhi Raman, J., refused to accept the appellants' contention on the ground that there were two distinct rights in this case, one right conferred on the parents of the plaintiffs and the other right conferred on the plaintiffs themselves and therefore it could not be said that there was a private right claimed in common for themselves and others. With due respect to the learned Judge, we are of opinion that he overlooked the fact that in this case both the plaintiffs and their parents rely on the same settlement deed as the source of their title. In the prior case the parents relied upon the deed and in the present case the children rely upon the same deed. We think on principle the parents of the plaintiffs in the prior case must be deemed to have represented not only their interest but also the interests of their children under the same deed. This is a salutary principle which prevents multiplicity of proceedings and the anomaly of conflicting decisions on the effect of the same deed in respect of the same land. As early as 1789 in *Pyke* v. *Crouch*[1], it was ruled thus:

> "If several estates in remainder be limited in a deed, and one of the remaindermen obtains a verdict for him in an action brought against him for the same land; that verdict may be given in evidence for the subsequent remainderman, in an action brought against him for the same land, though he does not claim any estate under the first remainderman, because they all claim under the same deed."

That this principle would apply to the construction of Explanation 6 to section 11 of the Code appears to be clear to us—*vide* also Hukumchand's Treatise on *Res Judicata,* page 192. If this principle were not accepted it would mean that the parents and after them their children and probably the children one after the other can be permitted to agitate the same question over and over

1. 1 Lord Raymond 731: 91 E.R. 1387.

again in respect of the same title to the same land. The rule of *res judicata* was certainly intended to cover this class of cases in which all the donees under the settlement claim a common right.

It follows, that for the purposes of this suit it must be taken to have been adjudicated already that Ammani Ammal had no title to the property and the plaintiffs therefore would not obtain any rights under the settlement deed executed by her. This decision of ours on the question of *res judicata* would likewise prevent the plaintiffs from raising the question of adverse possession of Ammani Ammal because that question also was decided by Chandrasekhara Aiyar, J., against Ammani Ammal in the prior litigation.

Apart from the question of *res judicata,* we also consider that the plaintiffs would be bound by the several admisisons made by Ammani Ammal under whom they claim, to which reference has been made earlier in our judgment. Therein she had unequivocally admitted that the suit property was one of the properties which belonged to the deceased Perumal Naidu and the defendant was his sole heir. She tried no doubt to get out of these admissions by putting forward the case that she did not know the contents of the affidavits before she set her mark to them. This case of hers was not accepted by Wallace, J., and must be rejected. Her original admissions therefore stand and in the face of those admissions, the plaintiffs cannot be permitted to assert any title in derogation of the title of the defendant to the suit property.

For these reasons the appeal must be allowed and the suit dismissed with costs throughout. The memorandum of objections filed by the plaintiffs must also be dismissed. There will be no separate order as to costs in the memorandum of objections. The costs will be recovered from the next friend. The plaintiffs will pay the court-fee due to Government on the plaint and the memorandum of cross-objections.

Mack, J.—I entirely agree. *Appeal allowed.*

V.P.S. *Cross-objections dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. P. V. RAJAMANNAR, *Officiating Chief Justice* AND MR. JUSTICE SATYANARAYANA RAO.

Rajam Naidu and another .. *Appellants*[1]

v.

Meenakshi Ammal and others .. *Respondents.*

Civil Procedure Code (V of 1908), sections 48 and 145—Stay of execution of mortgage decree—Surety bond—Liability of surety—Contingent liability on deficiency in mortgage sale being ascertained—Application to enforce—Time limit—Starting point—Limitation Act (IX of 1908), Article 181.

In September, 1926, one *M* obtained a preliminary mortgage decree in the Sub-Court, Cuddalore, against three persons. Against that decision the defendants preferred an appeal to the High Court. When the decree-holder applied for the passing of a final decree the defendants filed an application to the High Court for stay of the proceedings. Stay was granted by the High Court on condition of the judgment-debtor furnishing security. In pursuance of the order of the High Court the defendants executed a security bond which provided among other things as follows: "We further agree that if, on the execution application of the decree-holder immediately after the disposal of the appeal by the High Court an amount in excess of Rs.......... should be found due to the decree-holder and if the hypothecated properties do not on sale fetch the amount for which they have been accepted as security we and our legal representatives will be personally liable for the difference between the said execution amount (exclusive of costs) and the value of the security accepted by the Court".

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[1] L.P.A. No. 103 of 1946. 16th April, 1948.

The High Court confirmed the decree of the lower Court in August 1929 and the final decree was passed on 19th March, 1931. The decree-holder realised a portion of the amount due to him by sale of the property by the year 1941, the last execution order being dated 21st February, 1941. On 20th February, 1944, the legal representative of the decree-holder, the latter having died in the meanwhile, applied to the Sub-Court, Cuddalore, for transmission of the decree and the security bond to the City Civil Court, Madras, for enforcing the security bond as against the sureties. The latter thereupon contended that as the decree was more than twelve years old by the date of the petition, the execution was barred under section 48 of the Civil Procedure Code.

Held, that though section 48 of the Code was applicable for the enforcement of the liability of the surety under section 145, Civil Procedure Code, inasmuch as under the terms of the surety bond the liability of the sureties was only a contingent liability arising after the mortgaged properties were sold and the deficiency was ascertained, the present application which was filed within three years from that date was within time both under section 48 of the Code and also under Article 181 of the Limitation Act.

Appeal under clause 15 of the Letters Patent against the judgment and order of Chandrasekhara Aiyar, J., dated 27th August, 1946, in A.A.O. No. 554 of 1945 (M.P. No. 149 of 1944 in O.S. No. 68 of 1925, Sub-Court, Cuddalore).

T. E. Ramabhadrachariar for Appellants.

T. R. Venkataraman for Respondents.

The Court delivered the following

JUDGMENT.—This is an appeal under clause 15 of the Letters Patent against the judgment of Chandrasekhara Aiyar, J., confirming with slight modification the decision of the Subordinate Judge of Cuddalore holding that the application for execution was in time.

On the 25th September, 1926, one Muthukomaraswami Chettiar obtained a preliminary mortgage decree in O.S. No. 68 of 1925 in the Sub-Court, Cuddalore, against three persons, Thayammal, Govindarajulu Naidu and Rajam Naidu. Against that decision the defendants preferred an appeal to the High Court in App. No. 132 of 1927. When the decree-holder applied for the passing of a final decree, the defendants filed C.M.P. No. 1393 of 1927 in the High Court for stay of the proceedings. Stay was granted by this Court on condition of the judgment-debtors furnishing security. In pursuance of the order of the High Court defendants 1 to 3 executed a security bond on 5th January, 1928. The relevant clause in that security bond is in these terms:

"We further agree that if on the execution application of the decree-holder immediately after the disposal of the appeal by the High Court an amount in excess of Rs. 11,748-13-10 should be found due to the decree-holder and if the hypothecated properties do not on sale fetch Rs. 11,748-13-10, the amount for which they have been accepted as security we and our legal representatives will be prsonally liable for the difference between the said execution amount (exclusive of costs) and Rs. 11,748-13-10, the value of the security accepted by this Court."

The High Court confirmed the decree of the Sub-Court on 2nd August, 1929. The final decree was passed on 19th March, 1931. The decree-holder realised a sum of about Rs. 6,000 by sale of the property by the year 1941, the last of the execution orders being dated 21st February, 1941. On 20th February, 1944, the legal representatives of the decree-holder, the decree-holder having died in the meanwhile applied to the Sub-Court, Cuddalore, in M.P. No. 149 of 1944 for transmission of the decree and the security bond to the City Civil Court, Madras, for execution against the sureties, defendants 1 to 3, by enforcing the security bond. This application was resisted by defendants 1 to 3 on two grounds, one of which alone is relevant for purposes of this appeal. Their contention was that as the decree was more than 12 years old by the date of the petition, the execution was barred under section 48 of the Civil Procedure Code.

The learned Subordinate Judge overruled this objection and directed transmission of the decree to the City Civil Court. This order was confirmed by Chandrasekhara Aiyar, J., and this Letters Patent Appeal is against his decision.

The only question that arises for consideration in this appeal therefore is whether the execution application is barred by limitation under section 48 of the Civil Procedure Code, as contended by defendants 1 to 3.

The present application is admittedly within three years from the date of the last order, 21st February, 1941, by which the property was sold and the deficiency for which the defendants 1 to 3 made themselves liable personally as sureties was ascertained. The only bar therefore to be considered is the bar of limitation under section 48 of the Civil Procedure Code.

Section 145 of the Civil Procedure Code gives a summary remedy to the decree-holder to enforce the personal liability of a surety who made himself answerable for the decree amount either in whole or in part. The section so far as is relevant to this appeal is as follows:—

"Where any person has become liable as surety—

(*a*) for the performance of any decree or any part thereof, or

* * * * * *

(*c*) for the payment of any money, or for the fulfilment of any condition imposed on any person under an order of the Court in any suit or in any proceeding consequent thereon, the decree or order may be executed against him, to the extent to which he has rendered himself personally liable, *in the manner herein provided for the execution of decrees,* and such person shall, for the purposes of appeal, be deemed a party within the meaning of section 47."

The liability of the surety arises under the bond executed by him. Under section 128 of the Contract Act the liability of the surety is co-extensive with that of the principal debtor unless it is otherwise provided by the contract. It is now settled law that even if the enforcement of the liability against the principal debtor is barred by limitation, the liability of the surety is not extinguished. *Vide* the decision in *Mahant Singh* v. *U Ba Yi*[1]. That by virtue of section 145, a surety does not become a joint debtor along with the judgment-debtor is also fairly well established by decisions of the Courts in India. All the decisions have been reviewed by Beasley, C.J., and King, J., in *Gangaraju* v. *Subbayya*[2].

Under section 48 of the Civil Procedure Code,

"Where an application to execute a decree not being a decree granting an injunction has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of twelve years from—

(*a*) the date of the decree sought to be executed".

(The other clauses are omitted as they are not material). This section applies as between the decree-holder and the judgment-debtor who are parties to the suit. Where there is a combined decree passed under the old Code in a mortgage suit providing for the sale of the property in the first instance and also for the personal liability of the mortgagor for the balance found due after such sale, it was held by a Full Bench of this Court in *Aiyasamier* v. *Venkatachala Mudali*,[3] that the decree-holder had twelve years under section 48 of the Civil Procedure Code for the recovery of such balance reckoned from the time when it was ascertained to be due. Under the present Code however a fresh decree has to be passed under Order 34, rule 6, on the personal covenant for the balance due after the hypotheca was sold. The decision in *Aiyaswamier* v. *Venkatachala Mudali*[3], is however no longer good law in view of the decision of the Privy Council in *Khulna Loan Co.* v. *Jnanendranath Bose*[4]. This deci-

1. (1939) 2 M.L.J. 253: I.L.R. 66 I.A. 198: (1939) Rang.L.R. 358 (P.C.).
2. (1934) 68 M.L.J. 119: I.L.R. 58 Mad. 276.
3. (1916) 31 M.L.J. 513: I.L.R. 40 Mad. 989 (F.B.).
4. (1917) 22 C.W.N. 145: A.I.R. 1917 P.C. 85 (P.C.).

sion of the Privy Council was considered by this Court in two subsequent decisions in *Nawab Shuja-ul-Mulk Bahadur* v. *Umir-ul-umra Bahadur*[1] and *Swaminatha Odayar* v. *Thiagarajaswami Odayar*[2], and it was held that if twelve years had elapsed from the date of the decree, execution is barred under section 48 of the Civil Procedure Code, notwithstanding the fact that the personal liability under the decree could not be ascertained till a later date. As the liability of the surety in this case arises only under the bond and not under the decree, the principle of these decisions is inapplicable to it. The liability however is enforced under section 145 of the Code by executing the decree obtained against the judgment-debtor against the surety to the extent of his personal liability. The expression "in the manner herein provided for the execution of decrees" in section 145 of the Civil Procedure Code seems to attract the provisions of section 48 of the Code as section 48 occurs in the part of the Code relating to execution. It is possible to contend that this language makes only the remedies such as arrest of the surety and sale of his property after the attachment applicable and does not attract the period of limitation under section 48 of the Code. But it is difficult to accept such a contention as the restriction or limitation on the right to execute the decree imposed by section 48 may also be treated as a "manner" of execution. The decision of the Privy Council in *Raja Kirtyanand Singh* v. *Raja Prithichand Lal Chowdhury*[3], which was an appeal against the decision of the High Court reported in *Kirtyanand* v. *Pirthichand*[4], places the matter beyond doubt, though in that case the contention was not specifically raised. In that case there was a decree for rent on the 1st April, 1914. During the pendency of the suit there was an application for attachment before judgment and the respondent before the Privy Council executed a security bond on 19th September, 1912. By that bond the surety undertook to pay to the decree-holder, the amount that may be awarded by the decree to the plaintiffs in the suit including the principal, interest and costs. After the decree there were as many as six execution applications against the judgment-debtors and some amount was realised. On the 13th July, 1927, a seventh application was made against the surety for realising the balance that remained unpaid. The objection raised by the surety was that as the decree was more than twelve years old execution was barred against him under section 48 of the Code. To meet this contention the decree-holders relied upon a "subsequent order" made in another suit for the administration of the estate in which a Receiver was appointed with directions to make half-yearly payments to the decree-holders. This order, it was contended on behalf of the decree-holders, was a "subsequent order" within the meaning of section 48 (1) (*b*) of the Civil Procedure Code. It was held that as the order in the Administration suit was made in the absence of the judgment-debtors and in the absence of the surety it was not a "subsequent order" within the meaning of section 48 (1) (*b*), and that, therefore, execution against the surety was barred. The relation between section 48 of the Code and Article 182 of the Limitation Act was not considered by their Lordships of the Judicial Committee. Nor was any contention raised before their Lordships that section 48 would not apply to the liability of the surety under section 145. Though there is no discussion of the question this decision has to be treated as authority for applying section 48 for the enforcement of the liability of the surety under section 145 of the Civil Procedure Code. But in that case it must be noted that the liability of the surety was absolute and arose on the date of the decree. It was not a contingent liability.

As section 48 applies to the liability of the surety under section 145 in view of the decision of the Privy Council in *Raja Kirtyanand Singh* v. *Raja*

1. (1925) 49 M.L.J. 498: I.L.R. 48 Mad. 846.
2. (1925) 52 M.L.J. 256: I.L.R. 50 Mad. 5.
3. (1932) 64 M.L.J. 599: L.R. 60 I.A. 43: I.L.R. 12 Pat. 195 (P.C.).
4. A.I.R. 1929 Pat. 597.

Prithichand Lal Chowdhury[1], the next question that arises for consideration is what is the date from which the period of twelves years should be computed in such a case. Under section 48 in a case between the decree-holder and the judgment-debtor, it is the date of the decree sought to be executed from which the period of twelve years has to be counted. As the liability of the surety is not under the decree and arises only under the bond, in our opinion, the period of twelve years should be calculated from the time when such liability accrued. The liability under a bond may be an absolute liability or a contingent or conditional liability. If it is an absolute liability the date from which the liability accrues coincides with the date of the decree. But if it is merely a contingent liability, a liability that arises after the ascertainment of the deficiency, in such a case, in our opinion, the period should be counted only from the date of the accrual of such liability. In this view we are supported by two decisions of the Privy Council in *Raja Raghunandan Prasad Singh* v. *Raja Kirtyanand Singh Bahadur*[2], which was an appeal against the decision of the Patna High Court in *Raja Raghunandan Prasad Singh* v. *Raja Kirtyanand Singh Bahadur*[3]. There was a mortgage decree on the 22nd December, 1917. The decree did not contain a personal liability against the mortgagor in view of Order 34, rule 6 of the Civil Procedure Code. There was an appeal against the decree to the High Court. On 31st August, 1918, the decree was made absolute while the appeal in the High Court was pending. The mortgagee decree-holder made an application to execute the decree and bring the properties to sale. At that stage the mortgagor applied for stay of execution in the High Court. Stay was granted on condition of the mortgagor furnishing solvent security in the lower Court to the satisfaction of the Subordinate Judge. The respondent before the Privy Council who was also a party to the suit as a puisne encumbrancer gave a security bond. It was construed by the Privy Council to have the same effect as the bond in the present case. After exhausting the remedy against the property, the mortgagee decree-holder applied to enforce the bond against the surety in 1927. The surety raised among other contentions that his liability under the bond was absolute and that the right to enforce the bond accrued to the decree-holder on the 1st April, 1920, according to the terms of the bond and that the application for execution against him filed more than three years thereafter under section 145 was barred by limitation. In construing the bond their Lordships observed at page 91 as follows:

"It is not a clause which puts upon the giver of the bond an obligation to make an immediate payment in cash; it is a clause which puts the decree-holders in the position of having a realisable security of Rs. 77,000. The question is whether that is an absolute security which the decree-holders are to be free to realise immediately on 1st April, 1920 or whether it is security to the extent of Rs. 77,000 for the balance of the sum, if any, remaining unpaid after the mortgaged property has been realised.

In their Lordships' judgment upon the true construction of this document having regard to the circumstances in which it was executed, this bond is a bond for securing the balance unprovided for by the proceeds of sale of the mortgage property, upto a sum not exceeding Rs. 77,000.

Upon that view of the case it is plain that until the property was sold the liability of the giver of the bond, the respondent here, could not be enforced. The application which was made in January, 1927, was necessarily within time inasmuch as under the Indian Limitation Act it must either be within three years if the application is properly an application in the suit, or within six years, if the application should have been made by independent suit."

No doubt, in that case the question for the applicability of section 48 of the Civil Procedure Code did not and could not arise. But if the liability of the surety arises only under the bond and not under the decree it is not unrea-

1. (1932) 64 M.L.J. 599 : L.R. 60 I.A. 43 : I.L.R. 12 Pat 195 (P.C.).
2. (1932) 63 M.L.J. 85 (P.C.).
3. (1928) I.L.R. 8 Pat. 310.

sonable to hold that there should be a different starting point under section 48 of the Code and under the Limitation Act. Their Lordships did not, however, indicate the proper Article of the Limitation Act applicable to the case. It is as if under section 145 of the Code when the liability springs under the bond it is a decree against the surety. No doubt the mode of enforcement is by execution of the decree obtained already. But that does not mean that the liability is a liability under the decree. In *Rameshwar Singh* v. *Homeshwar Singh*[1], their Lordships of the Judicial Committee had to consider the question whether the language of the first clause in the third column of Article 182, "Date of the decree or order" could properly be applied to a case where the decree was not a combined decree but a decree which imposed upon the judgment-debtor a contingent liability. The decree in that case did not provide for any personal liability of the judgment-debtor but declared that the decree amount should be realised by sale of the property belonging to one Janeshwar and left in Ekradeshwar's possession, Janeshwar being the judgment-debtor. Ekradeshwar however, did not obtain possession of the property of Janeshwar until after the termination of the litigation between him and the widow of Janeshwar which was on the 22nd July, 1914, under the judgment of the Privy Council. He then obtained possession of the property and the decree-holder made an application to execute the decree in December, 1914, after the decision of the Privy Council. The contention urged on behalf of the judgment-debtor was that under Article 182 of the Limitation Act execution was barred as the application was made more than three years from date of the decree. In answer to this contention their Lordships stated as follows:

"They are of opinion that, in order to make the provision of the Limitation Act apply, the decree sought to be enforced must have been in such a form as to render it capable in the circumstances of being enforced. A decree so limited in its scope as that of the 27th July, 1906, under consideration cannot, in their opinion, be regarded as being thus capable of execution. Under that decree Ekradeshwar was not made personally liable, nor did it extend to any portion of the estate of Janeshwar which was not in his hands. None of the estate came to his hands until after the decision of the Board in 1914........They are of opinion that when the Limitation Act of 1908 prescribes three years from the date of a decree or order as the period within which it must be enforced, the language, read with its context, refer only, as they have already indicated, to an order or decree made in such a form as to render it capable in the circumstances of being enforced........This application could not have been made till Ekradeshwar had come into possession of the property of Janeshwar, and by Article 181 in the Schedule to the Limitation Act, the period of limitation for making an application is three years from the time when the right to apply accrues."

Until the obligation of the surety becomes enforceable by reason of the contingency contemplated having occurred it cannot be said that the period of limitation whether under section 48 of the Code or under the appropriate Article of the Limitation Act commenced to run. It may be that the deficiency may not be ascertained even till after the lapse of a period of twelve years from the date of the decree. It may be that the liability might accrue immediately after the decree. In either case in our opinion the period starts from the moment the obligation of the surety became enforceable. Of course when there is no certain date Article 182 of the Limitation Act does not apply and it is only Article 181 that applies. This view was taken also in *Jamnadas Ravuji Sait* v. *Krishnan*[2], by Pakenham Walsh, J., and in *Annamalai Chettiar* v. *Sundaresa Iyer*[3], by Kuppuswami Aiyar, J. In the present case, under the terms of the surety bond the liability of the sureties was only a contingent liability arising after the mortgaged properties were sold and the deficiency was ascertained; and this occurred only in February, 1941. The present application which was filed within three years from that date is in time both under section 48 of the Civil Procedure Code and also under Article 181 of the Limitation Act.

1. (1920) 41 M.L.J 1: L.R. 48 I.A. 244: I.L.R. 44 Mad. 643 (P.C).
2. (1933) 65 M.L.J. 507.
3. (1943) 2 M.L.J. 444.

We therefore agree with the judgment of Chandrasekhara Aiyar, J., though not for the reasons given by him and confirm his decision and dismiss this appeal with costs.

B.V.V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL AND MR. JUSTICE RAJAGOPALAN.

Gopalakrishna Chetty .. *Appellant**

v.

R. Dorai Babu being minor by mother and next friend, second respondent and others .. *Respondents.*

Hindu Law—Joint family—Son of a permanently kept concubine of a sudra—Right to a share in the joint family property.

Before an illegitimate son of a sudra can establish a claim to a share in the properties of his putative father it must be shown that the son was born of a union neither adulterous nor incestuous. But where the claim of the illegitimate son is limited only to maintenance there is no need to prove that the union between his mother and his putative father was neither adulterous nor incestuous.

After the death of a sudra father, his illegitimate son born of a permanently kept concubine, the union not having been adulterous or incestuous, is not entitled to a share in the properties of the family of which his father was an undivided (*avibakta*) co-parcener when he died.

Case-law discussed.

On appeal from the judgment and decree of Rajamannar, J., dated 13th March, 1946 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C.S. No. 134 of 1945.

K. S. Sankara Aiyar, A. Kuppuswami Aiyangar and *A. Ramachandran* for Appellant.

N. Rajagopalan, A. Narasimhachariar and *A. Sundarachariar* for Respondents.

The Judgment of the Court was delivered by

Rajagopalan, J.—This is an appeal by the sixth defendant against the preliminary decree in the suit for partition of the family properties instituted by the plaintiff and tried on the original side by Rajamannar, J.

Tirumalai Chetti, the first and second defendants and Chinnadorai were the sons of one Ramiah Chetti. Chinnadorai died issueless in 1931. Tirumalai died in 1944. Both were undivided in status from their brothers at the time of their death. The plaintiff is the grandson of Tirumalai and the son of Raghava Chetti who pre-deceased Tirumalai. The plaintiff claimed that he along with the first and second defendants and their sons, the third and fourth defendants, constituted a coparcenary. The fifth defendant is the widow of Tirumalai. The sixth defendant is the son of Janaki, who he claimed, was the lawfully wedded second wife of Tirumalai; the sixth defendant was their legitimate son. The alternative claim of the sixth defendant in the suit was on the basis, that he was a *dasiputra* and that Janaki was a continuously kept concubine of Tirumalai. The parties were all *sudras.*

The learned trial Judge found that Janaki was not the lawfully wedded wife of Tirumalai, but that she was only the concubine of Tirumalai, and that the sixth defendant was their son. The correctness of this finding was challenged in the memorandum of appeal, but that finding was amply supported by the evidence on record. D. W. 2, a cousin of Tirumalai, called by the

*O.S.A. No. 26 of 1946. 23rd April, 1948.

sixth defendant, stated quite unequivocally that Janaki was not married to Tirumalai but that she was only his concubine. Even apart from the statements of Tirumalai himself embodied in Exs. P. 1 and P. 2 the testimony of D.W. 2 should suffice to negative the plea of the sixth defendant that his mother was the lawfully wedded wife of Tirumalai and that he was Tirumalai's legitimate son.

The alternative basis for the claim put forward in the suit by the sixth defendant for a share in the properties of the family, of which the plaintiff and defendants 1, 2, 3 and 4 were co-parceners, was that the sixth defendant was the illegitimate son of Tirumalai, born of Janaki, the permanently kept woman of Tirumalai. In paragraph 3 of the plaint the plaintiff averred:

"As the said deceased Tirumalai Chetti left no separate property of his, and all the properties are joint family properties and as he had also left his undivided brothers, the sixth defendant even if he is proved to be validly an illegitimate son of the deceased is not entitled to enforce a partition, but at best entitled to maintenance only."

The sixth defendant's answer to this was in paragraph 5 of his written statement. He claimed that, even if he was only an illegitimate son of Tirumalai, he would still be entitled "to a share in the properties of the said Tirumalai Chetti" and "not merely entitled to maintenance therefrom as alleged in the plaint." Issue 4 in the suit ran:

"Is the sixth defendant a legitimate son of the late Tirumalai Chetti? If not, is he the son through a permanently and exclusively kept concubine? If so, is he entitled to any share or other right in the joint family?"

The only witnesses examined before the preliminary decree was issued were D. Ws. 1 and 2. The trial at this stage appears to have come to an end rather abruptly when D.W. 2, who was in the box, gave up the case pleaded by the sixth defendant, that the sixth defendant's mother Janaki was the lawfully wedded wife of Tirumalai. The only record of what happened in the trial Court that is available to us is what the learned trial Judge himself has embodied in his judgment. The plaintiff's counsel in the trial Court referred to *Pachai Pillai* v. *Gopala Pillai*[1]. The learned trial Judge observed,

"It was there held that before the illegitimate sons of a Sudra can succeed to his estate, they must show that connection between their parents was not adulterous. This may be so; but in this case, admittedly, the sixth defendant is not entitled to any right of inheritance; all that he can claim is a right to maintenance and so far as his right to maintenance is concerned, it is well-established law that even an offspring by adulterous and incestuous intercourse is entitled to maintenance from the father's estate as well as from the estate of the coparcenary of which the father was a member."

The learned trial Judge apparently decided that it was unnecessary to go into the question, whether it had been proved that the union between Janaki and Tirumalai was neither adulterous or incestuous.

In this appeal the sixth defendant reiterated his claim, that even as the illegitimate son of Tirumalai and Janaki, he was entitled to a share in the property of the family of which his father had been a member.

The questions that remain for determination are (1) Is the sixth defendant the illegitimate son of Tirumalai by his permanently kept woman? and (2) Is the sixth defendant entitled to a share in the properties involved in this suit, or is he only entitled to maintenance therefrom?

No serious attempt was made by the respondent in the appeal to challenge the correctness of the finding of the learned trial Judge, amply supported by the evidence on record, that the sixth defendant was the illegitimate son of

1. (1921) 42 M.L.J. 276.

Tirumalai, and that his mother, Janaki, was the permanently kept concubine of Tirumalai.

Point No. 2:—Mr. Rajagopalan, learned counsel for the plaintiff, had the advantage of representing the plaintiff, both in the trial Court and before us in appeal. He contended that, as the sixth defendant abandoned his claim to a share in the properties of the family after the examination of D.W. 2 in the trial Court and limited his (sixth defendant's) claim at that stage to maintenance from the properties of the family, the sixth defendant was not entitled at this stage in appeal to revive his claim to a share in the family properties. The appellant's advocate urged that no stage in the trial Court did the sixth defendant abandon his claim to a share in the properties of the family. It should be quite obvious from the wording of issue 4 that at least upto that stage there was no abandonment of a claim to a share in the properties. Even apart from the fact, that no affidavits were filed by either side, to indicate what precisely happened in the trial Court we can only look to the record in this case to find out what did happen, and as we have pointed out, the only record that can help us to determine that question is the statement of the learned trial Judge himself in the judgment. Unfortunately that statement does not by itself establish that there was a specific abandonment by the sixth defendant of his claim to a share in the properties of the family. It is on that basis we have to proceed in investigating now on the evidence on record whether the sixth defendant's claim to a share is well-founded.

No doubt it is well settled that, before an illegitimate son of a Sudra can establish a claim to a share in the properties of his putative father, it must be shown that the son was born of a union neither adulterous nor incestuous. See *Pachai Pillai* v. *Gopala Pillai*[1], in which the learned Judges followed a decision of the Full Bench in *Soundararajan* v. *Arunachalam Chetti*[2]; but, were the claim of the illegitimate son limited only to maintenance, there should be no need to prove that the union between his mother and his putative father was neither adulterous nor incestuous.

The learned counsel for the plaintiff-respondent contended that the burden lay upon the sixth defendant, who claimed a share in the properties, to establish that the union between Janaki and Tirumalai was neither adulterous nor incestuous. In *Pachai Pillai* v. *Gopal Pillai*[1], there was no occasion for the learned Judges to go into the question of the burden of proof; nor was there any occasion to go into that question in *Soundararajan* v. *Arunachalam Chetti*[2]. The question of burden of proof came up specifically for decision in *Palani Ammal* v. *Kuppusami Goundan*[3], Sadasiva Aiyar, J. after pointing out that adultery was an offence punishable under the Penal Code in India, observed that, as the law always presumed innocence both in civil and criminal cases, the presumption was that the connection was not adulterous. It therefore rested on the person who pleaded that the connection was adulterous to prove it. There was no such specific plea in the plaint; certainly there was no proof. No doubt, incest as such is not on a par with adultery under the Criminal law of India; there can be no question of presumption. In *Palani Ammal* v. *Kuppusami Goundan*[3], Sadasiva Aiyar, J., pointed that no question of incest could arise there as the parties belonged to different sub-sects. In the present suit Tirumalai Chetti was described as a Telugu Chetty. In the particulars furnished by the sixth defendant on a call from the plaintiff Janaki was shown as a widow born of Yadava parents. The sixth defendant's claim was not specifically contradicted by the plaintiff or by any of the other parties to the suit at any stage in the trial Court, nor was any evidence offered to prove that that claim of the sixth defendant was not true. On the material

1. (1921) 42 M.L.J. 276.
2. (1915) 29 M.L.J. 793: I.L.R. 39 Mad. 136 (F.B.).
3. (1921) 13 L.W. 511.

on record we have no hesitation in coming to the conclusion, that no question of incest could arise in this case. To sum up there was no proof that the union between Tirumalai and Janaki was adulterous; there was no proof that it was incestuous.

In deciding whether the sixth defendant is entitled to a share in the properties of the family, the real question for determination is, whether, after the death of Tirumalai, a Sudra father, the sixth defendant, his illegitimate son born of a permanently kept concubine, the union not having been adulterous or incestuous is entitled to a share in the properties of the family of which Tirumalai was an undivided (*avibhakta*) co-parcener when he died. That question we have no hesitation in answering in the negative.

The question is really concluded by the authority. In *Rathnasabapathi Odayar* v. *Gopala Odayar*[1], Devadoss J., observed at page 708,

"After a careful and anxious consideration of the original texts and the decided cases, I hold that the illegitimate son of a Sudra does not acquire by birth an interest in the property of his putative father's father and therefore cannot get the father's share if the putative father dies undivided from his brother or brother's sons or other collaterals."

It should, however, be remembered that in that case the claim was by an illegitimate son, who figured as the plaintiff, for partition of the properties of the family of which his putative father had been an undivided member. It should also be noted that the putative father of the claimant in that suit had no legitimate son.

That the presence of a legitimate son should not make any real difference in principle was what was held in the earlier case in *Gopalaswami Chetti* v. *Arunachalam Chetti*[2]. In that case the illegitimate son of a deceased Chetti sued the adopted son and the brother of his late father for a share in his father's estate, and in the alternative for maintenance. The Court held that the claim for a share must fail as it was not shown that the deceased had left any separate or self-acquired property. It was also held that inasmuch as the plaintiff's father had predeceased his father and brother, the plaintiff could claim no share as against his grandfather and uncle; and, as he was illegitimate, he could not represent his father in the undivided family. The learned Judges observed at page 35:

"It is true that in none of the reported cases on the point did there exist, as in the present case, along with the illegitimate son, a legitimate son, by birth or adoption—of the deceased 'Avibhakta' or undivided father. But that circumstance cannot make any difference in principle inasmuch as the special rule of inheritance in favour of the illegitimate son of a Sudra, along with his legitimate brothers, provides that, in the absence of legitimate brothers, the illegitimate son may inherit the whole property in default of daughter's son of the deceased. This clearly shows that the Sudra father therein contemplated is one that was divided from his ancestors and collaterals."

It is no doubt true that both in *Gopalaswami Chetti* v. *Arunachalam Chetti*[2], and in *Rathnasabapathi Odayar* v. *Gopala Odayar*[1], as well as in *Nagaratnammal* v. *Chinnusah*[3], the claim for partition was put forward by an illegitimate son who figured as the plaintiff in the suit. This is a suit by one of the co-parceners of the family for partition. The learned advocate for plaintiff-respondent pointed out that every claimant in such a suit for partition was in the position of a plaintiff. Whether a claimant figured as plaintiff or as defendant in a suit for partition could make no real difference. The real question for determination in this appeal is whether the sixth defendant is entitled to a share in the properties of the family of which his putative father, Tirumalai, was an undivided member.

1. (1928) 56 M.L.J. 673.
2. (1903) I.L.R. 27 Mad. 32.
3. (1927) 53 M.L.J. 861.

The learned advocate for the appellant referred us to *Jogendra Bhupati Hurrochandra Mahapatra* v. *Nityanand Man Singh*[1]. Their Lordships of the Privy Council who decided that case approved of the decision in *Sadu* v. *Baiza*[2]. Their Lordships held that under the Mitakshara, among Sudras, where a father left a son by a wedded wife and an illegitimate son, the ordinary rule of survivorship incidental to a family coparcenary applied; and the illegitimate son having survived the legitimate, was entitled by survivorship to succeed to the family estate on the death of his brother without male issue. That, however, is not sufficient to hold that an illegitimate son in the position of the sixth defendant is a co-parcener with his putative father and with the latter's collaterals, that is, a coparcener in every sense of the term. No question of collaterals arose either in *Jogendra Bhupati Hurrochandra Mahapatra* v. *Nityanand Man Singh*[1], or in *Sadu* v. *Baiza*[2]. In *Rathnasabapathi Odayar* v. *Gopala Odayar*[3], at page 696, Devadoss, J., pointed out that in *Karuppa Goundan* v. *Kumarasami Goundan*[4], the learned Judges were not prepared to extend the principle laid down in *Jogendra's case*[1], to the case of collaterals in the face of the rulings of this Court in *Krishnayya* v. *Muthuswami*[5], and *Ranoji* v. *Kandoji*[6]. Again at page 698, the learned Judge pointed out that in *Viswanathaswami Naicker* v. *Kamu Ammal*[7], Miller and Rahim, JJ., were not prepared to hold that the illegitimate son was a coparcener with his father's collaterals. At page 695, Devadoss, J., summed up the position,

"The illegitimate son of a Sudra is not a coparcener with his father though he may be a coparcener with his father's legitimate son. In order to get a share of the grandfather's property along with the father's brother or brother's sons, he must have acquired by birth an interest in the grandfather's property."

With these observations we respectfully agree.

The position was made even more clear in *Vellayyappa Chetti* v. *Natarajan*[8]. At page 15, their Lordships of the Privy Council observed,

"On a consideration of the texts and the cases on the subject their Lordships are of opinion that the illegitimate son of a Sudra by a continuous concubine has the status of a son, and that he is a member of the family; that the share of inheritance given to him is not merely in lieu of maintenance, but in recognition of his status as a son; that where the father has left no separate property and no legitimate son, but was joint with his collaterals, as in the present case, the illegitimate son is not entitled to demand a partition of the joint family property in their hands, but he is entitled as a member of the family to maintenance out of that property; that his position in this respect is analogous to that of widows and disqualified heirs to whom the law allows maintenance because of their exclusion from inheritance and from a share on partition."

As we have already pointed out, the presence of a legitimate son of the putative father aurasa or adopted, should make no real difference in principle.

In a clear exposition of the law on the subject in Mayne's Hindu Law and Usage, the learned author observed at page 649,

"An illegitimate son is not a coparcener with his father or his coparceners or even with his own legitimate brothers in respect of the joint family estate. It is settled that the text of Yagnavalkya declaring the rights of an illegitimate son refers only to estate of a separate householder. But when a legitimate son and an illegitimate son succeed to their father's separate estate, they take as coparceners with mutual rights of survivorship."

We hold that though the sixth defendant is the *dasiputra* of Tirumalai, born of a union which was neither adulterous nor incestuous, the sixth defendant is not entitled to a share in the properties of the family of which Tiru-

1. (1890) L.R. 17 I.A. 128 : I.L.R. 18 Cal. 151 (P.C.).
2. (1878) I.L.R. 4 Bom. 37 (F.B.).
3. (1928) 56 M.L.J. 673 at page 696.
4. (1901) I.L.R. 25 Mad. 429.
5. (1883) I.L.R. 7 Mad. 407.
6. (1885) I.L.R. 8 Mad. 557.
7. (1912) 24 M.L.J. 271.
8. (1931) 61 M.L.J. 522 : I.L.R. 55 Mad. 1 (P.C.).

malai was an undivided member at the time of his death. It was quite possibly the realization of this position in law that impelled the sixth defendant's counsel in the trial Court to press the claim for maintenance, though, as we have already observed, there was no clear and unequivocal indication that the claim for a share in the properties of the family was specifically abandoned.

The learned advocate for the appellant urged that, whether or not the sixth defendant could claim a share in the properties which belonged to the coparcenary, which on the eve of the suit for partition consisted only of the plaintiff and defendants 1 to 4, the sixth defendant could claim a share in whatever share was allotted to the plaintiff, who could and did represent Tirumalai's branch of the family. As we have already pointed out, the specific claim that the sixth defendant put forward in paragraph 5 of his written statement was to a share in the properties of his putative father Tirumalai Chetti. The learned trial Judge was not called upon to investigate the question, whether, if the plaintiff succeeded in getting his share of the properties in the coparcenary of which the plaintiff was a member the sixth defendant as the illegitimate son of Tirumalai Chetti could claim a share in the properties allotted to the plaintiff in this suit. Virtually, what the sixth defendant claimed in this suit was a share in the properties of the coparcenary. His claim was not to what was Tirumalai's property but for a share in what could have been Tirumalai Chetti's property, had Tirumalai Chetti been divided in status from his brothers.

To sum up, we have no hesitation in negativing the claim of the sixth defendant to a share as such in the properties of the family of which Tirumalai Chetti was an undivided member.

As the illegitimate son of Tirumalai Chetti the sixth defendant was rightly allowed maintenance by the learned trial Judge. The quantum of maintenance was left over for determination at the stage of the final decree and we are not concerned with that now.

The appeal fails and is dismissed with costs—one set of advocate's fees to be apportioned between the contesting respondents.

V.P.S. *Appeal dismissed.*

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Allahabad.)

PRESENT:—LORD SIMONDS, LORD MORTON OF HENRYTON AND SIR MADHAVAN NAIR.

Durga Prasad and another .. *Appellants**

v.

Ghanshiam Das and others .. *Respondent.*

Hindu Law—Joint family business and branch firms started with a nucleus of joint property—Separation—Onus of proof.

Where it is established that an old family firm was joint and that the branch firms started with a nucleus of family property, were also joint, it is the task of a member alleging a separation to prove it. Where there are incidents and transactions which point more or less strongly to a separation having taken place at some time, if they are susceptible of explanation the opposite conclusion can be reached on the balance of evidence. As a determining factor of the whole case the question of onus only arises if the Court finds the evidence so evenly balanced that it can come to no definite conclusion. A definition of shares in Khewats or other revenue papers can be regarded as only a very slight indication of title as it is not the function of the officer who compiles such papers to decide questions of title.

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* 6th April, 1948.

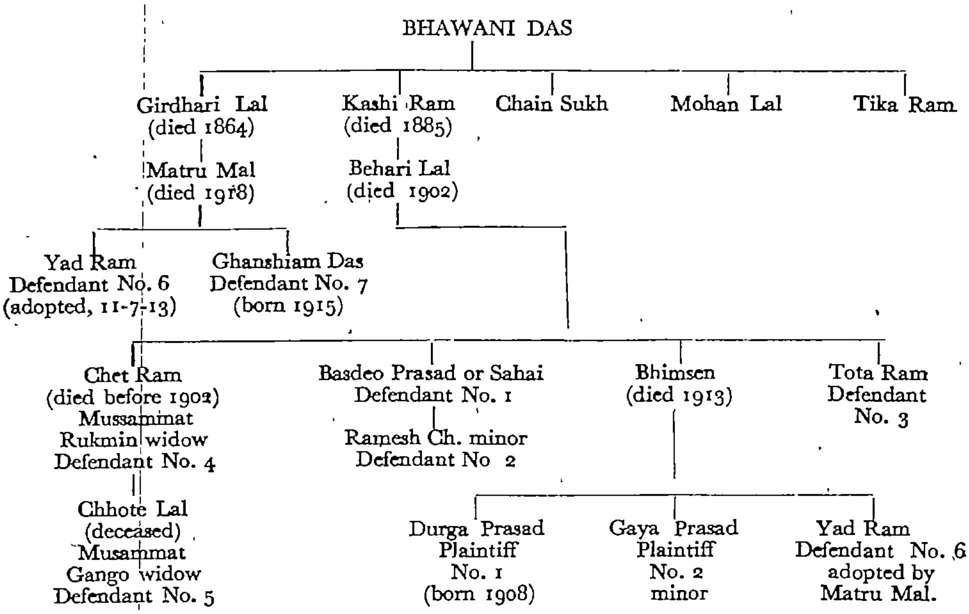
A. G. P. Pullan, J. M. R. Jayakar and *Dingle Foot* for Appellants.

C. S. Rewcastle, S. P. Khambatta and *Hon. Gavin Simonds* for Respondents.

Their Lordships' Judgment was delivered by

LORD SIMONDS:—These consolidated appeals from a judgment and decree of the High Court of Judicature at Allahabad, which varied a judgment and decree of the Subordinate Judge at Aligarh, have involved the close scrutiny of a large number of documents covering a long period of years. In this task their Lordships have been greatly assisted by the diligent researches of Counsel for the appellants, but after a careful consideration of all the material before them they have come to the conclusion that no sufficient reason has been shown for displacing the judgment of the High Court.

The appeals raise the question in the broadest outline whether there has been a separation of an undivided Hindu family of which the common ancestor was one Bhawani Das, who died very many years ago. The family and the parties to the suit out of which these appeals arise can be conveniently seen in the following pedigree:—



Of the facts which are stated in the pedigree, their Lordships take particular note of the circumstance that the respondent Ghanshiam Das was not born until 1915 and that prior to his birth the appellant Yad Ram had been adopted by Matru Mal who was then without male issue. Yad Ram was the natural son of Bhimsen who was the son of Behari Lal who was the son of Kashi Ram, and thus belonged naturally to the other branch of the family from that of Ghanshiam Das who descended from Girdhari Lal.

In the year 1933 the present suit was commenced by the appellants Durga Prasad and Gaya Prasad and a third plaintiff who subsequently disappeared from the proceedings. Every member of the family was made a party to the suit and they were conveniently grouped into five sets of defendants: (1) Basdeo Sahai and his son Ramesh Chander (defendants 1 and 2), (2) Tota Ram (defendant 3), (3) Musammat Rukman Kunwar and Musammat Gango (defendants 4 and 5), (4) Yad Ram and Ghanshiam Das (defendants 6 and

7) and (5) Sri Thakur Murli Manoharji Maharaj (defendant 8) whose rights are no longer in dispute.

By their plaint the plaintiffs pleaded *inter alia* that (*a*) during the time of Bhawani Das Girdhari Lal and his brothers there was no family property or fund and that Matru Mal, Kashi Ram and Bihari Lal acquired property and collected funds by their own efforts, (*b*) that Matru Mal adopted Yad Ram and executed a will on 17th December, 1913, whereby he bequeathed his property in equal shares to Yad Ram and to his natural son, if any, born to his second wife, and that thereafter Ghanshiam Das was born so that he and Yad Ram became the owners of Matru Mal's property in equal shares, (*c*) that both Bihari Lal and Matru Mal carried on a separate money-lending business, the former under the style of Kashi Ram-Bihari Lal and the latter under the style of Girdhari Lal-Matru Lal and that in addition they carried on a joint business under the style of Kashi Ram-Matru Mal of which they were joint owners in equal shares, (*d*) that since the death of Matru Mal in 1918 all three concerns had been managed and supervised by Basdeo alone, (*e*) that the family of the plaintiffs and the defendants 1 to 5 had remained joint and defendant 1 (Basdeo) was the manager and supervisor thereof, (*f*) that by reason of the dishonest dealings of Basdeo and his failure to render accounts the plaintiffs did not wish to remain joint and claimed partition, (*g*) that defendants 4 and 5 were entitled only to maintenance but, as some of the Zamindari properties stood recorded in the Revenue Papers against their names "for their conclusion", they too had been impleaded, (*h*) that defendants 6 and 7 (Ghanshiam Das and Yad Ram) were entitled to a moiety share in the joint property and the money dealing of Matru and Bihari Lal and (*i*) that in 1911 Matru Mal had constructed a temple and given some of the Zamindari property out of his half share in the Zamindari to defendant 8.

By their plaint the plaintiffs divided the property into three schedules—

(*a*) Property owned by the plaintiffs and defendants 1, 2 and 3 as descendants of Bihari Lal, of which the plaintiffs claimed one-third.

(*b*) Property owned by Ghanshiam Das and Yad Ram as to one-half and by the plaintiffs and defendants 1, 2 and 3 as to the other half, of which the plaintiffs claimed one-sixth.

(*c*) Property of which Ghanshiam Das and Yad Ram and defendant 8 or defendant 8 alone was owner as to one half and the plaintiffs and defendants 1, 2 and 3 as to the other half of which the plaintiffs claimed one-sixth.

It was urged upon their Lordships, and there is much upon the face of the plaint to support the contention, that at this stage of the proceedings the plaintiffs proceeded upon the assumption that at some time the two branches of the family deriving from Girdhari Lal and Kashi Ram respectively had divided and that the business latterly known as Kashi Ram-Matru Mal was owned by the two branches in partnership in equal shares. It was perhaps for this reason that the plaintiffs did not think it necessary to plead with any particularity how or when the partition had taken place. They, it was said, regarded the dispute between themselves and Basdeo, another member of their own branch, as the only material issue and their joinder of Ghanshiam Das and Yad Ram was little more than formal. But whether or not this assumption was made and whatever the justification for it, it could no longer be properly made after Ghanshiam Das had by his guardian put in his written statement and particularly his somewhat belated supplementary written statement of December 16, 1932, by which he pleaded

"The entire business of the family of the plaintiffs, defendants' 1st and 2nd parties and the contesting defendant has been carried on from this very ancestral fund and the

entire property has been acquired from this very ancestral fund in different shapes. The business and money-lending, etc., no matter in whose name they are carried on and the property, no matter in whose name they have been purchased, all belong to the joint family, in which the contesting defendant owns a moiety share''.

From this moment it was clearly incumbent on the plaintiffs to establish affirmatively a division between the two branches of the family and, as will be seen, they have failed in the opinion of the High Court to do so. The claim of Ghanshiam Das to own a ''moiety share'' in the joint property rested on his refusal to admit that Yad Ram had been validly adopted by Martru Mal. That is a matter no longer in dispute. But it has remained in dispute whether Yad Ram is entitled to one-half or one-quarter of the moiety belonging to Matru Mal's branch of the family. If the plaintiffs are right in their contention that at some date, which, however uncertain, must have been before Matru Mal's will, a division took place, then Matru Mal was competent to dispose of the property of which he purported to dispose, his will operated according to its tenor, and Yad Ram is entitled to one-half; if, on the other hand, there was not a division and Matru Mal was not competent to dispose of property which *ex hypothesi* was still joint, then Yad Ram was under Hindu law entitled to one-quarter only of the share, the other three-quarters being taken by Ghanshiam Das, the natural son of Matru Mal. It is for this reason, no doubt, that Yad Ram has throughout the proceedings, including these appeals, allied himself to the plaintiffs.

To the written statements of the other defendants it is unnecessary to refer in detail. It is sufficient to say that, while upon the issue whether there had been a division between the two branches of the family there was no general opposition to the plaintiffs, the sources of dispute between the members of the plaintiff's branch of the family appear to have been numerous and complex. These matters are irrelevant to the present appeals. It may, however, be noted that specific reference was made to a partition of certain shops which took place in 1911 between Matru Mal on the one side and Basdeo, Bhimsen and Tota Ram on the other side, a transaction which, whatever its true significance, appears to have led the learned Subordinate Judge to a conclusion which was not supported in the High Court or before their Lordships.

Upon the pleadings a number of issues were framed of which only three need be mentioned:—

1. Are the plaintiffs and defendants 1st and 2nd parties (defendants 1 to 3) and defendant 7 not members of the joint Hindu family and did any partition take place between them, if so, when? Are the plaintiffs entitled to have any of the properties partitioned?

2. Is the firm Kashi Ram-Matru Mal a joint Hindu family firm or is it a mere partnership firm?

3. What are the respective shares of the parties in different properties in suit and how is the partition to be effected?

It is, as their Lordships think, unfortunate that the issue of partition was not framed with greater precision, for this, if for no other, reason, that their Lordships have not the advantage of the views of the learned Subordinate Judge upon the contention which has been strenuously and cogently argued before them that the partition took place at some date in or about the year 1885. Whether or not this contention was raised before the learned Judge, their Lordships are not in a position to say. There is at least no trace of it in his judgment. On the contrary, after a consideration of the oral evidence and the documents which were voluminous he held

that there was a partition between Matru Mal on the one hand and Bhimsen, Tota Ram and Basdeo Sahai on the other hand on the 2nd October, 1911.

That there was such a partition of certain items of property on that date is beyond doubt. But the judgment of the learned Judge and the decree that was

based on it make it clear that he for some reason regarded the partition of all the family property as having taken place at that time.

From the judgment and decree of the learned Judge several appeals were preferred to the High Court at Allahabad. The appeal with which their Lordships are at present concerned was that of Ghanshiam Das who claimed in the words of his first ground of objection that it was

"amply proved from the evidence on the record that the family to which the parties belong is still joint and the finding of the Court below that a partition took place between Matru Mal on one side and Basdeo Sahai and others on 2nd October, 1911, is against the weight of evidence on the record and the plaintiffs have altogether failed to prove the same."

Upon this question the High Court after a penetrating and exhaustive examination of all the relevant facts and documents came to a clear conclusion. In the first place they rejected the finding of the learned Subordinate Judge that a partition of the family property took place on 2nd October, 1911, holding that this finding was not in accordance with the pleading of any party and that it was not supported by any evidence. They then proceeded to consider the case which, as they said, had been put before them on appeal by learned Counsel for all parties except Ghanshiam, "namely that Matru Mal separated about 1885", and upon this the first conclusion to which they came is worth citing verbatim.

"In spite of the suppression of many of the books of the family (for which the plaintiffs and Tota Ram blames Basdeo and for which Basdeo blames the plaintiffs and Tota Ram) there is abundant evidence to show that Kashi Ram-Matru Mal was merely the continuation of the ancestral business which was going on from 1832 under the name of Bhawani Das Girdhari Lal and that it was not a new business begun by Kashi Ram and Matru Mal".

Next they considered the origin and status of the two so-called branch firms of Girdhari Lal-Matru Mal and Kashi Ram-Behari Lal and upon the evidence came to the conclusion of fact that each of these firms was started with joint family property, whence followed the conclusion of law that the property acquired by each of these firms was joint family property. From these conclusions which are supported by adequate evidence their Lordships see no reason for dissenting and they concur in the view which has been urged upon them by learned Counsel for the respondent that a disclosure of all the books of family accounts might well have placed beyond doubt not only that the conclusions already stated were correct but also that no separation had taken place. It was contended on behalf of the appellant Yad Ram that he at least had not been implicated in any suppression of books, but his interest lay with those who were responsible for the suppression and he must suffer with them.

The facts being established that the old family firm was joint and that the branch firms, having been started with a nucleus of family property, were also joint, it was the task of the plaintiffs and their allies to prove a separation. No special stress need here be laid on the question of onus. As a determining factor of the whole case that question only arises if the Court finds the evidence so evenly balanced that it can come to no definite conclusion, see *Robins* v. *National Trust Co.*[1]. In the present case, though there are incidents and transactions which point more or less strongly to a separation having taken place at some time, it appears to their Lordships, as it did to the High Court, that they are susceptible of explanation and that the balance of evidence leads to the opposite conclusion. It would be superfluous to rehearse the elaborate scrutiny to which every incident in the case has been subjected on the careful judgment of the High Court. In the present appeal, great stress was laid upon the acts of Matru Mal himself, the father of Ghanshiam Das, and particularly upon his endowment in 1911 of a temple in Purdilnagar and his adoption of Yad Ram in

1. (1927) A.C. 515 at 520.

1913 and upon the will that he made in the same year. It is not to be denied that these are factors from which, if they stood by themselves an inference could be drawn that at some time a separation had taken place. But the appellants' case was that a separation had taken place as long ago as 1885 or thereabouts and, insufficient and imperfect as the family records are, they create a general impression which is not to be displaced by the conduct of Matru Mal nor by the fact, also relied on by the appellants, that the terms of his will were acted on by Basdeo and other members of that branch of the family. In this connection it is not to be forgotten that Matru Mal was Karta of the family and that, if he did not always act within the strict limit of his legal right under Hindu law, acquiescence by the other members of the family would not be unusual.

One other category of documents may be mentioned. The appellants relied upon the fact that in certain Khewats, in which Matru Mal and Bihari Lal had been registered as sharers in equal shares upon the death of Bihari Lal, his sons, Basdeo Sahai, Bhimsen and Tota Ram (and in some cases also the widows of a son and grandson) were registered as the transferees of his share "by right of inheritance". It was rightly pointed out that such language is inappropriate to a transfer upon the death of a member of an undivided family. But their Lordships would repeat what was said in *Nageshar Baksh Singh* v. *Ganesha*[1], at pp. 69, 70, that a definition of shares in Khewats or other Revenue Papers can be regarded as only a very slight indication of title: it is not the function of the officer who compiles such papers to decide questions of title. In particular the nice distinction which arise upon an issue whether or not there has been a separation are not for their determination. Thus, one by one, the documents on which the appellants rely can be examined and, though their cumulative weight may be considerable, there still remain the formidable facts, to which reference has already been made, and these are the more formidable because, through no fault of the respondents but by the deliberate act of one or more of the appellants, documents, which might have made the story clear, have been withheld. Nor can it be ignored that the appellants did not, as they should have done, at an early stage formulate exactly how and when the partition alleged by them took place, but left it to emerge from such oral evidence as might be given and such documents as they themselves thought fit to disclose.

On the whole, therefore, in this difficult and complex case, their Lordships concur in the judgment of the High Court. The appeals of (1) Durga Prasad and Gaya Prasad and (2) Tota Ram (now represented by Musammat Har Piari) and (3) Lala Yad Ram fail and must be dismissed. A fourth consolidated appeal (No. 33 of 1939) was not proceeded with and must also be dismissed. Two other matters may properly be mentioned. The first relates to the maintenance now payable to Musammat Gango, the widow of Chhote Lal, a son of Chet Ram, who was a brother of Basdeo, Bhimsen and Tota Ram. This maintenance which had been fixed by the Subordinate Judge at Rs. 51 per month was under his decree payable by the plaintiffs and by the defendants Basdeo and Tota Ram. This was clearly right. By the High Court the maintenance of Musammat Gango was increased to Rs. 80 per month but the increase appears to have been directed to be paid by the appellants Durga Prasad, and Gaya Prasad only. The reason for this apparent error is that they alone were made respondents to the appeal by Musammat Gango from the order of the Subordinate Judge, by which she asked (*inter alia*) that her maintenance might be increased. This appeal together with all the other appeals was disposed of by the High Court in one judgment and it appears to have escaped the notice of the Court that the parties were defective. Upon the present appeal, however, the appellants Durga Prasad and Gaya Prasad have taken the point

1. (1920) 38 M.L.J. 521 : L.R. 47 I.A. 57 : I.L.R. 42 All. 368 (P.C.).

and have submitted that the appeal by Musammat Gango was incompetent in that it failed to implead the other parties who had to share in the order to pay maintenance and that the order of the High Court should in this respect be set aside. At the hearing of the appeal it was contended in the alternative that the burden of increased maintenance should be directed to be borne equally in the same way as the original maintenance, and it was urged that the order of the High Court should be varied accordingly. Their Lordships cannot entertain this latter alternative. There is no trace in the formal case of these appellants that they proposed to ask for any order against Basdeo and Tota Ram or their representatives and it would not be proper that any such order should be made. That leaves the question whether it was competent for the High Court to make an order for increased maintenance against the share of Durga Prasad and Gaya Prasad only. It does not appear that this matter was argued, or indeed that the point was ever taken, before the High Court, and for this reason, particularly having regard to the trifling nature of the sum involved, their Lordships do not think that the order of the High Court should in this respect be varied.

The second matter which must be mentioned is the apparent discrepancy between the judgment of the High Court and the formal decree in Appeal No. 246 of 1933. Their Lordships have expressed their approval of, and concurrence in, the conclusions of the judgment. But they find it difficult to reconcile it in all respects with the terms of the decree. Inasmuch, however, as there has been no cross appeal by Ghanshiam Das, who must be presumed to be content with the decree, their Lordships do not think it right to make further comment upon it or to advise that it should be varied so as to conform more nearly with the judgment.

For the reasons above appearing their Lordships will humbly advise His Majesty that these appeals should be dismissed. The appellants in each of the appeals other than the fourth appeal must pay one-third of the costs of the respondent Ghanshiam Das of the consolidated appeals.

Solicitors for Appellants: *Barrow Rogers and Nevill.*

Solicitors for Respondents: *T. L. Wilson and Co.*

K.S. *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE GOVINDARAJACHARI.

Mulukulla Kumaraswami .. *Appellant**

v.

Ghantasala Mahalakshmamma and another .. *Respondents.*

Civil Procedure Code (V of 1908), Order 21, rule 90—Application to set aside sale on the ground of scaling down of decree subsequent to sale—Maintainability.

In deciding the question whether by reason of the scaling down of the decree subsequent to the sale in execution, the sale is liable to be set aside, the principle to be applied is to consider what would have been the position had the scaled down decree been passed by the Court in the first instance.

Where though there were three plots of land they were brought to sale as one plot without any objection and the decree was subsequently scaled down, in the circumstances it could not be said that if the decree had been scaled down prior to the date of the sale, there would have been no need to sell the property and as such it cannot be maintained that the subsequent scaling down of the decree rendered the sale invalid.

Case-law reviewed.

Appeals against the order of the District Judge, Kistna, in A.S. No. 355 of 1944 (A. S. No. 111 of 1944, Sub-Court, Bezwada) and A.S. No. 271 of

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* A.A.A.O. Nos. 51 and 128 of 1946. 8th April, 1948.

1944 (A.S. No. 72 of 1944, Sub-Court, Bezwada), respectively preferred against the order of the Court of the District Munsif of Bezwada in E.A. No. 1463 and 1462 of 1943, respectively in O.S. No. 107 of 1934.

B. Srinivasamurthi and *Ch. Raghava Rao* for Appellant.

P. Somasundaram for Respondents.

The Court delivered the following

JUDGMENT:—These are two appeals by father and son, judgment-debtors in O.S. No. 107 of 1934 on the file of the Court of the District Munsif of Bezwada. They arise out of two applications under Order 21, rule 90 of the Civil Procedure Code for setting aside a sale held on 20th June, 1941. The decree-holder was herself the purchaser. She purchased the properties in question which were sold as one lot for Rs. 1,010.

Applications were made in 1938 for the scaling down of the decree. The scaling down proceedings passed through several vicissitudes which it is unnecessary to follow.

At the time when the sale was held, and in fact at the time of the filing of E.P. No. 548 of 1940 in which the sale was held, the applications for scaling down stood dismissed and the amount due under the decree together with execution costs stood, according to the execution petition at the figure of Rs. 1,131-5-5.

By reason of certain orders of this Court and consequential orders passed by the Court of the Subordinate Judge of Bezwada, the decree was, subsequent to the sale, scaled down to Rs. 321-1-6 together with subsequent interest thereon at 6¼ per cent. per annum from 1st October, 1937 plus Rs. 248 which represented the amount of costs together with interest thereon at 5 per cent. per annum from 15th September, 1934. If the amount due on 20th June, 1941, *viz.*, the date of sale, is calculated in the light of the later orders scaling down the decree, it would appear that there would, at that time, be due from the judgment-debtors only Rs. 621 and odd.

The short point which arises in these appeals is whether by reason of the subsequent scaling down of the decree to the extent already stated, the sale is liable to be set aside. The principles governing cases of this description are laid down in two decisions of this Court in *Venkataswami Naidu* v. *Annappareddi Nagireddi*[1] and *Kuppa Sankara Sastri* v. *Kakumanu Varaprasad*[2]. In *Venkataswami Naidu* v. *Annappareddi Nagireddi*[1], Wadsworth and Patanjali Sastri, JJ., observed that,

> "the true criterion seems to be to consider what would be the position had the appellate Court's decree been passed by the Court of first instance. If the sale which has been held is one which would have been held even if the Court of first instance had decreed the amount eventually found due in appeal, there is no legal or equitable reason for setting aside that sale or ordering restitution."

In *Kuppa Sankara Sastri* v. *Kakumanu Varaprasad*[2], Wadsworth, J., followed the rule laid down in *Venkataswami Naidu* v. *Annappareddi Nagireddi*[1]. The application of that principle to the facts which arose before the learned Judge is significant. There, two items of property were sold in execution of a mortgage decree for Rs. 1,900 and Rs. 2,223, respectively, the preliminary decree being for Rs. 4,119-7-4. The decree was subsequently scaled down to a sum of Rs. 1,728-9-0 and Rs. 493 costs with subsequent interest amounting in all to Rs. 2,469. It was therefore apparent that even if the scaled down decree is taken into consideration, after the first item was sold for Rs. 1,900, there would still have remained an amount of approximately Rs. 569, due under the

1. (1946) 1 M.L.J. 5.   2. (1947) 1 M.L.J. 369.

decree. Though the second item realised, as already stated, Rs. 2,223, the sale of that item too was upheld because it was obvious that the decree as scaled down would not have been satisfied by the sale of the first item alone. In the present case though there were three plots of land they were brought to sale as one lot without apparently any objection. It could not be said that if the decree had been scaled down before 20th June, 1941, as it subsequently was scaled down, there would have been no need to sell the property. Applying the principle laid down in the two decisions already referrd to, it seems to me that it cannot be maintained that the subsequent scaling down of the decree rendered the sale invalid.

The decision in *Kuppa Sankara Sastri* v. *Kakumanu Varaprasad*[1], is also authority for the position that it is not open to an executing Court to refuse to execute the decree as it stands and that a sale held on foot of a decree which is not then scaled down but which ultimately turns out to be one which is liable to be scaled down, is not invalid as offending against section 7 of Madras Act IV of 1938.

Agreeing with the Courts below, I hold that the sale cannot be set aside on the ground which has been put forward. The appeals are accordingly dismissed with costs.

Leave to appeal is refused.

V.S. *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANCHAPAGESA SASTRI.

Ratnaswami Padayachi and others .. *Appellants**

v.

Kuppuswami Ayyar and others .. *Respondents.*

Civil Procedure Code (V of 1908), section 48—Last day of the twelve years period expiring on Sunday—Execution petition filed the next day—If barred—Applicability of the principle that a party should not suffer where he is prevented from doing a thing by the act of the Court.

A party should not suffer for the act of the Court and if a Court is not sitting on the last day when he should do any particular act he will be in time if he does it on the next day when the Court sits. This principle has been recognised by the provisions of the General Clauses Act and also by the express provisions of section 4 of the Limitation Act.

Held, applying this principle, that where the last day of the twelve years period fixed under section 48 of the Civil Procedure Code expired on a Sunday on which day the Court was closed and the execution petition was filed on the next day, it was in time.

Appeal against the order of the District Court, South Arcot, dated 30th November, 1946 in A.S. No. 314 of 1945, preferred against the order of the Court of the District Munsif, Chidambaram, dated 5th March, 1945, in E.P.R. No. 90 of 1943, in O.S. No. 289 of 1930, District Munsif Court, Pattukottai.

K. Srinivasan for Appellants.

A. V. Viswanatha Sastri for Respondents.

The Court delivered the following

JUDGMENT.—This second appeal arises out of the execution proceedings in E.P.R. No. 90 of 1943, on the file of the District Munsif's Court of Chidambaram in O.S. No. 289 of 1930, on the file of the District Munsif's Court, Pattukottai. The judgment-debtors are the appellants here. There was a decree

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1. (1947) 1 M.L.J. 369.

* A.A.A.O. No. 79 of 1947. 16th April, 1948.

against them for Rs. 1,200 and odd passed by the District Munsif of Pattukottai on 29th November, 1930. This decree was assigned over to the present first respondent, Kuppuswami Iyer. He had the decree transferred for execution to the District Munsif's Court, Chidambaram and filed E.P. R. No. 90 of 1943 therein on 30th November, 1942. The twelve years period fixed under section 48, Civil Procedure Code would expire by 29th November, 1942, but as it happened to be a Sunday on which the Court was closed the execution petition was filed on the next day. Objection was taken by the judgment-debtor that no order could be passed on the execution petition by reason of the provisions of section 48, Civil Procedure Code which provides for an absolute term of twelve years within which the execution petition should be filed. It was contended that there is no statutory provision which allows any extension of time beyond the period fixed in section 48 itself and the only exceptions are those which are recognised in that section itself. The District Munsif upheld the objection and dismissed the execution petition. On appeal the learned District Judge of South Arcot held that the execution petition was in time and ordered execution. This second appeal is filed by the judgment-debtors against the said judgment of the District Court.

It is argued by the learned counsel for the appellants that section 48 of the Civil Procedure Code does not provide for any extension of time except in the cases which are provided for in that very section and that the lower appellate Court was wrong in applying section 4 of the Indian Limitation Act or section 10 of the General Clauses Act or in relying on any general principle in favour of the decree-holder. Reliance is placed on the decision in *Subramaniam* v. *Nataraja*[1], where it was held that section 15 of the Indian Limitation Act cannot be availed of by a decree-holder to get over the bar of section 48 of the Civil Procedure Code which provides for a maximum period of twelve years only. It was held then that the period of twelve years aforesaid is not a period of limitation in the strict sense. It is further argued that it is really a condition precedent for a proper execution petition that it should be presented within the period of twelve years provided for in section 48 of the Civil Procedure Code and in that view the principle of the decision in *Chenchu Ramana* v. *Arunachalam*[2], applies to the present case. On the other hand the learned counsel for the respondents contends that section 4 of the Limitation Act would govern the present case and that even assuming that it is not applicable section 10 of the General Clauses Act would apply. In any event the decree-holder can rely on the well settled principle of law that where the parties are prevented from doing a thing in a Court on a particular day, not by any act of their own but by the act of the Court itself they are entitled to do it at the first subsequent opportunity. This principle has been frequently recognised and acted upon in several decisions out of which it is sufficient to refer to the decision in *Peary Mohun Aich* v. *Anunda Charan Biswas*[3], *Sambasivachari* v. *Ramaswami Reddi*[4] and *Sivarama Pattar Kanicker* v. *Krishna Iyer*[5].

The arguments before me have covered a wide ground and the learned Counsel on both sides have placed before me all the various aspects of the matter very elaborately. It is not, however, necessary to deal with the various contentions as in my opinion this second appeal can be disposed of on the application of the principle recognised in *Peary Mohun Aich* v. *Anunda Charan*

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1. (1922) 43 M.L.J. 168 : I.L.R. 45 Mad. 785.
2. (1935) 69 M.L.J. 283 : I.L.R. 58 Mad. 794 (F.B.).
3. (1891) I.L.R. 18 Cal, 631.
4. (1898) 8 M.L.J. 265 : I.L.R. 22 Mad. 179.
5. (1914) 26 M.L.J. 307.

Biswas[1], and followed by our Court in *Sambasivachari* v. *Ramaswami Reddi*[2]. In the present case we are concerned only with the question as to the effect of the Court being closed on the last day of the twelve years period. It is unnecessary, therefore, to deal with the wider question whether the twelve-year period fixed is a period of "limitation" and if so in what sense? There is a certain amount of conflict between the decisions in *Subramania* v. *Nataraja*[3] and *Kalyanasundaram* v. *Vaithilinga*[4]. In *Drigpal Singh* v. *Pancham Singh*[5], there is a full and elaborate discussion of the conflicting view points. It is not necessary to pursue that matter further in the present case. The principle that a party should not suffer for the act of the Court and that if there is no Court sitting on the last day when he should do any particular act he will be in time if he does it on the next day when the Court sits is too well established to be challenged now. That has been recognised by the provisions of the General Clauses Act and also by the express provisions of section 4 of the Indian Limitation Act. In the circumstances it is sufficient to rest this judgment on the application of that principle. In that view it follows that the decision of the learned District Judge is right.

The decision of the Full Bench in *Chenchu Raman* v. *Arunachalam*[6], bears no true analogy to the facts of the present case. There it was held that the period of three months provided by section 9 of the Provincial Insolvency Act is not a period of limitation for the presentation of a petition for adjudication as an insolvent but is a condition precedent for an *available* act of bankruptcy. On a proper construction of sections 7 and 9 of the Act, an act of bankruptcy ceases after the lapse of three months to be a valid ground of adjudication.

This appeal accordingly fails and is dismissed with costs of the contesting respondents. No leave.

V.S. —————— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Kotha Appa Rao .. *Petitioner**

v.

M. Mohammad Haneef .. *Respondent.*

Arbitration Act (IX of 1899), section 14 (2)—Award—Court passing decree on award before expiry of time for filing an application to set aside award—Decree passed without jurisdiction.

If a decree is passed by a Court on the award of an arbitrator before the expiry of the time for making an application to set aside the award, then such a decree should be deemed as passed without jurisdiction.

In a suit a reference was made for arbitration and when the award was received by the Court the pleaders of both parties were present while the defendant alone was absent and the Court forthwith passed a decree confirming the award, though the defendant's pleader asked for an adjournment.

Held, that the period of thirty days for filing objections not having expired the Court was not justified in passing the decree and therefore the matter should be remanded to the lower Court for adhering to the procedure under section 14 (2) of the Act.

Petition under section 115 of Act V of 1908, praying, that the High Court will be pleased to revise the decree of the Court of the District Munsif of Erode, dated 27th May, 1946, in O.S. No. 301 of 1944.

K. Desikachari for Petitioner.

T. L. Venkatarama Aiyar for Respondent.

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1. (1891) I.L.R. 18 Cal. 631.
2. (1898) 8 M.L.J. 265 : I.L.R. 22 Mad. 179.
3. (1922) 43 M.L.J. 168 : I.L.R. 45 Mad. 785.
4. I.L.R. 1939 Mad. 611.
5. I.L.R. 1939 All. 647 (F.B.).
6. (1935) 69 M.L.J. 283 : I.L.R. 58 Mad. 794 (F.B.).

* C.R.P. No. 1206 of 1946. 16th April, 1948.

The Court delivered the following

JUDGMENT.—A reference was made to arbitration in a suit. The award was received on the day when the Court re-opened after the summer vacation. The pleaders for the parties were present in Court and the plaintiff at once expressed his intention of accepting the award; but in the absence of the defendant, the defendant's pleader asked for an adjournment, which was refused. Upon his reporting no instructions, the award was accepted and a decree passed at once.

Even for arbitration in suits, the general rules relating to arbitration proceedings have to be followed as far as possible; so that it is necessary for an arbitrator to inform the parties that he has made the award; and it is the duty of the Court under section 14 (2) of the Act upon receiving the award, to inform the parties of its having been filed. Since the pleaders who represented the parties were present, we may take it that this direction was complied with by the District Munsif by informing the pleaders that it had been filed. The Court, however, had no right to pass the decree forthwith. Not apparently having found any reason for remitting the award or any part of it for reconsideration, it was its duty to pass a decree only after the time for making an application to set aside the award had expired. That period was thirty days under the Schedule to the Act. No time having been given at all, the decree was clearly passed without jurisdiction.

The petition is allowed and the suit remanded to the trial Court for dismissal after giving fresh notice to the parties and allowing thirty days to intervene before passing a decree to permit of the filing of an application to set aside the award. The costs of this petition will abide the result.

K.C. *Petition allowed.*

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Bombay.)

PRESENT:—LORD NORMAND, LORD MACDERMOTT AND SIR JOHN BEAUMONT.

Bhagwanji Morarji Goculdas .. *Appellant**

v.

The Alembic Chemical Works Company, Ltd. and others .. *Respondents.*

Partnership—Continuity of personality after change of members—Limits—Members then constituting firm or who may thereafter constitute it employed as managing agents of company—Provision that appointment was not liable to be revoked thereafter—Firm if can enforce the right when all the original partners who had entered into the contract had ceased to be its members—Companies Act (VII of 1913), *section* 87-B (*c*)*—Applicability.*

A company by its Memorandum of Association provided that the members who then constituted or who might thereafter constitute the firm of "K. A. and Company" were thereby appointed as secretaries, treasurers and agents of the company upon the terms contained in an agreement and it was expressly provided that the appointment should not be liable at any time thereafter to be revoked or cancelled. In case of change in the constitution of the firm by death, retirement or admission of new partners it was provided that a fresh agreement if necessary should be entered into by the company and the firm on the same terms. No such agreements were entered into and ultimately when the only remaining original partner had ceased to be a member of the firm the company alleged that the agreement had come to an end as the firm with which the company had entered into the agreement ceased to exist.

A new partner of the firm filed a suit against the company for damages for breach of the agreement.

Held, the new partner cannot enforce the rights, nor be rendered liable for the obligations of the firm arising under the agreement, as there was no privity of contract between the company and the firm as it subsequently existed.

The Partnership Act avoids making a firm a corporate body enjoying the right of perpetual succession. The fact that a firm under the Indian Partnership Act possesses

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*P.C. App. No. 73 of 1948. 23rd February, 1948.

a distinct personality does not involve that the personality continues unchanged so long as the business of the firm continues. Though for the purposes of the proviso to sub-clause (c) of section 87-B of the Indian Companies Act, persons who were partners, at the date of the commencement of the Amending Act (1936) may be in the position of "Original partners", it does not make them "original partners" for the purpose of the managing agents' agreement.

Sir Herbert Cunliffe, K.C. and *P. Quass* for Appellant.

D. N. Pritt, K.C., Gordon Brown and *B. Sen* for Respondents.

Their Lordships' Judgment was delivered by

SIR JOHN BEAUMONT.—This is an appeal from the Judgment and decree of the High Court of Judicature at Bombay, dated the 24th November, 1943, dismissing the appellant's appeal from the judgment and decree dated the 16th December, 1942, of Mr. Justice Chagla exercising original civil jurisdiction of the High Court.

In the suit out of which this appeal arises the appellant, who was plaintiff, claimed against the first respondent, The Alembic Chemical Works Company, Limited, (hereinafter referred to as "the Company") Rs. 9,00,000 damages for breach of an agreement of the 7th December, 1907, to employ the firm of Kotibhasker Amin and Company, of which the appellant claimed to be a member, as managing agents of the company.

The claim arises in this way. The Company was formed in the year 1907 and under clause 6 of the Memorandum of Association it was provided that the members who then constituted or who might thereafter constitute the firm of Messrs. Kotibhasker Amin and Company were thereby appointed secretaries, treasurers and agents of the company upon the terms contained in the agreement annexed to the Articles of Association, and it was expressly provided that in consideration of the services rendered by them in promoting the company, the appointment of the said firm as secretaries, treasurers and agents of the company should not be liable at any time thereafter to be revoked or cancelled on any ground or for any reason whatever, save and except their being found guilty of fraud in the management and discharge of their duties as such secretaries, treasurers and agents, and that the remuneration payable to the said firm should be as therein mentioned. Clause III of the Articles of Association was expressed in much the same terms and referred to the agreement thereto annexed and marked A.

The agreement referred to in the Memorandum and Articles of Association was dated the 7th December, 1907, and was made between the Company of the one part and Anant Shirdhar Kotibhasker, Bhailal Dajhibai Amin, Krishnalal Tribowandas Gajjar then a minor by his guardian Tribhowandas Kalyandas Gajjar and Moreswar Balchandra Bhatvabeker, carrying on business in Bombay under the name and style of Messrs. Kotibhasker, Amin and Company of the other part. The agreement so far as material provided that in consideration of the agreement of the Company thereinafter contained they, the four persons of the second part, promised and agreed on behalf of themselves and each of them and the members or member of the said firm of Messrs. Kotibhasker Amin and Company, for the time being, thereinafter referred to as the said firm (Clause 1) that they would faithfully and to the best of their ability perform the offices of secretaries, treasurers and agents of the said Company for the purpose of carrying on to the best advantage the business of the said company so long as the said company and the said firm should continue to carry on their respective business at the remuneration upon the terms and subject to the conditions thereinafter mentioned. (Clause 2). That in consideration of the agreement thereinbefore contained on the part of the said firm, and in further consideration of the said firm having promoted the said company, the company thereby promised and agreed with the said firm and its members or member for-

the time being that the said firm should be employed as, and should be the secretaries, treasurers and agents of the said company as long as the said firm and the said company should exist and continue to carry on the business either in the present or any name, and that such appointment should not be liable to be at any time revoked or cancelled on any ground or for any reason whatever except their being found guilty of fraud in the management and discharge of their duties of secretaries, treasurers and agents; and the said company thereby for itself and for its successors covenanted with the said four persons of the second part of the said firm severally and jointly that the said company should from time to time when the constitution of the said firm changed by death, retirement, admission of any new partner or otherwise, enter into a fresh agreement if necessary with the said firm and the partner or partners therein in the terms of agreement.

It was admitted by counsel for the respondents before the Board that the said managing agents' agreement was executed by the company after its incorpoporation, though that fact does not appear from the record.

The subsequent history of the constitution of the firm is as follows:—

In the year 1910 A. S. Kotibhasker died. In the year 1911 the said Bhatvabekar assigned his share in the firm to T. K. Gajjar. In the year 1910 T. K. Gajjar assigned his share to K. T. Gajjar, who already possessed one share. In 1920 K. T. Gajjar assigned his two shares to one N. Purushottam. In the year 1922 the said N. Purushottam assigned his shares to the appellant. The firm then consisted of the said B.D. Amin, one of the original partners, and the appellant. On the 5th October, 1939, the said B. D. Amin assigned his share in the firm to his son, the second respondent. It is not disputed that on the occasion of any change in the constitution of the firm notice of the fact was given to the company who recorded such fact in its minutes, but it is not alleged that on any of these occasions an express fresh agreement was entered into by the company with the reconstituted firm as contemplated in clause 2 of the managing agents' agreement.

On the 20th November, 1939, the company, by their attorneys, wrote to the firm alleging that since the 5th October 1939, when B. D. Amin, the only remaining original partner, assigned his share in the firm, the firm with which the company had entered into the agreement of the 7th December, 1907, ceased to exist, and that such agreement had come to an end, and informing the firm that the then firm of Kotibhasker, Amin and Company was not entitled to act as secretaries, treasurers and agents of he company and to be paid remuneration as such. After some correspondence between the parties this suit was filed on the 14th March 1940, by the appellant against the company, the second respondent, who was not willing to join as plaintiff, and certain parties whose position is not now material. The claim, as already stated was for damages for breach of the agreement of 7th December, 1907.

The learned trial Judge dismissed the suit primarily upon the ground that the firm of Kotibhasker, Amin and company existing at the commencement of this suit, and consisting of the appellant and respondent No. 2, neither of whom was a partner at the date of the managing agents' agreement, was not the same firm as that which had entered into such agreement, and that the appellant, not having been a party to such agreement could not enforce the rights, nor be rendered liable for the obligations, of the firm arising thereunder.

An appeal to the High Court in its Appellate Jurisdiction was dismissed substantially on the same ground. Their Lordships think that the decisions of the Courts in India upon this point were right.

Before the Board it was argued that under the Indian Partnership Act, 1932, a firm is recognised as an entity apart from the persons constituting it, and that the entity continues so long as the firm exists and continues to carry on its business. It is true that the Indian Partnership Act goes further than the English Partnership Act, 1890, in recognising that a firm may possess a personality distinct from the persons constituting it; the law in India in that respect being more in accordance with the law of Scotland, than with that of England. But the fact that a firm possesses a distinct personality does not involve that the personality continues unchanged so long as the business of the firm continues. The Indian Act, like the English Act, avoids making a firm a corporate body enjoying the right of perpetual succession. The agreement of the 7th December, 1907, was made between the company and four named individuals, and when all of those four individuals had ceased to be members of the firm, there was no privity between the company and the firm as it then existed.

In the Court of Appeal the appellant sought to raise a further point. It was contended that as the company had recognised B. D. Amin and the appellant as their managing agents from 1922 to 1930 it must be inferred that the company had entered into an agreement with the said B. D. Amin and the appellant to employ them as managing agents, upon the terms of the agreement of the 7th December, 1907. Thereupon the appellant asked for leave to amend the plaint by alleging an implied agreement made in 1922 between the company on the one hand and B. D. Amin and the appellant on the other, and claiming damages for the breach of such agreement. The Court refused, leave to amend, and the appellant has argued before the Board that such refusal was wrongful. In their Lordships' view the Court of Appeal in India was right to refuse leave to amend, since at the time when leave to amend was sought any claim under the alleged implied agreement would have been barred by limitation.

In the trial Court and before this Board some reliance was placed on section 87-B (*c*) of the Indian Companies Act. That sub-clause was introduced into the Companies Act by the Amending Act of 1936. The sub-clause renders a transfer of his office by a managing agent void unless approved by the company in general meeting but there is a proviso removing from the operation of the sub-clause any change in the partners of a managing agent's firm so long as one of the original partners continues to be a partner in such firm, and "original partners" are defined to mean, in the case of managing agents appointed before the commencement of the Amending Act, 1936, partners who were partners at the date of the commencement of the Act. So, for the purposes of the proviso, the appellant was to be regarded as an original partner. Their Lordships agree with the learned trial Judge that this section of the Companies Act has no application to the present case. It places the appellant in the position of an original partner for the purposes of the proviso, but does not make him an original partner for the purpose of the managing agents' agreement.

For these reasons their Lordships will humbly advise His Majesty that this appeal be dismissed with costs.

Solicitors for Appellants: *T. L. Wilson & Co.*

Solicitors for Respondents: *Hy. S. L. Polak & Co.*

K.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANCHAPAGESA SASTRI.

Vedachala Gramani .. *Petitioner**

v.

Sivasankari Ammal .. *Respondent.*

Civil Procedure Code (V of 1908), *Order* 22—*Death of a defendant—Widow added as legal representative in time—Will by the deceased leaving the suit property to his daughter—Subsequent application to add daughter—Earlier application* bona fide—*Bar of limitation.*

Pending the trial of a suit, one of the defendants died on 23rd November, 1946 and the plaintiff filed an application within the prescribed period to implead the widow of the deceased defendant as his legal representative, which was ordered on 27th February, 1947. During the course of the enquiry into this petition it appeared that the deceased defendant had left a will under which the suit property was bequeathed to his daughter, whereupon on the 10th of April, 1947, the plaintiff filed another application to implead the daughter also as a legal representative. That petition was dismissed on the ground that the delay between the two dates 27th February and 10th April, 1947, was not properly explained. In revision,

Held, that the order of dismissal was materially irregular as, in a case like this, where one person has been impleaded in time as a legal representative and it is found necessary later on to implead another person as the real legal representative and there is nothing to suggest that the earlier petition impleading the wrong person as the legal representative was not *bona fide,* there was no question of limitation as such which precludes the second petition being entertained and ordered by the Court.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge, Chingleput, dated 21st July, 1947, in I.A. No. 199 of 1947 in O.S. No. 90 of 1946.

G. Venkataraman for Petitioner.

S. V. Rama Aiyangar and *S. V. Ramaratnam* for Respondent.

The Court delivered the following

JUDGMENT:—The plaintiff Vedachala Gramani filed O. S. No. 90 of 1946 on the file of the Principal Subordinate Judge's Court, Chingleput, to set aside an order rejecting the petition for redelivery of properties from which he had been dispossessed by the first defendant in the action. Pending trial the first defendant died on the 23rd November, 1946 leaving behind him his wife Devaki Ammal and a daughter by name Sivasankari Ammal, wife of Sendilvelu Mudaliar of Sembiam. The plaintiff then filed an application to bring on record Devaki Ammal as legal representative of the deceased first defendant within three months from the date of death and the lower Court accordingly directed that the wife should be brought on record as the sixth defendant. During the course of that enquiry it appeared that Singaravelu Mudaliar had left a will in and by which the said property was bequeathed to his daughter Sivasankari Ammal. On the 27th February the widow was impleaded as the sixth defendant. The plaintiff filed another petition, I.A. No. 199 of 1947, to implead the daughter also as the legal representative by reason of her enjoying the property as legatee under the will of Singaravelu Mudaliar. This petition was filed on the 10th April 1947. It was supported by an affidavit wherein it was stated that the plaintiff came to know of the will and the bequest thereunder only on the 9th April 1947. The daughter to whom notice was ordered appeared and filed a counter-affidavit objecting to her being impleaded as defendant in the action on the ground that the petition was filed too late and that the plaintiff knew all along of the will of the deceased Singaravelu Mudaliar and the bequest in favour of the daughter. The lower Court has dismissed the petition on the ground that the delay between the 27th February

*C.R.P. No. 1618 of 1947. 12th April, 1948.

1947 and 10th April 1947 has not been explained properly and has observed further that every day's delay should be accounted for. The revision petition is against this order of the lower Court.

It is conceded for the respondent that the only objection to the petition is based on the unexplained delay between the 27th February and 10th April, 1947. The lower Court is wrong in thinking that each day's delay of the said period should be explained satisfactorily. This is really a case where the petitioner had two months time to set aside the abatement, if there was abatement at all. As a matter of fact there was really no abatement because there was a prior order impleading the widow as the sixth defendant. In a case like this where one party had been impleaded in time as a legal representative and it is found necessary later on to implead another person as the real legal representative and there is nothing to suggest that the earlier petition impleading the wrong person as the legal representative was not *bona fide*, there is no question of limitation as such which precludes the latter petition being entertained and ordered by the Court. The lower Court has therefore acted with material irregularity in the exercise of its jurisdiction and its order has to be set aside.

It is further contended by Mr. Rama Iyengar for the respondent that there was no stay of the trial of the suit as regards the other defendants during the pendency of the revision petition here and that the plaintiff had in fact obtained a decree against those defendants. He argues that this operates as a bar to the entertainment of the revision petition now and will preclude the plaintiff from proceeding with the trial against the daughter if she is now allowed to be brought on record as a supplemental defendant. I do not agree with this contention. The daughter is directed to be brought on record as the legal representative of the deceased Singaravelu Mudaliar and impleaded as seventh defendant. The trial will go on as against the seventh defendant who will have the usual opportunity of filing a written statement and contesting the suit in the ordinary manner. This revision is accordingly allowed with costs payable by the respondent.

V.P.S. ——— *Petition allowed.*

[PRIVY COUNCIL.]

(On appeal from the Calcutta High Court[1].)

PRESENT:—LORD SIMONDS, LORD NORMAND, LORD MORTON OF HENRYTON, LORD MACDERMOTT, SIR MADHAVAN NAIR AND SIR JOHN BEAUMONT.

The English and Scottish Joint Co-operative Wholesale Society, Limited .. *Appellant**

v.

The Commissioner of Agricultural Income-tax, Assam .. *Respondent.*

Income-tax—Society owning estate growing tea and manufacturing it—Sale to members—Profits derived from—Liability to income-tax—Assam Agricultural Income-tax Act, 1939.

An association, society or company which grows produce on its own land or manufactures goods in its own factories, using either its own capital or capital borrowed whether from its members or from others and sells its produce or goods to its members exclusively cannot claim exemption from liability to income-tax as a purely mutual co-operative society which could not make taxable profits out of its own component elements. If a society sells the tea grown and manufactured by it at a price which exceeds the cost of producing it and rendering it fit for sale, it has earned profits which are, subject to the provisions of the Assam Agricultural Income-tax Act, taxable profits.

New York Life Insurance Co. v. *Styles,* (1889) 14 A.C. 381, distinguished.

The English and Scottish Joint Co-operative Wholesale Society, Ltd. v. *The Commissioner of Income-tax, Madras,* (1929) 3 I.T.C. 385, overruled.

The English and Scottish Joint Co-operative Society, Ltd. v. *Commissioner of Agricultural Income-tax, Assam,* (1945) I.T.R. 295, affirmed.

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1. (1945) I.T.R. 295.

*P.C. App. No. 75 of 1946. 27th April, 1948.

Terence Donovan, K.C. and *S. C. Isaacs* for Appellant.

J. M. Tucker, K.C. and *B. Sen* for Respondent.

Their Lordships' Judgment was delivered by

LORD NORMAND.—The appellant a society incorporated in the United Kingdom under the Industrial and Provident Societies Act, 1893, submits to review in this appeal a judgment of the High Court at Fort William in Bengal[1] in a reference made under section 28 (1) of the Assam Agricultural Income-tax Act, 1939. By that judgment the High Court answered in the affirmative a question of law submitted by the Board of Agricultural Income-tax in relation to the assessment of the appellant for the year 1939-40. The question is "whether the society is chargeable to Assam Agricultural Income-tax in respect of the cultivation and—or manufacture of tea at its Deckiajuli Estate in the Province of Assam, and sold to its members." The question is neither grammatical nor intelligible as it stands, and the Statement of Facts omits to state some of the facts regarded by the parties as material for the decision of the question which the Board seems to have intended to submit.

That question emerges clearly enough from a consideration of the proceedings which took place while the company's assessment was under consideration. The Assam Agricultural Income-tax Act applies to all agricultural income derived from land situated in the province of Assam (section 5) and it provides by the charging section (section 3) that agricultural income-tax at the rate specified in the annual Assam Finance Acts shall be charged for each financial year on the total agricultural income of the previous year. The part of the definition section (section 2) which is relevant to the present case defines agricultural income as any income derived from land used for agricultural purpose by agriculture. The Indian Income-tax Act contains a definition of agricultural income in the same terms, but by a rule (rule 24) made under it, "income derived from the sale of tea grown and manufactured by the seller in British India shall be computed as if it were income, derived from business and 40 per cent. of such income shall be deemed to be income profits and gains liable to tax." The scheme of the Assam Act is to tax the remaining 60 per cent. only of the income derived from the sale of tea grown and manufactured by the seller in Assam and that result is secured by suitable provisions which need not be recited (see the explanation to section 2, the proviso to section 8 and rule 5 made under the Act). Under the Act appeals against assessment lie to the Assistant Commissioner of Agricultural Income-tax (section 24) and from him to the Commissioner (section 26). When a question of law arises in the course of any assessment the Asam Board of Agricultural Income-tax may, either of its own motion or on reference from any Agricultural Income-tax authority subordinate to it, draw up a statement of the case and refer it with its own opinion to the High Court (section 28).

The procedure which led to the reference under section 28 can be briefly summarised. While the assessment was under consideration the appellant petitioned the Board of Agricultural Income-tax, Assam, to state a case to the High Court. The petition stated that the appellant society was a co-operative society incorporated under the Industrial and Provident Societies Act of 1893 and that the tea produced on its estates belonged to and was distributed entirely to its members, except certain inferior grades of dust teas which were sold in the Calcutta market, and that no profit accrued by such sales as the prices obtained were below the cost of production. The petition also stated that the question of law was whether the appellant society, owning tea estates in Assam, the produce of which is distributed only among its members, is liable to assessment to Assam Income-tax. The Board refused the prayer of the petition, but subsequently

1. (1945) I.T.R. 295.

changed its view and of his own motion the Board member stated the present case. It is unfortunate that he neither consulted the parties about the facts which were necessary to raise the supposed question of law, nor about the formulation of the question of law itself. For some reason he rejected the formulation suggested in the petition and substituted a question of his own. As the accompanying statement of facts merely stated that the tea produced by the appellant society (apart from the dust tea) was sold to its members and said nothing of the price, it can be inferred that the Board member intended to submit the question whether a business carried on by a society or company, whether incorporated or not, which cultivates produce on its own land and sells it exclusively to its own members, is by its nature incapable of begetting profits as that term is understood in the Assam Agricultural Income-tax Act or, since there is no distinction on this point, the Indian or the United Kingdom Income-tax Acts.

It is unfortunate that this question is presented in an abstract and general way without any statement of facts setting out or summarizing the society's accounts for the year of computation. The statement of facts is also defective for, besides failing to refer to the price at which the tea was sold, it omits to mention certain loans made to the appellant society by its members to which the appellant's counsel attached much importance. This Board was urged by both parties to proceed with the appeal as if the statement of facts contained in the judgment of Gentle, J., in the High Court were substituted for the findings of facts in the submission. It is with reluctance that their Lordships would grant such an indulgence. But, taking into account the circumstance that the present case began not long after the Assam Agricultural Income-tax Act came into operation, and making allowance for the lack of experience which may have been the cause of the inadequate presentation of the case in the submission, they will accede to the parties' request.

The facts as stated by Gentle, J., are:—

"As previously mentioned the Society is incorporated in the United Kingdom under the Industrial and Provident Societies Act, 1893, it has an unlimited capital divided into shares of £5 each. It is non-resident in British India. Its objects, as set out in its Rules, *inter alia*, are: 'To carry on the business of planters, growers, producers, merchants and manufacturers and brokers of tea. The Society consists of two members, namely, the Co-operative Wholesale Society, Ltd. and the Scottish Co-operative Wholesale Society, Ltd. The Society owns the Deckiajuli Estate where it grows and manufactures tea. Except a small portion of produce, which is unfit for export and which is sold locally, the whole of the Society's output of tea is sold to its two members at market rates and is exported to England and Scotland. Each year the members of the Society pay, by way of advances to the Society, sums of money to meet the cost of tea to be supplied by the Society to the members. The market prices of the tea, with which the members are supplied, are debited against these payments. The supplies are recorded as sales to the members. Out of the proceeds from the sales, the expenses of production and management and the interest on loans are paid or provided.

By the Rules of the Society its net profits are applied: (*a*) In depreciation of land (except agricultural land and tea gardens), buildings, live and rolling stock; (*b*) payment of interest not exceeding 6 per cent. per annum on the share capital; (*c*) appropriation to a reserve fund; (*d*) appropriation to a special fund for making grants as determined in general meeting; (*e*) payment of a dividend to members rateable in proportion to the amount of purchases made by them from the Society; and (*f*) the remainder, if any, carried forward to the next account."

An argument was addressed to their Lordships by counsel for the appellant in which the advances made annually by the two members to the Society were treated as contributions by the members in cash which afterwards came back to them in kind when the tea was sold to them. This is a view of the transaction which their Lordships cannot accept. The advances were a loan to the Society for the purpose of enabling it to produce tea on its own land. When the tea was produced it was sold to the lenders, and the price was set-off against the amount of the loan. There was therefore a dual relationship be-

tween the appellant and its members; there was a mutual creditor-debtor relationship and there was a buyer and seller relationship. There was nothing notional about either of these relationships; they were not mere conventional machinery to give efficacy to a relationship which was in substance that of principal and agent. On the facts stated the members genuinely made a loan to the appellant; the appellant genuinely owned the land which it itself genuinely cultivated and it genuinely sold the tea at a genuinely market price to its members.

The statement of facts shows that in the ordinary sense of the word profits might well result, for the proceeds of the sales might and probably did exceed the expenses of production and management and the interest on loans; that profits would result was in fact contemplated and there are rules providing for the application of the net profits. These rules are made under the Industrial and Provident Societies Act, 1893, section 10, which contemplates that a society registered under the Act will be a profit-making concern and therefore requires that all societies registered under the Act shall make such rules. The application of net profits which may be made under the rules is in essentials not different from the application of net profits which might be made by any trading company, and it need not result in the distribution of all profits among the members of the society. Thus any net profits applied under heads (*a*), (*c*), (*d*) and (*f*) would be retained by the appellant society.

When the constitution, rules and business practice of the appellant society so closely conform to the pattern of an ordinary profit-making concern, how can it plausibly be maintained that no profits can result? The answer to this question is to be found, if anywhere, in a case under the Indian Income-tax Act decided in the High Court at Madras (reported in 3 Reports of Income-tax Cases, p. 385), in which it was held on facts indistinguishable from those stated by Gentle, J., in this case that this very society was a purely mutual co-operative society making no profits and, being within the ruling of *New York Life Insurance Co.* v. *Styles*[1], was not liable to be assessed to income-tax. It is on this decision that the appellants found their claim to exemption from the Assam Agricultural Income-tax Act. The High Court in the present case refused to follow the Madras decision and Gentle, J., after considering it, *Styles' case*[1] and other authorities, expressed himself thus:—

"In the view which I hold, the Society is a trading concern and carries on business as growers, manufacturers and sellers of tea; out of this business it derives profits; the dividends which it pays to its members are a distribution amongst them of its trading profit; and the payments of these dividends are not a return to the members of balances from the sums which they have subscribed to the Society. . . . The circumstance that the Society's produce is sold to its members does not affect the position and would not do so even if the Society were restricted to selling to its members alone."

In the Madras case the learned Chief Justice (3 Reports of Income-tax Cases at p. 396) expressed the opposing view, which is the view now supported by the appellant's counsel.

"Before the incorporation of the Society," he says, "there existed two large co-operative societies in Great Britain, one in England known as the Wholesale Co-operative Society Ltd., and the other in Scotland known as the Scottish Co-operative Society, Ltd. They were co-operative societies of the familiar type which deliver goods to their members on a system the object of which is to eliminate the profits of the middleman as between those societies and their individual members. The goods they were to distribute to their members the Societies had of course to purchase in the market. A portion of the goods so distributed were products of Southern India, notably tea. The idea then occurred that a further elimination of outside profits could be effected by producing their own tea and other products. Accordingly the Corporation now sought to be assessed was founded with the object of acquiring and working estates in various parts of the world including Southern India to supply the two original co-operative societies with the goods they required direct ....In fact the only shareholders in the English and Scottish Society are the two original

1. (1889) 14 A.C. 381.

co-operative societies registered in England and Scotland respectively and the object of the Society sought to be assessed is simply to run the estates, grow the produce required and ship it to the two component Societies which are its shareholders........The Society cannot make taxable profits out of its own component elements, and, with that starting point established, it is to my mind immaterial that the moneys that came into the hands of the 'Apex' Society are distributed in the form in part of a dividend to the shareholders so long as those shareholders do not include any person who is not a member of the co-operative society.''

He therefore concluded that the case fell within the principle of *Styles' case*[1].

The foregoing passage has been cited *in extenso* lest injustice should be done to it by condensing it in a summary. The learned Chief Justice has treated the motive for setting up the appellant society as material. There was in the case no finding about the motive, and the learned Chief Justice has assumed it; but motive is altogether irrelevant. The component members may have wished and intended that middlemen's profits should be eliminated, but the question is whether profits have in fact been earned by the appellant society which they set up. The learned Chief Justice has also failed to notice that tea grown on estates which belonged to the appellant society was not tea which the members could correctly describe as "their own tea". But the crucial part of the judgment is the affirmation that the society could not make taxable profits out of its own component elements. The proposition is derived by the Chief Justice from *Styles' case* (*cit. supra*)[1].

In *Styles' case*[1] and in the other cases in which the principle established by it was applied the business carried on by the company or society sought to be taxed was mutual insurance. The essence of that kind of business (with the exception of life insurance) is that a number of persons form an association which collects from the members contributions to a common fund which the members authorize the association to use for payments in indemnity of the losses assured against, for defraying the expenses of management, and for repayment to themselves of any balance. In life insurance business the association is authorized to use the common fund not for payments in indemnity of losses but for payment of sums payable on the death of a member. But in the nature of things there are no profits to be made out of a mutual arrangement to share losses, and there are no profits to be made out of a mutual arrangement to pay a sum to executors or assignees on the death of an associate. It is also to be observed that in *Styles'*[1] and similar cases the contributors to the common fund and the participators in it are two indentical bodies. The role of the association is to collect from the associates the contributions to the common fund and to make the payments from it in accordance with the contributors' mandate, and this mandate may be and usually is written into the constituent documents of the association, which may or may not be a corporation. The association is therefore no more than a convenient agent for carrying out what the associates might more laboriously do for themselves.

What kinds of business other than mutual insurance may claim exemption from liability to income-tax under the principle of *Styles' case*[1] need not be here considered; but their Lordships are of opinion that the principle cannot apply to an association, society or company which grows produce on its own land or manufactures goods in its own factories, using either its own capital or capital borrowed whether from its members or from others, sells its produce or goods to its members exclusively. In the present case the appellant society is not bound by its rules to sell its tea only to its members, but it could make no difference if it were. No matter who the purchasers may be, if the society sells the tea grown and manufactured by it at a price which exceeds the cost of producing it and rendering it fit for sale, it has earned profits which are, subject to the provisions of the taxing act, taxable profits.

1 (1889) 14 A.C. 381.

It is next necessary to show that this view truly represents the judgments in *Styles' case*[1] and is in accordance with judicial comments subsequently made upon them. The appellant in *Styles' case*[1] was a life insurance company the members of which were the holders of participating policies, each of whom was entitled to a share of the assets and liable for all losses. The company collected as premiums from members a sum to cover its requirements on a calculation of the probable death rate and of the probable expenses and other liabilities. An account was taken annually and the greater part of the surplus of premiums over expenditure was returned to the policy holders as bonuses, either by addition to the sums insured or in reduction of future premiums. The remainder of the surplus was carried forward as funds in hand to the credit of the general body of the members. It was held that no part of the premium income received under the participating policies was liable to be assessed to income-tax as profits or gains under Schedule D. Lord Watson having distinguished the case from the earlier case of *Last*[2] on the ground that in *Last's case*[2] some of the policy holders were outsiders whereas in *Styles' case*[1] the policy holders and they alone were members of the company said

"the individuals insured and those associated for the purpose of receiving their dividends, and meeting policies when they fall in, are identical, and I do not think that their complete identity can be destroyed, or even impaired, by their incorporation. The corporation is merely a legal entity which represents the aggregate of its members; and the members of the appellant company are its participating policy-holders. When a number of individuals agree to contribute funds for a common purpose, such as the payment of annuities, or of capital sums to some or all of them on the occurrence of events certain or uncertain, and stipulate that their contributions, so far as not required for that purpose, shall be repaid to them, I cannot conceive why they should be regarded as traders, or why contributions returned to them should be regarded as profits."

Lord Herschell, after stating that the Attorney-General had conceded that the fact that the persons associating themselves together for the purpose of mutual assurance had been incorporated was immaterial, added:

"I think the Attorney-General was correct in thinking it immaterial that the persons then associated had been incorporated, and that a legal entity had been created distinct from the members of which it was composed. This being so I shall for the sake of simplicity consider the questions that arise as though the association were unincorporated."

He later says:

"Persons who agree to contribute to a common fund for mutual insurance certainly would not in ordinary parlance be regarded as carrying on a trade or vocation for the purpose of earning profit. Let us see how the so-called profit arises. It is due to the premiums which the members are required to pay being in excess of what is necessary to provide for the requisite payments to be made upon the deaths of members, and not being, as the case states they were intended to be, commensurate therewith....The members contribute for a common object to a fund which is their common property; it turns out that they have contributed more than is needed, and therefore more than ought to have been contributed by them, for this object and accordingly their next contribution is reduced by an amount equal to their proportion of this excess. I am at a loss to see how this can be considered as a 'profit' arising or accruing to them from a trade or vocation which they carry on."

From these quotations it appears that the exemption was based on (1) the identity of the contributors to the fund and the recipients from the fund, (2) the treatment of the company, though incorporated, as a mere entity for the convenience of the members and policy holders, in other words as an instrument obedient to their mandate, and (3) the impossibility that contributors should derive profits from contributions made by themselves to a fund which could only be expended or returned to themselves.

Cornish Mutual Assurance Co. v. *Inland Revenue Commissioners*[3] was a case similar to *Styles' case*[1] and would have had the same result but for a pro-

1. (1889) 14 A.C. 381.
2. (1885) 10 A.C. 438.
3. (1926) A.C. 281.

vision in section 53 (2) of the Finance Act, 1920, which expressly provided that the surplus arising from the transactions between mutual trading concerns and their members should be treated as profits. The only importance for present purposes of the judgments in the case is that Lord Cave, L.C., took occasion to question and correct Lord Watson's opinion that the company in *Styles' case*[1] was not carrying on a trade; it was carrying on a trade, but one in which no profits could be earned by it.

In *Liverpool Corn Trade Association, Ltd.* v. *Monks*[2], a company incorporated with the object of promoting the interests of the corn trade, with power to declare dividends collected entrance fees from its members and made charges, both against members and other persons for the use of various facilities provided by it. It was found liable to income-tax. The case is consistent with the view expressed by their Lordships because the shareholders and the contributors to the fund out of which dividends were paid were not identical.

Thomas v. *Richard & Co., Ltd.*[3], was held by Rowlatt, J., to fall within the principle of *Styles' case*[1]. The association was a purely mutual assurance association and the contributors and the assured persons were identical bodies; any surplus of contributions over payments to policy holders was ultimately returned to contributors. Rowlatt, J., said :

"Where all that a company does is to collect money from a certain number of people —it matters not whether they are called members of the company or participating policy holders—and apply it for the benefit of those same people, not as shareholders in the company, but as the people who subscribed it, then as I understand *Styles' case*[1], there is no profit. If the people were to do the thing for themselves there could be no profit, and the fact that they incorporate a legal entity to do it for them makes no difference; there is still no profit. This is not because the entity of the company is to be disregarded; it is because there is no profit, the money being simply collected from those people and handed back to them, not in the character of shareholders but in the character of those who have paid it."

The judgment came before the House of Lords (1927) A.C. 827 and was affirmed. Lord Cave, L.C., said,

"Sooner or later, in meal or in malt, the whole of the company's receipts must go back to the policy holders as a class, though not precisely in the proportions in which they have contributed to them; and the association does not in any true sense make a profit out of their contributions."

Lord Dunedin's judgment was to the same effect.

In *Municipal Mutual Insurance, Limited* v. *Hills*[4], a company formed primarily for the purpose of mutual insurance against fire also carried on employers' liability and other miscellaneous insurance business. It was admitted that the fire insurance business was purely mutual and did not attract tax. But it was found as a fact that on the other side of the business the redundant part of the premiums was not returnable to the contributors of the premiums, and it was therefore held that the surplus was subject to tax. Lord Macmillan, dealing with the tax exemption of surpluses arising in the conduct of mutual insurance, said,

"the cardinal requirement is that all the contributors to the common fund must be entitled to participate in the surplus and that all the participators in the surplus must be contributors to the common fund; in other words, there must be complete identity between the contributors and the participators. If this requirement is satisfied, the particular form which the association takes is immaterial."

The requirement is not satisfied in the present case; for there is no common fund to which the members of the appellant society contribute and in which they participate.

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1. (1889) 14 A.C. 381.
2. (1926) 2 K.B. 110.
3. (1927) 1 K.B. 33.
4. 16 T. C. 430.

For these reasons the appeal fails, and the Madras case in which the appellant society was concerned must be held to have been wrongly decided.

In the course of the debate the suggestion was thrown out that on the facts and accounts of a particular year the appellant society might be in a position to maintain that a payment to its members under paragraph (e) of the Rules for the application of profits fell to be treated as a discount having the effect of reducing the price of the tea sold to the members and so reducing or perhaps eliminating the profits. Their Lordships are not concerned to discuss that suggestion in this appeal and express no opinion, favourable or unfavourable, upon it.

It is expedient, in view of the defects of the question, to answer it not by a simple affirmative, but by declaring that the society is not exempt from liability to Assam Agricultural Income-tax in respect of profits from the sale to its members of tea cultivated or manufactured at its Deckiajuli Estate in the province of Assam.

Their Lordships will therefore humbly advise His Majesty that the judgment of the High Court should be varied by the substitution for an affirmative answer to the question of this following answer:—

> "The Society is not exempt from liability to Assam Agricultural Income-tax in respect of profits from the sale to its members of tea cultivated or manufactured at its Deckiajuli Estate in the province of Assam"

and that subject thereto the appeal should be dismissed.

The appellant must pay the costs of this appeal.

K.S. *Answer varied and appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MACK.

Ippagunta Lakshminarasinga Rao .. *Appellant**

v.

Ippagunta Balasubramanyam and another .. *Respondents.*

Civil Procedure Code (V of 1908), section 48—Criterion date of decree for purposes of section 48—Executable preliminary decree—Application for execution beyond twelve years of such decree but within twelve years of the final decree—If barred.

The criterion date of the decree for the purposes of section 48, Civil Procedure Code, is the date on which the decree becomes operative, namely, that on which the plaintiff is at liberty to file an execution petition to enforce a relief which the Court has granted him.

In a partition suit a preliminary decree was passed on 3rd March, 1932, giving the plaintiff some immediate executable money reliefs and was followed by a final decree on 8th September, 1932, and the plaintiff filed an execution petition for the money reliefs as well as other reliefs on 8th September, 1944, though a prior execution petition of 1942 in respect of the money reliefs was pending. On a contention that the petition filed in 1944 was barred by the provisions of section 48, Civil Procedure Code.

Held, (1) that it was clearly open to the plaintiff to file an execution petition to enforce the preliminary decree reliefs granted to him on 3rd March, 1932, and so far as such reliefs were concerned, this was the criterion date for commencing the twelve year period for purposes of section 48, Civil Procedure Code. Hence, the petition filed on 8th September, 1944, was clearly barred under section 48.

(2) The execution petition of 1944 could not be treated as a continuation of the pending execution petition filed in 1942, for it was filed outside the twelve years prescribed by law and in it the plaintiff had sought other reliefs in addition to those sought in the petition of 1942, but it was open to the plaintiff to proceed with that pending application.

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*A.A.O. No. 322 of 1946. 2nd April, 1948.

1. (1929) 3 I.T.C. 385.

Appeal against the order of the District Court, Nellore, dated 26th January, 1946, in E.P. No. 4 of 1946 (E.P. No. 94 of 1944 in O.S. No. 39 of 1929, Sub-Court, Nellore).

M. S. Ramachandra Rao and *D. R. Krishna Rao* for Appellant.

B. Srinivasamurthi for Respondents.

The Court delivered the following

JUDGMENT.—The appellants are two brothers who were judgment-debtors in a partition decree. The preliminary decree was passed on 3rd March, 1932. It contained provisions for giving the plaintiff who was a nephew some immediate executable reliefs: (1) costs of Rs. 93-6-0; (2) partition and separate possession of specified immoveable properties; and (3) Rs. 750 for past and subsequent mesne profits. This preliminary decrees in due course fructified into a final decree on 8th September, 1932. The point this appeal raises for determination is whether E.P. No. 94 of 1944, which was filed on 8th September, 1944, for these money reliefs is in time. It is admittedly more than 12 years after the preliminary decree was passed, but within this period dating from the final decree. At the time when this execution petition was filed there was another execution petition E.P. No. 85 of 1942 in fact pending. It was filed by the decree-holder against these same judgment-debtors for the recovery of these same money reliefs accorded in the preliminary partition decree by attachment and sale of some specified immoveable property. Then in E.P. No. 94 of 1944 the decree-holder sought to attach again, it would appear by way of abundant caution the same immoveable property but added prayers for arrest and attachment of moveable property as well.

(2) A specific objection was taken to the E.P. No. 94 of 1944 in the counter of the first respondent in paragraph 2 that this execution petition was barred by the 12 years' limitation period prescribed by section 48 of the Code of Civil Procedure. The learned District Judge has given no finding on this point at all. In paragraph 4 of his judgment he stated that the first defendant contended that the preliminary decree was only a declaratory decree and that it was unexecutable and secondly that this execution petition was barred by limitation. He observed then that both these contentions were devoid of substance, but nowhere in his judgment has he dealt specifically with the point whether E.P. No. 94 of 1944 was barred under section 48 of the Code of Civil Procedure.

(3) Mr. Srinivasamurthi, advocate for the respondents, concedes that the execution petition is more than 12 years from the date of the preliminary decree, but as I understand his argument he urges that it was by way of continuation of E.P. No. 85 of 1942. I am wholly unable to follow this contention. E.P. No. 94 of 1944 was filed outside the 12 years prescribed by law and in it plaintiff has sought other reliefs in addition to those sought in E.P. No. 84 of 1942. The next point urged is that the date of the decree for the purpose of applying section 48 of the Code of Civil Procedure is the date of the final decree. The criterion date, however, must be in my opinion the date on which the decree becomes operative, namely, that on which the plaintiff is at liberty to file an execution petition to enforce a relief which the Court has granted him. It was clearly open to the plaintiff to file an execution petition to enforce the preliminary decree reliefs granted to him on 3rd March, 1932, and so far as such reliefs are concerned this is the criterion date for commencing the 12 year period. I find that E.P. No. 94 of 1944 is clearly time-barred under section 48 of the Code of Civil Procedure. It is open to the plaintiff to proceed with E.P. No. 85 of 1942 which is still pending and admittedly not time-barred, subject to any contentions raised therein. It is regrettable that as the records in E. P. No. 85 of 1942 have also been sent up to this Court in connection with the present appeal, those execution proceedings have also been hung up since 1946. The appeal is allowed with costs. Advocate's fee, Rs. 25.

V.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO.

Alla Subbareddi .. *Petitioner**

v.

Lankireddi Narayanaswamireddi and others .. *Respondents.*

Civil Procedure Code (*V of* 1908), *sections* 24, 141 *and Order* 40, *rule* 1—*Application for transfer of suit to High Court—Notice served on defendants—Order for transfer not made—Application for appointment of receiver—Maintainability in High Court.*

When an application for the transfer of a suit to the High Court is made under section 24, Civil Procedure Code, and notice is ordered, it is in the nature of an original proceeding within the meaning of section 141 of the Code and the procedure of the Court in regard to suits becomes applicable thereto. Order 40, rule 1 of the Code will be attracted by section 141 to such proceedings and the High Court will have power to appoint a receiver before the transfer of the suit is ordered and after notice on the petition for transfer had been served on the defendants.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to direct the transfer of O.S. No. 354 of 1947 from the file of the Court of the District Munsiff of Bezwada to the file of the High Court and retransfer the same to the said Court of the District Munsiff, Bezwada, after appointing a receiver in respect of the suit properties, etc.

M.S. Ramachandra Rao for Petitioner in C.M.Ps. Nos. 3369 and 3370 of 1948 and for Respondent in C.M.Ps. Nos. 3627 and 3691 of 1948.

P. Somasundaram, *P. Chandra Reddi* and *O. Chinnappa Reddi* for Respondents in C.M.Ps. Nos. 3369 and 3370 of 1948 and for Petitioner in C.M.Ps. Nos. 3627 and 3691 of 1948.

The Court made the following

ORDER.—C.M.P. No. 3369 of 1948 was filed by the second plaintiff in O.S. No. 354 of 1947 on the file of the Court of the District Munsiff of Bezwada for transfer of the suit to this Court and for passing interlocutory orders and for retransferring the same. Along with this application he also filed C.M.P. No. 3370 of 1948 to appoint the Tahsildar of Bezwada or any other proper person as receiver for the properties involved in the suit O.S. No. 354 of 1947. Those applications were moved before me in the Vacation Court and came up for orders on the 19th of May, 1948.

Plaintiffs 1 and 2 instituted O.S. No. 354 of 1947 for a permanent injunction restraining the first defendant, the Zamindar, from disturbing their possession of certain lanka lands of the extent of 150 acres. Their case was that these lankas were in their possession for a continuous period of about 8 years, the last of the leases in their favour expiring by 30th June, 1947, and that the Zamindar notwithstanding the fact that they had acquired occupancy rights in the lankas was attempting to lease the properties to others and was seeking to disturb their possession. In the first instance only the Zamindar was impleaded as the sole defendant. They also applied along with the suit, in I.A. No. 1057 of 1947 for an interim injunction against the defendants, and an *ex parte* order was passed on the 21st June, 1947. Before the order could be served on the Zamindar he died on the 24th June, 1947, and subsequently his legal representatives were impleaded as defendants 2 and 3. By a further application the injunction was extended to the legal representatives also. Meanwhile the Zamindar seems to have leased the property to defendants 4 and 5 on the 4th of July, 1947, that is, after the institution of the suit by the plaintiffs which was filed on the 19th of June, 1947. As the plaintiffs apprehended disturbance of possession by defendants 4 and 5 they took proceedings under section 144 of the Criminal Procedure Code in M.C. No. 67 of 1947 on the file of the Sub-Divisional Magistrate's Court, Bezwada, and obtained an *ex parte* order against defendants 4 and 5 which was current for a period of one month. A commissioner

* C.M.P. Nos. 3369, 3370, 3627 and 3691 of 1948. 13th July, 1948.

was appointed in I.A. No. 1694 of 1947 to inspect and report as to who was in possession of the property, and he submitted a report that the plaintiffs were in possession. When the order under section 144, Criminal Procedure Code, was about to expire the plaintiffs seem to have moved the Minister for extension of the order, and the Government seems to have directed the District Collector to go into the matter. The District Collector seems to have suggested proceedings under section 145, Criminal Procedure Code, and the plaintiffs filed M.C. No. 18 of 1948 under section 145, Criminal Procedure Code and a preliminary order was passed on 8th March, 1948. Pending these proceedings the Tahsildar of Bezwada was appointed receiver to auction the crops on the lands which were claimed to have been raised by both the parties. On their own application defendants 4 and 5 were impleaded as parties to the suit. On the 17th of May, 1948, while the receiver was in possession of the property the defendants 4 and 5 filed Crl.R.C. No. 586 of 1948 before the Vacation Judge to quash the proceedings under section 145, Criminal Procedure Code. On the 18th of May, 1948, Yahya Ali, J., passed the following order in Crl. M.P. No. 1162 of 1948 :

"Further proceedings in M.C. No. 18 of 1948 will be stayed. This does not amount to disturbing the possession of the receiver appointed by the Magistrate."

Apprehending that the receiver appointed by the Criminal Court would vacate possession of the property the second plaintiff moved for transfer of the suit to this Court and for an interim order. As I have already said, these petitions came before me on the 19th of May. On the transfer petition I ordered notice, and on the petition for an interim order I passed the following order on that date :

"The Tahsildar of Bezwada is to continue as receiver in respect of the suit properties pending further orders in the Civil Miscellaneous Petition. He is at liberty to lease out the suit properties by public auction."

In pursuance of this order the Tahsildar seems to have auctioned the leasehold right on the 25th of June, 1948, and one Janga Ramireddi became the highest bidder for the cultivation right of this fasli for a sum of Rs. 7,900.

The fourth defendant filed C.M.P. No. 3627 of 1948 to vacate the order appointing interim receiver and to set aside the sale held by him on the ground that there was no notice of the order appointing receiver to him, and that the sale was vitiated by various irregularities. He also alleges that one S. Basavayya was prepared to bid for Rs. 12,000 provided he was given an opportunity to bid. C.M. P. No. 3691 of 1948 was filed on behalf of the Zamindars, defendants 2 and 3, also for similar relief.

When these petitions came up for hearing before Govinda Menon, J., he felt some difficulty regarding the power of this Court to pass an interim order appointing a receiver before notice in the transfer petition was served and the transfer of the suit was ordered. He therefore directed the petitions to be posted before me.

In these petitions the questions that have been raised are (1) Whether this Court has jurisdiction to appoint an *ex parte* receiver before the transfer of the suit was ordered after notice on the petition for transfer was served on the defendants. (2) Has the second plaintiff made out a case for the appointment of a receiver, and (3) Whether the sale by the receiver is valid. First as regards the question of the jurisdiction of this Court to appoint an interim receiver : In *Jumna Bai* v. *Ramanathan Chetti*[1], Ramesam, J., was of opinion that when a suit was instituted in an inferior Court in the mofussil and that Court was closed for summer recess the High Court had power to transfer the suit under clause 13 of the Letters Patent and pass interim orders but that such application should be made on the original side of the High Court and should also ask for an injunction or other interlocutory relief and a further application should be made for retransferring all the proceedings to the original Court. The power to pass an interlocutory order either granting injunction or some other relief before the suit

1. (1928) 55 M.L.J. 690 : I.L.R. 52 Mad. 52.

was transferred was recognised at page 55 of the report. It was however pointed out by the Full Bench in *Krishna* v. *Sabapathi*[1], that if a suit was withdrawn under clause 13 of the Letters Patent from a mofussil Court to the original side for trial and determination, this Court has no power to retransfer it to the Court from which it was withdrawn. There is, however, according to the Full Bench such power under section 24, Civil Procedure Code. It was pointed out that such power of transfer under section 24 should be exercised only after notice to the parties and after giving them an opportunity to be heard. The Full Bench however does not deal with the powers of this Court pending the disposal of the application for transfer ; nor does it dissent from the view expressed by Ramesam, J., in *Jumna Bai* v. *Ramanathan Chetti*[2]. Even apart from this, I think that when an application for transfer of a suit to this Court is made under section 24, Civil Procedure Code and notice is ordered, it is in the nature of an original proceeding within the meaning of section 141 of the Civil Procedure Code, and the procedure provided under the Code in regard to suits becomes applicable. Order 40, rule 1, therefore is attracted by section 141, Civil Procedure Code, to such proceedings, and the Court would have power to appoint a receiver.

In *Asadali Chowdry* v. *Mahomed Hossain Chowdry*[3], the Calcutta High Court had to consider the applicability of the provisions of Order 40, rule 1, to proceedings for the appointment of a Common Manager under section 93 of the Bengal Tenancy Act. The learned Judges were of opinion that the proceeding was in the nature of an original proceeding contemplated by section 141, Civil Procedure Code, that therefore the procedure under Order 40, rule 1, was attracted and that in such a case the Court had jurisdiction to appoint a receiver provided a case for the appointment was made out. It was also pointed out in that case that there is power in the Court to pass even an *ex parte* order appointing a receiver. At page 988 it is observed,

"Then as regards the question of notice, although an order is generally made by a Civil Court upon notice to the parties concerned, there may be cases in which the issue of notice may so delay the proceedings as to defeat the object of the order made, and the Court has to pass an order without previous notice in cases of emergency, leaving the party aggrieved to object to it either in the Court making the order or by way of appeal to a higher Court."

It has been pointed out in *Nandakishore Singh* v. *Ram Gulam Sahu*[4], that even before an application for special leave to appeal to His Majesty in Council was filed the High Court had inherent power to stay the execution of its own decree.

Mr. Somasundaram, the learned advocate appearing for the Zamindar and Mr. Chandra Reddi, the learned advocate appearing for the fourth defendant did not seriously contest before me the jurisdiction of this Court to pass an *ex parte* order appointing a receiver ; but as a doubt has been felt by my learned brother Govinda Menon, J., I had to deal with it somewhat fully. I am therefore of opinion that, even before a final order transferring the suit is passed and when the application for transfer is pending disposal, the Court has power to pass an interlocutory order either granting an injunction or appointing a receiver or grant such other relief pending disposal of the transfer petition, as the proceeding is an original proceeding within the meaning of section 141 and all the powers which the Court possesses for passing interlocutory, orders in the case of a suit can be exercised during the pendency of such proceedings.

It is not seriously contested before me that this is not a proper case in which the receiver should continue. There was already a scramble for possession and the Criminal Court thought fit to appoint a receiver for the sale of the crops. Defendants 4 and 5 were restrained by an order under section 144, Criminal Procedure Code, from interfering with the possession of the property as the authorities feared that there would be breach of the peace. The proceedings under section 145 are pending, and the revision petition for quashing them is also pending in this

1. (1945) 1 M.L.J. 14 : I.L.R. 1945 Mad. 389 (F.B.).
2. (1928) 55 M.L.J. 690 : I.L.R. 52 Mad. 52.
3. (1916) I.L.R. 43 Cal. 986.
4. (1912) I.L.R. 40 Cal. 955.

Court. It is therefore necessary to continue the receiver and make arrangements for the cultivation of the extensive lanka lands.

The only serious objection is as regards the validity of the sale. Various objections have been raised in the counter-affidavit and in the affidavits on behalf of the Zamindar and on behalf of the fourth defendant, and there is also the report of the Tahsildar of Bezwada who was appointed receiver. I am however not going into that matter, as the only question now before me is whether the order appointing receiver and empowering him to sell the leasehold right of the property is proper or not, and as I have come to the conclusion that it is proper, the order passed by me in C.M.P. No. 3370 of 1948 has to be confirmed. The petition for transfer is ordered, and the suit is retransferred to the District Munsiff's Court, Bezwada.

I understand that there is already an application filed by the second defendant raising the question of the validity of the sale. The learned District Munsiff will after taking the necessary evidence dispose of that petition at an early date before the cultivation season commences.

There will be no order as to costs in these applications in this Court.

B.V.V. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO.

Sri Yerri Swami by Committee Members Thaiyiveera Bhadrappa and others .. *Appellants**

v.

Madiga Chinna Vannurappa and others .. *Respondents.*

Stamp Act (II of 1899), section 36—Promissory notes not properly stamped—Admissibility in evidence for deciding one of the issues in the first instance—How far marking as exhibits preclude the raising of objection as to sufficiency of stamp at a later stage.

In suits on promissory notes for the recovery of moneys due, though the objection was raised that they were not properly stamped the Court marked them as exhibits for the purpose of deciding one of the issues in the first instance. The suits were dismissed on the decision of that issue but on appeal the finding on that issue was reversed and the suit was remanded for disposal on other issues. On a question whether the defendants could raise the question of the sufficiency of the stamp on the notes at the time of the hearing of the case on remand.

Held, that in view of the fact that the notes were marked by the trial Judge as exhibits only tentatively without even the point of admissibility having been considered, there was no admission of the documents within the meaning of section 36 of the Stamp Act so as to preclude the defendants from raising the question that the documents were not properly stamped.

Appeal against the decrees of the Court of the Subordinate Judge of Anantapur in A.S. Nos. 72 and 73 of 1944 respectively preferred against the decrees of the Court of the District Munsiff of Anantapur in O.S. Nos. 88 and 93 of 1942 respectively.

A. C. Sampath Aiyangar and *S. Krishnamachariar* for Appellants.

C. Kondiah for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiffs are the appellants in these two second appeals. Their suits for recovery of moneys due under promissory notes were dismissed by the lower appellate Court. Hence these second appeals.

The promissory note which is the subject-matter of second appeal No. 1361 of 1945 is dated 2nd March, 1939, and is Ex. P. The promissory note which is the subject-matter of S.A. No. 1362 is dated 3rd March, 1939, Ex.P-1. These promissory notes were affixed with postage and revenue stamp of one anna each. Even in the written statements filed by the defendants, objection was taken that these promissory notes were not enforceable as they were not properly stamped. Issue 3 was framed to cover this contention.

* S.A. Nos. 1361 and 1362 of 1945. 9th July, 1948.

The learned District Munsiff who tried the two suits out of which these second appeals arise in the first instance disposed of the suits only on issue 4 and he came to the conclusion that the money advanced under the promissory notes was not out of the funds of the temple but out of the private money of the first defendant. Notwithstanding the existence of an issue regarding the sufficiency of the stamp, the promissory notes were marked as Ex. P and Ex. P-1 for the hearing of the suits on issue 4. The suits were dismissed by the District Munsiff on the finding on issue 4 and there was an appeal to the District Court. The District Judge reversed the finding on issue 4 and remanded the suits for disposal on other issues. After remand the suits again came up for trial before the same learned District Munsiff. His finding on this issue was that as the promissory notes were admitted under Order 13, rule 4, Civil Procedure Code, the defendants were precluded from raising the objection regarding the sufficiency of stamp under section 36 of the Stamp Act. He observed in the course of the judgment :

"There is nothing on record to show that the defence counsel took objection to the admissibility of these documents when they were admitted into evidence. Nor is there any evidence on record to show that the suit promissory notes were not properly stamped. In fact, no such objection was taken then. In the absence of any objection by the defence at the time of marking these documents as Exs. P and P-1 and admitting them into evidence, the usual procedure laid down in Order 13, rule 4 was followed and the promissory notes were admitted in evidence with the view that there was nothing against their admission."

These remarks of the learned District Munsiff are somewhat surprising. In the first place his statement that there was no evidence on record to show that the promissory notes were not properly stamped discloses that the learned District Munsiff did not look into the documents at the time they were marked ; for if he had done so, he would have noticed that they bear only a postage and revenue stamp of one anna each. The more serious objection to his remarks is that the learned District Munsiff seems to have overlooked the plea in the written statement and the issue in the case which definitely raised the question of the insufficiency of the stamp. In the face of these objections it is difficult to see what necessity there was for the counsel for the defence to go on repeating his objections at each time. The very finding of the learned District Munsiff discloses that when the promissory notes were marked at the preliminary trial as Exs. P and P-1, he did not at all consider the admissibility of the documents and must have marked them tentatively for the purpose of the disposal of that issue.

The learned appellate Judge in my opinion came to the correct conclusion in holding that in view of the circumstances set forth above there was no admission of the documents in evidence within the meaning of section 36 of the Stamp Act. As in the present case there was a specific issue on the point and as the documents were marked at the preliminary trial without disposing of that issue, it cannot be said that the documents were admitted in evidence within the meaning of section 36 so as to preclude the defendants from raising question that the documents were not properly stamped. Even if the learned District Munsiff had decided issue 3 in favour of the plaintiffs and came to the conclusion that they were admissible, it would have been perfectly open to the appellate Court to reverse that finding and reject the documents as it must be deemed that an admission under section 36 must be only subject to his finding on issue 3. As I agree therefore with the finding of learned Subordinate Judge on this point, it is unnecessary for me to go into the other questions that have been raised. The result is that these appeals fail and are dismissed with costs.

No leave.

K.C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDARAJACHARI.

Ponnath Kalyani Amma's son Eacharan Nair .. *Petitioner**

v.

Cherikkottil Sayed Rowther's son family manager Chinnayya Rowther (died) and another .. *Respondents.*

Provincial Insolvency Act (V of 1920), section 78 (2)—Mortgagee not proving his debt in insolvency—Suit for money claim against debtor after annulment of adjudication—Limitation—Right of mortgagee to exclusion of period from date of order of adjudication to the date of the order of annulment.

A mortgage executed on 8th June, 1931, was repayable on 13th July, 1932. The mortgagor was adjudged insolvent on 3rd January, 1933 ; but the adjudication was annulled on 27th August, 1943. A legatee of the mortgagee filed a suit on 13th July, 1944, for a money decree, having given up his security. On a question of limitation,

Held :—Except where a secured creditor realises his security or relinquishes it or values it, he is not bound to prove his debt in the insolvency of his debtor. The mortgage debt is not provable in insolvency and the plaintiff is entitled to have an exclusion of the period from the date of the order of adjudication to the date of the order of annulment in computing the period of limitation for the suit.

Chockalinga v. *Manicka*, (1942) 1 M.L.J. 11 : I.L.R. 1942 Mad. 448, applied.

Petition under section 25 of Act IX of 1887 praying that the High Court will be pleased to revise the decree of the Court of the Subordinate Judge of Palghat, dated the 8th February, 1946, and passed in S.C.S. No. 62 of 1945.

C. Unikanda Menon for Petitioner.

D. A. Krishna Variar for Respondents.

The Court delivered the following

JUDGMENT.—The petitioner is the legatee under a will of two ladies, Amman and Channammu, of a mortgage executed in their favour on 8th June, 1931, by the respondent. The mortgage was repayable on 13th July, 1932. The respondent was adjudged insolvent on 3rd January, 1933, but the adjudication was annulled on 27th August, 1943. The suit out of which this civil revision petition arises was filed on 13th July, 1944, for a money decree, the plaintiff having given up his security. The suit was dismissed by the lower Court on the ground that it was barred by limitation. The petitioner relied on section 78 (2) of the Provincial Insolvency Act and sought an exclusion of the period from the date of the order of adjudication to the date of the order of annulment. It is not denied that if that exclusion is made, the suit would be in time. It was however contended by the respondent, and that contention found favour with the Court below, that section 78 (2) of the Act did not apply because the debt is one provable but not proved under the Act. It is admitted that the petitioner had not proved the debt in the insolvency of the respondent. The petitioner's contention in the Court below was that the debt is not one provable under the Act. This contention was not accepted by the lower Court. The same point is raised before me on the petitioner's behalf.

It seems to me that the question is directly covered by the decision in *Chockalinga* v. *Manicka*[1], in which Leach, C.J. and Happell, J., held on a consideration of sections 28 (2) and (6), 34 (2), 44 and 47 that a secured debt is not ordinarily provable in insolvency and that it is provable only in the three contingencies contemplated by sub-sections (1), (2) and (3) of section 47 ; or in other words that except where a secured creditor realises his security or relinquishes it or values it, he is not bound to prove his debt in the insolvency of his debtor. *Chockalinga* v. *Manicka*[1] no doubt arose under section 44 of the Act and did not deal with any question of limitation ; but the point that arose in that decision would equally apply where the question that falls to be considered in applying the provisions of section 78 (2) of the Act is whether a mortgage debt is or is not provable in insolvency.

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* C.R.P. No. 1014 of 1946. 9th April, 1948.

1. (1942) 1 M.L.J. 11 : I.L.R. 1942 Mad. 448.

The lower Court assumed that at the instance of a prior mortgagee, the mortgaged property had been sold up in execution of his mortgage decree some time before the order of annulment. It seems this assumption is not correct and from a certified copy of the suit register relating to that suit the petitioner's counsel states that neither the petitioner nor his predecessors-in-title were parties to the suit of the prior mortgagee and that their rights therefore are left unaffected by that decree and any execution proceedings which might have followed it.

Apart from this, however, and even assuming that there was a mortgage decree obtained by the prior mortgagee binding on the petitioner and that in execution of it the entire mortgaged property was sold away, it seems to me that the principle of *Chokkalinga* v. *Manicka*[1], must be applied and the exclusion of the period claimed by the petitioner allowed in his favour. That decision is not distinguishable on the ground that it did not deal with a case where there were two mortgage decrees or with a case where the security was no longer available to the mortgagee by reason of its having been sold away by a prior mortgagee. As I understand it, that decision recognises only three exceptions to the general rule which dispenses with proof of a mortgage debt in insolvency proceedings. It is not possible to say that the present case falls under any of those exceptions and it is clearly not a case in which sub-section (1) of section 47 could apply because it cannot be said that the petitioner realised his security and there was still a balance due to him.

For the above reasons I hold that the suit is in time, set aside the decree of the lower Court and pass a decree as provided for with costs here and in the Court below against the estate of the deceased first respondent in the hands of the second respondent. Court-fee payable on the plaint will be paid by the 2nd respondent out of the said estate. Interest will be payable at 6 per cent. per annum from the date of suit till payment on the amount of Rs. 1,000 which is the principal claimed.

K.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

M. V. Berankutty Haji .. *Petitioner**

v.

C.I. Raman and others .. *Respondents.*

Criminal Procedure Code (V of 1898), section 522—Order for restoration of property—Jurisdiction to pass after order dismissing revision petition by the accused, long after the conviction by trial Court.

Though literally interpreting section 522 of the Criminal Procedure Code, the Court can pass an order for restoration of property only when convicting persons committing the offence or at any time within a month from the date of the conviction, that could not have been the intention of the Legislature. Clause 3 of the section indicates that the revisional Court can pass such an order at the time of dismissing the revision application or within a month of that date, though it may be long after the conviction by the trial Court.

Petition praying, that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to issue an order directing that the properties involved in C.C. No. 647 of 1946 on the file of the Court of the Sub-Magistrate of Quilandy (Crl.R.C. No. 391 of 1947 on the file of the High Court) now in the unlawful possession of the respondents (accused 1 to 5) as a result of the offences of which they have been convicted, be restored to the petitioner herein.

B. Pocker for the Petitioner.

M. C. Sridharan for the Respondents.

The Assistant Public Prosecutor (*A. S. Sivakaminathan*) on behalf of the Crown.

The Court made the following

ORDER.—The petitioner's case, which has been accepted by three Courts, is that the respondents, a party of five men, formed themselves into an unlawful

1. (1942) 1 M.L.J. 11 : I.L.R. 1942 Mad. 448.

*Cr.M.P. No. 588 of 1948. 23rd July, 1948.

assembly, trespassed on the petitioner's land, and took away a thousand cocoanuts. After being convicted by the Sub-Magistrate, they at once appealed to the Sub-Divisional Magistrate of Calicut. That appeal was dismissed; and they at once filed Crl.R.C. No. 391 of 1947 in this Court. That petition was dismissed on the 25th February, 1948; and within one month of the order of this Court dismissing the revision case this petition has been filed, praying than an order be passed under section 522 of the Code of Criminal Procedure for the restoration of possession of the property to the petitioner.

It is argued by the learned Assistant Public Prosecutor and by the learned advocate for the accused that the trespass was not attended by criminal force or show of force and that therefore section 522 is not applicable. There is evidence that the *kariasthan* of the petitioner was in the field at the time; but even if that were not the case, the accused went in a body to the field for the purpose of making a show of force so that they would be able to trespass and to commit theft of cocoanuts. Whether they actually met with any resistance or not is beside the point. They went there prepared to meet resistance and therefore made a show of force in committing the trespass.

It has been further contended that this Court has no jurisdiction; because the passage in section 522 giving one month to the petitioner to file an application for restoration of property applies only to the convicting Court. It is difficult, however, to read the section in that way. Literally interpreting section 522, the Court can pass an order only when convicting such person or at any time within a month from the date of the conviction; so that if in revision the hearing is more than a month after the time of conviction, as is usually the case, the revisional Court would be unable to pass any such order. That surely could not have been the intention of the Legislature. In my opinion, clause 3 indicates that the revisional Court can pass such an order at the time of dismissing the application or within a month of that date.

Finally, it has been urged that in view of the delay that has occurred and also of the circumstances of this case, this Court should not exercise its discretion in passing such an order. It is no doubt true that the petitioner could have applied to the Courts below at the time when the accused were convicted and when their appeal was dismissed. It has however been pointed out that the appeal and the revision case were filed so quickly after the orders of the Courts below were passed that the petitioner had little time in which to make such an application.

As to the propriety of such an order, I have no doubt. The object of this section is to prevent any person gaining wrongful possession of land by his own unlawful and forcible acts. The object of the respondents in this case was to retain possession until some future legislation is passed, which they hope will enable them to remain lawfully in possession; in other words, they hope to gain title to the property by their unlawful act of trespassing on this land. This is therefore certainly a fitting case in which such an order as is prayed for should be passed.

The accused are therefore ordered under section 522 of the Criminal Procedure Code to restore immediately to the petitioner the possession of the land on which they trespassed.

K.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDARAJACHARI.

Datla Sanyasi Seetharamaraju .. *Appellant**

v.

Datla Satyanarayanamurthi Raju and others .. *Respondents.*

Madras Estates Land Act (I of 1908), section 3 (5)—Usufructuary mortgagee of post-settlement inam—If a landholder within the meaning of the Estates Land Act.

A usufructuary mortgagee of a post-settlement inam is a landholder within the meaning of the Madras Estates Land Act.

Appeals against the orders of the District Court of Vizagapatam dated 15th August, 1945, in A.S. No. 527, etc. of 1944 respectively (O.S. No. 9 etc. of 1944 respectively, District Munsiff Court, Vizianagaram.)

P. Satyanarayana Raju for Appellant.

K. Venkatarama Raju and *D. V. Reddi Pantulu* for Respondents.

The Court made the following

JUDGMENT.—The only question that arises in these appeals is whether a usufructuary mortgagee of a post-settlement inam is a landholder within the meaning of the Madras Estates Land Act. There is abundant authority in support of an affirmative answer (vide *Appalanarasimhulu* v. *Sanyasi*[1], *Subramania* v. *Muthiah Chettiar*[2], *Kallalagar Devasthanam* v. *Anthony Moopan*[3], and *Vallachami* v. *Thiruvaroor Devasthanam*[4]). The learned District Judge refers only to the third of these decisions and his attention does not appear to have been drawn to the other three which are decisions of Division Benches. After referring to *Kallalagar Devasthanam* v. *Anthony Mooppan*[3], which is the decision of a single Judge, the learned District Judge says that he is unable to follow it, in view of a later decision, also of a single Judge, in *Nallakakkan Ambalam* v. *Sri Kallalagar Devasthanam*[5]. This last decision, however, is clearly distinguishable. It arose under section 46 of the Madras Estates Land Act which has since been repealed by the Amendment Act of 1934. Under section 46 (5) the sum payable in respect of " old waste " for the acquisition of occupancy right had to be paid to the land-holder " who is the owner of the estate." In view of this special provision, Devadoss, J., held in *Nallakakkan Ambalam* v. *Sri Kallalagar Devastanam*[5], that a person who was not the owner of the estate (in that case it was a trustee) could not accept the amount tendered and grant occupancy right. This decision has no bearing on the definition of landholder and turns merely on the special provision just mentioned.

Mr. K. Venkataramaraju, counsel for the plaintiffs-respondents in these appeals, has attempted to argue that the sale-deeds executed by the tenants in favour of the appellant, Sri Datla Sanyasi Seetharama Raju, were taken *benami* for the benefit of the usufructuary mortgagee, Pusapati Venkataranayana Raju. As the learned District Judge rightly points out, this question was not raised in the pleadings and no issue was framed in regard to it. It cannot therefore be permitted to be raised. The result is that the civil miscellaneous appeals must be allowed, the judgment and decrees of the learned District Judge must be set aside and the orders of the learned District Munsiff restored with costs here and in the lower appellate Court. (Advocate's fee, Rs. 100).

K.C. ——— *Appeal allowed.*

*A.A.O. Nos. 657 to 660 of 1945. 8th April, 1948.

1. (1912) I.L.R. 38 Mad. 33.
2. (1915) 1 L.W. 1004.
3. (1924) 48 M.L.J. 147.
4. A.I.R. 1935 Mad. 452.
5. (1925) 49 M.L.J. 628.

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Madras.)

PRESENT :—LORD SIMONDS, LORD MORTON OF HENRYTON AND SIR MADHAVAN NAIR.

Raja of Venkatagiri .. *Appellant**

v.

Raja Rao Sri Krishnayya Rao Bahadur Zamindar .. *Respondent.*

Contract Act (IX of 1872), sections 2 (d) and 25 (2)—Applicability—Money advanced for defending a suit in pursuance of an undertaking and not voluntarily or at the desire of the promisor—Promissory note executed for—If supported by consideration.

X wrote to his brother *R* who was consulting him as to the giving of his son *K* in adoption by a widow, that if the reversioners of the widow were to file a suit in respect of the adoption and if *R* or *K* were to spend money for defending the action *X* was ready to bear the expenses and if the adoptive mother did not advance the money for expenses *X* shall advance without fail and have the case conducted without fail.

In respect of the litigation questioning the validity of the adoption, *X* and after his death, his son *G*, advanced moneys for the purpose. At the stage when the case had to be taken to the Privy Council, *K* who wanted finances for the purpose was made to execute a promissory note in favour of *G* and *G* wrote a letter to *K* in these terms :—

" I received your promissory note of even date for rupees one lakh and fifty thousand only which you executed for amounts advanced by me from time to time for the expenses of the litigation. If the suit is decided against you in the Privy Council I shall not enforce your liability under the said pronote." Meantime the adoptive mother who had been given half the estate had mortgaged it to *G* for Rs. 2,50,000 for payment of her debts. The adoption having been upheld in the Privy Council *G* sued *K* on the promissory note. On a contention that the note was void for want of consideration,

Held :—The original letter by *X* contained an unconditional undertaking on the part of *X* to provide money for expenses of the case, implying thereby the case in all its stages, and have it conducted. The word " advance " in the letter does not connote any idea of repayment. As the moneys were advanced not as the result of the importunity of the promisor but because of the undertaking given by *X* to *R*, that will not be a consideration within the meaning of section 2 clause (*d*) of the Contract Act to support the promissory note.

K is not precluded by any provision or principle of law from saying that the consideration stated in the promissory note was past consideration which, not having moved at the " desire " of the promisor, *i.e.*, himself, does not fall within section 2 clause (*d*) of the Contract Act. Nor can *G* rely on section 25, clause (2) of the Contract Act. To invoke the aid of that provision it must be shown that there was a promise by *K* to " compensate " *G* or his father *X* for something which had been already done by them " voluntarily " for him. The moneys in question were not advanced " voluntarily " but because of the undertaking given by *X*.

Sir Herbert Cunliffe K.C. and *P. V. Subba Rao,* for Appellant.

C. S. Rewcastle K.C. and *Chinna Durai* for Respondent.

The judgment of the Court was delivered by

SIR MADHAVAN NAIR.—This is an appeal by special leave from a judgment and decree dated 3rd March, 1941, of the High Court of Judicature at Madras, which in its appellate jurisdiction, affirmed a judgment and decree dated 27th April, 1939, of the same High Court in its original jurisdiction.

The appeal arises out of a suit instituted by the first plaintiff to enforce payment of money due under a promissory note dated 29th, March, 1933, executed by the respondent in his favour for Rs. 1,50,000 which with interest amounted to Rs. 1,58,725 at the time of the suit. By this instrument the respondent promised to pay on demand a sum of Rs. 1,50,000 with interest at 2 per cent. per annum, " in consideration of the amounts advanced from time to time for the Gollaprole litigation."

The only question for decision in the appeal is whether the promissory note is supported by " consideration." The High Court in its original jurisdiction, as well as on appeal, answered the question in the negative. The question was considered by the Court in the light of sections 2 clause (*d*) and 25, sub-section (2) of the Indian Contract Act (Act IX of 1872).

* 18th March, 1948.

Section 2, clause (*d*), of the Contract Act in so far as it is material is as follows :—

"When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise."

Section 25, sub-section 2, is as follows :—

"An agreement made without consideration is void unless :—

* * * * *

(2) It is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor or something which the promisor was legally compellable to do."

Before stating the facts of the case, it will be advantageous to explain the relationship of the parties to the appeal, and also to summarise the events which have a bearing on the Gollaprole litigation, and the execution of the promissory note. These events date back as far as 1869. The following two pedigree tables will serve to illustrate the relationship of the parties to the appeal.

Venkatagiri.

Kumara Yachendra Bahadur.

Raja Gopala Krishna.	Ramakrishna (adopted by Raja of Pittapur).
Govinda Krishna (1st Plaintiff).	
Kumara Raja (2nd Plaintiff and present Raja of Venkatagiri).	Sri Krishnayya, adopted by Ramayyamma.

Pittapur.

Surya Rao.

Gangadhara Rama Rao (late Raja of Pittapur) died in 1890.	Venkata Rao (died in 1871). = Venkayamma (died in 1889). = Ramayyamma (died 24th Oct., 1923).
Adopted son Ramakrishna Rao (died April, 1914).	Adopted son Sri Krishnayya (Defendant).

(N.B.—Only portions of the pedigree tables necessary for this appeal are given above.)

The appellant before the Board is the second plaintiff, the present Maharajah of Venkatagiri who succeeded to the Zemindari on the death of his father the first plaintiff, the late Maharajah, and was brought on record as his representative, in accordance with an order of the Court dated 3rd December, 1937.

The respondent is the defendant, the Zemindar of Gollaprole. He is the fourth son of Ramakrishna who was the natural brother of the first plaintiff's father Raja Gopala Krishna, and was a member of the Venkatagiri family. He had been adopted by the then Raja of Pittapur, Gangadhara Rama Rao, who had in 1869 transferred to his only brother Venkata Rao the estate known as Gollaprole which formed part of the Pittapur Zemindari. Venkata Rao died childless in 1871. He was survived by two widows, Venkayamma, who died in 1889, and Ramayamma

who died on 24th October, 1923. Ramayamma belonged to Vundur; she and the members of her family have been referred to in the case as "Vundur people."

Gangadhara Rama Rao died in 1890, leaving behind him Ramakrishna, the adopted son, and the present Maharajah who was born after the adoption of Ramakrishna, and to whom he had willed the estate of Pittapur.

In 1891, litigation began between Ramakrishna and the Maharajah respecting the Pittapur estate in which Ramakrishna questioned the legitimacy of the Maharajah. The Privy Council before which the case came ultimately, declared that the Maharajah of Pittapur was entitled to the estate under the late Raja's will. The question of legitimacy was not determined. (*Sri Raja Rao Venkatasurya Mahipathi Ramakrishna Rao Bahadur* v. *Court of Wards and Venkata Kumar Mahipathi Suryarao*[1]).

In 1914, it was proposed that Ramayamma, the then sole surviving widow of Venkata Rao, and who was in possession and enjoyment of the Gollaprole estate, as his widow, should adopt the respondent (the fourth son of Ramakrishna), who was then aged 21 or so. As in a previous litigation Ramayamma had failed to show that her husband had given her authority to make an adoption, she sought the permission of her deceased husband's nearest Sapindas to adopt the respondent. At the date of the adoption the nearest reversioners of her husband were Ramakrishna, and the Maharaja of Pittapur.

On 27th January, 1914, she wrote to Ramakrishna asking him to consent to the adoption of the respondent. Before giving his consent Ramakrishna consulted the father of the first plaintiff, his elder brother, the then Maharajah of Venkatagiri. In the letter to Ramayamma giving his consent dated 30th January, 1914, Ramakrishna stated "...... I have considered over it and obtained the advice of my elder brother ..... I hereby give you my consent to take my son Krishnayya in adoption."

On the 29th January, 1914, *i.e.*, the day previous to the above mentioned letter, Raja Gopala Krishna wrote to Ramakrishna a letter in which he said :

> "Whether it be at at the time of the issue of the notice by Vundur Ramayamma Garu to the Rajah of Pittapuram informing him that she is taking your fourth son Sri Sri Krishnayya in adoption, and asking him for his consent, or whether it be after the adoption, if the Raja Garu of Pittapuram were to file a suit against you in respect of the said adoption, and if either you or the said adopted boy should have to spend money in filing answer, etc., (written statement, etc.), we are ready to bear the said expenses. If on taking the advice of two vakils we ask you to remain *ex parte* you have to do so. If Vundur Ramayamma Garu does not advance moneys for the expenses of the case we shall without fail advance for expenses and have case conducted without fail".

To what extent the undertaking given in this letter is binding on the Venkatagiri family is the main theme of the appellant's argument in the appeal.

The Maharajah of Pittapur refused his consent to the adoption, but despite his refusal, the adoption took place on 15th February, 1914. Two months later, Ramakrishna died.

As a result of the adoption, the respondent became entitled to the Gollaprole estate. On the day following the adoption, he conveyed half of the estate of Gollaprole to his adoptive mother and gave her also a monthly allowance of Rs. 500 for her maintenance. Ramayamma was heavily indebted at the time.

On 25th July, 1914, Ramayamma, one of her two brothers and a son of the deceased brother executed a mortgage for Rs. 2,50,000 in favour of the father of the first plaintiff for payment of debts of the mortgagors. The mortgage included Ramayamma's half share of the Gollaprole estate. By a second mortgage dated 25th September, 1920, a further sum of Rs. 1,78,596-4-6 was borrowed by the mortgagors from the same mortgagee.

On 17th August, 1915, the Maharajah of Pittapur instituted in the Court of the Subordinate Judge of Cocanada C. S. No. 55 of 1915 against Ramayamma

1. (1898-99) 9 M.L.J. (Supp.) 1 : L.R. 26 I.A. 83 (P.C.).

and the respondent as defendants, disputing the validity of the adoption, as it was made without securing his consent. The suit was transferred as O. S. No. 34 of 1919 to the District Court of Rajahmundry. The respondent and his adoptive mother pleaded that the Maharajah was not the son of the late Raja and as such was not a Sapinda whose consent was necessary for the adoption. They also stated that if his consent was found necessary it was improperly refused by him and the consent of Ramakrishna alone was sufficient to validate the adoption. Thus began the Gollaprole litigation which as will be shown below continued until July, 1935, when the respondent's adoption was upheld by the Privy Council. It was in the course of the litigation that the suit promissory note was executed by the respondent.

In 1920, the District Judge held that the Maharajah of Pittapur was the son of Gangadhara Rama Rao and that the respondent's adoption was invalid. On appeal to the High Court by the defendants, the learned Judges of the Bench who heard the appeal agreed that the Raja was the son of Gangadhara Rama Rao, but differed on the validity of the adoption. As a result of this disagreement, there was a Letters Patent Appeal to the High Court which was heard by three learned Judges two of whom held the adoption to be invalid while the third held that it was valid. The majority view prevailed, and the adoption was held invalid. (*Krishnayya Rao* v. *Raja of Pittapur*)[1]. The letters patent appeal was decided on 7th March, 1928.

Ramayamma had died in 1923. The respondent and Prakasa Rao to whom she had left her half share of the Gollaprole estate appealed to the Privy Council in 1929-30, against the decision of the High Court. They also contended that certain evidence relating to the parentage of the Maharajah was wrongly excluded. The Privy Council accepted this contention and remanded the case to the High Court for further hearing. (*Krishnayya Rao* v. *Raja of Pittapur*)[2]. The case was then heard by three learned Judges who agreed that the evidence established that the Maharajah was the legitimate son of Gangadhara Rama Rao. The Privy Council accepted this finding, but held that the adoption of the respondent was valid, and that the refusal of his consent by the Maharajah was unjustified and could be disregarded (*Krishnayya Rao* v. *The Raja of Pittapur*[3]). In consequence, the suit of the Maharajah was dismissed with the result that at long last the respondent after 20 years of litigation secured his share of the Gollaprole estate.

On 23rd July, 1916, the father of the first plaintiff who had agreed to finance the Gollaprole litigation died. On 26th January, 1916, he noted on the back of a letter dated 20th January, 1916, written to him by P. V. Krishnaswami Chetty, High Court Vakil, asking for funds to defend the adoption suit, a memorandum stating . . . . . . "as per their written promise Vundur Varu must bear the expenses." Apparently there seems to have been an arrangement with Ramayamma about the expenses of the litigation. In this memorandum he referred to the adoption case " . . . . . . which is the result of our folly." He however went on meeting the expenses of the litigation until his death.

On 24th April, 1918, *i.e.*, about two years after his father's death the first plaintiff wrote to the respondent asking for the letter given to his father Ramakrishna, on 29th January, 1914, and the respondent sent it to him. There was nothing to show that the first plaintiff was unwilling to meet the expenses of the litigation, until 4th May, 1928. On that date, the Venkatagiri cashier wrote to the respondent stating that the estate would only pay Rs. 4,000, towards the decree (costs) and that :

" . . . . .as the Vundur people are also partners in the case you and they should confer and pay the balance. Their half they should themselves without fail bear. All these must be talked over between you alone. . . . . . ."

1. (1928) 55 M.L.J. 894 : I.L.R. 51 Mad. (P.C.).
2. (1933) 67 M.L.J. 697 : L.R. 61 I.A. 340
3. (1935) 69 M.L.J. 388 (P.C.).

On 16th August, 1928, the treasury officer wrote another letter which shows that the first plaintiff's attitude was what was intimated by the treasury officer in his previous letter.

It will be remembered that an appeal had been filed against the decision of the High Court before the Privy Council. When the appellant was pressed to provide the funds for prosecuting this appeal the respondent was summoned to Madras where he was called upon by the appellant to execute the suit promissory note. On the same day that the promissory note was executed by the respondent the first plaintiff wrote to him the following letter :—

"I received your promissory note of even date for rupees one lakh and fifty thousand (Rs. 1,50,000) only which you executed for amounts advanced by me from time to time for the expenses of the Gollaprole litigation. If the Gollaprole suit is decided against you in the Privy Council I shall not enforce your liability under the said pronote."

It is not disputed that the expenses for the Gollaprole litigation were furnished by the appellant, and his predecessors. When demand was made for the money mentioned in the note after the successful termination of the appeal, the respondent denied his liability to pay by raising various contentions only one of which falls to be decided by the Board, *viz.*, that relating to "consideration." The respondent alleged that the suit note was void for want of consideration, as according to him the moneys were advanced to him, not as a loan, but in fulfilment of the promise made by appellant's grandfather to his father Ramakrishna by his letter dated the 29th January, 1914, already referred to.

On the above contention the learned Trial Judge held that though moneys had been advanced to the respondent there was no "consideration" in law for the promissory note as the respondent had not brought himself either under section 2, clause (*d*), or under section 25, sub-section (2), of the Indian Contract Act. In his view, the advances made by the Maharajah and his successors were not made at "the desire" of the respondent but were made in pursuance of the undertaking given by the first plaintiff's father to the father of the respondent.

On appeal, the learned Judges concurred with the above view and expressed their finding as follows :—

". . . . . .the learned Judge has held that no request was ever made by the respondent himself for money. Here the learned Judge undoubtedly meant that the respondent had made no request which was not based on Raja Gopala Krishna's undertaking to finance the litigation if called upon and we concur in this finding. . . . ."

"No doubt the respondent from time to time called upon the appellant to meet the expenses of the litigation but this would not make him liable for repayment. The respondent's natural father gave his consent to the adoption of the respondent by Ramayamma only because Raja Gopala Krishna had agreed to finance the litigation, if Ramayamma failed to do so. Therefore Raja Gopala Krishna was under an obligation to provide the necessary money when called upon. In agreement with the finding of the learned Trial Judge we hold that the advances were not made as the result of the importunity of the respondent, but because of the undertaking given by the then head of the Venkatagiri family to finance the litigation in case of need and considerations of self interest, namely, the desire to safeguard the security given for the advances made to Ramayamma and her brothers. Because the necessity for further advances may have been impressed on the respective heads of the Venkatagiri family by the respondent from time to time it does not necessarily mean that the advances became loans made by the lenders at "the desire" of the respondent within the meaning of section 2 (*d*) of the Contract Act. In making requests for money the respondent was demanding what he considered he had a right to demand and at no time did he ask for money as a matter of grace."

Referring to section 25, sub-section (2) of the Indian Contract Act which was relied on by the appellant the learned Judges held :

"that in signing the promissory note in suit the respondent was not promising to compensate the first plaintiff for something which had been done for him voluntarily"

and therefore the section did not apply to the facts of the case. This was the opinion of the Trial Judge also.

The main argument before the Board elaborately urged by Counsel for the appellant was that the learned Judges of the Courts in India have misconceived the effect of the letter of the 29th January, 1914, and erred in thinking that it created a legal enforceable obligation on the writer of the letter and his successors

to finance gratuitously the respondent in the litigation between him and the Raja of Pittapur in all its stages. It was urged that the Promissory note is *prima facie* supported by consideration, that the sum mentioned in it consisted of advances made from time to time at the request of the respondent, and that the undertaking contained in the letter of the 29th January, 1914, which it is said make it obligatory on the appellant to advance the money, is not supported by consideration and is not therefore binding on the appellant.

As the entire case, as conceded by the Council on both sides, very largely hinged on the letter of 29th January, 1914, it is necessary that its scope and implications should be examined. It appears to their Lordships that its significance and binding character can be properly understood only if it is examined in relation to the events of the Gollaprole litigation which form its background, and the interest which the Maharaja of Venkatagiri had in that litigation.

The great object of the plaintiff in that litigation was to have it declared that the adoption of this respondent was invalid. The father of the first plaintiff was vitally interested in supporting its validity. The respondent was given in adoption only after Rama Krishna had taken his advice and secured his support. On 27th January, 1914, Ramayamma asked Ramakrishna's permission to adopt the respondent. Ramakrishna feared, as he had questioned the legitimacy of the Maharaja (the plaintiff in the Gollaprole suit) in a previous suit, that the adoption would land him and his son in litigation—as it afterwards really did ; he naturally solicited the advice of his powerful relation, the father of the first plaintiff, who assured him his support by writing to him on 29th January, 1914, the letter now under discussion. On 30th January, Ramakrishna wrote to Ramayamma giving his consent and stating in the letter :

"I have considered over it and obtained the advice of my elder brother the Maharaja."

Soon after, on 15th February, the adoption took place. It is clear that Rama-Krishna would have never consented to give his son in adoption had it not been for the promised support of the Maharaja of Venkatagiri. If a suit were filed by the Maharaja of Pittapur in respect of the adoption the Maharaja of Venkatagiri was bound to support the respondent as promised in the letter of 29th January, 1914. Though Ramakrishna was no longer legally a member of the Venkatagiri family, he was born a member of that family and was the Maharaja's brother. The adoption would make his nephew an independent Zamindar in his own right as Gollaprole would ultimately become his after the adoption. Natural love and affection towards his relations and desire to extend the influence of his family must have weighed with the Maharaja when he advised Ramakrishna to give his consent and promised him to support. Facts show that other thoughts also must have been at work in his mind. As already stated, after obtaining for herself half of the Gollaprole Estate from the respondent, after his adoption Ramayamma and her relations executed on 25th July, 1914, a mortgage of that estate to the first plaintiff to secure a loan of Rs. 2,50,000. The mortgage deed stated :

"For clearing the debts due by us to others, we have hypothecated to you the immoveable property scheduled hereunder and belonging to us and have borrowed from you Rs. 2,50,000 (Rs. two lakhs and fifty thousand in words). As we owe you the said amount, we shall pay the same with interest accruing thereon at 4 per cent. (four rupees) per hundred per annum as per instalments hereunder."

It is said that the language of the document connotes a contemporaneous advance of money and not a previous advance, but it is not stated that the loan was advanced that day, and as the learned Judges of the High Court, who had also the advantage of examining the document, say, the language is not inconsistent with an earlier advance. Between 25th July, 1914, and 28th September, 1920, the Venkatagiri family advanced further sums to Ramayamma and her relations which were secured by another mortgage on the same property for Rs. 1,78,596-4-6. In the circumstances, the opinion of the High Court :

"that there are grounds for the suggestion that in writing the letter of 29th January, 1914, Raja Gopala Krishna had in mind a scheme for securing for himself in respect of moneys advanced or to be advanced to Ramayamma and her brothers"

cannot be said to be far-fetched or unwarranted. It was only by supporting the adoption questioned in the Gollaprole suit that the safety of the security for the advances of money made to Ramayamma could be secured. Litigation may be risky in its results, but it is easy to see that if the adoption suit was not defended through all its stages and brought to a successful end, there was serious risk of loss of money to the Venkatagiri family. Apart from these considerations which would give the letter its binding character, the letter shows on the face of it " consideration " when it states that if a suit in respect of the adoption were instituted the Maharaja would advance expenses and " have the case conducted without fail." When the suit questioning the adoption was filed, the obligation on the part of the Maharaja to perform his part of the promise to have the case conducted by advancing money became imperative. In this connection the significance of the conduct of the Venkatagiri family should not be overlooked. It is not disputed that the funds required for the litigation were all supplied by the appellant, his father and grandfather. From the commencement of the litigation in 1915, till the 4th May, 1928, the Venkatagiri Samasthanam seems to have advanced funds without objection, apparently realising the binding nature of the promise contained in the letter of 29th January. At that date, the position was that a few months before, on 7th March, the High Court had held in the L. P. Appeal that the adoption was invalid. The Venkatagiri Samasthanam then began to take up the attitude that their liability was limited as may be seen from the letters of the treasurer ; even then, it was not directly stated in the letters that the respondent was responsible for the expenses. The letter of 4th May, 1928, only stated that " Vundur people " should pay their half of the expenses. When the appeal was lost in the High Court the appellant evidently became disheartened, and wanted to get out of his liability. Even so, no document was taken from the respondent till 1933, by which time most of the amount if not all that was required for the litigation must have been advanced by the appellant. It was stated that advances of money were made even after the execution of the promissory note, but it was candidly admitted that there was no document in the case to support the statement. In their Lordships' opinion the whole conduct of the appellant and his predecessors is only consistent with the view that they must have felt that there was an obligation binding on the Venkatagiri family to finance the Gollaprole litigation from the beginning to its end. Indeed, the conduct of the appellant and his predecessors form an illuminating commentary on the binding nature of the letter of 29th January, 1914.

Their Lordships do not think that the Courts in India have misconstrued the letter of 29th January, 1914. It says in unmistakable terms

" If the Raja of Pittaparam were to file a suit against you in respect of said adoption. . . . if Vundur Ramayamma Garu does not advance moneys for the expenses of the case we shall without fail advance for expenses and have case conducted without fail."

It is not the case of either party that Vundur people provided the funds necessary for the litigation. Their Lordships hold that the letter contains an unconditional undertaking on the part of the Maharaja of Venkatagiri to provide money for expenses of the case implying thereby the case in all its stages and have it conducted if Vundur Ramayamma Garu does not advance moneys for the same. The word " advance " used in the letter does not connote any idea of repayment ; if repayment was intended words signifying it might well have been used by the Maharaja who must be presumed to have known fully the scope of his undertaking when he wrote the letter.

It was also argued that since the suit promissory note states its " consideration " the respondent should not in law be allowed to plead that it is not supported by consideration. The argument appears to be based on a misundertanding of the real nature of respondent's plea. When he denies liability under the note he is not to be understood as saying there is no consideration ; what he says being that there is consideration but he will show that it is past consideration which, not having moved at the " desire " of the promisor, *i.e.*, himself, does not fall within section 2, clause (*d*) of the Contract Act. He is not precluded from doing so by

any provision or principle of law. As mentioned already, the Courts in India have concurrently found that the advances of money for the litigation were made not as the result of the importunity of the respondent but because of the undertaking given by the Maharaja of Venkatagiri to Ramakrishna which their Lordships have now held to be binding on the appellant, and that the respondent made no request which was not based on the Maharaja's undertaking to finance the litigation. No doubt the respondent pressed the appellant to furnish the necessary funds but in doing so he was only asking him to give effect to his grandfather's undertaking contained in the letter of 29th January. Their Lordships accept these findings. The result is that it cannot be held that the advances of money were made at the "desire" of the respondent within the meaning of section 2, clause (*d*) of the Contract Act.

It also follows from the findings, that section 25, clause (2) of the Contract Act cannot be relied upon in support of the appellant's case. To invoke the aid of that provision it must be shown that there was a promise by the respondent to "compensate" the appellant or his father for something which had been already done by them "voluntarily" for him. The findings of the Courts which their Lordships have accepted show that the moneys which had been advanced were not advanced to the respondent "voluntarily" but because of the undertaking given by the Maharaja of Venkatagiri at the time of the adoption. They also show that in executing the promissory note the respondent was not promising to compensate the appellant for something which had been done for him voluntarily. It follows that the said promissory note is not supported by consideration; that being so, the other contentions raised by the respondent need not be considered by the Board.

Before parting with the case their Lordships may point out that the trial Court expresses the opinion:

"so it will be seen that the second plaintiff concedes that Rs. 1,27,508-11-5 expenses of this litigation are secured by mortgages from the Vundur family."

These mortgages are B-35 and B-39. This point has not been considered by the High Court and their Lordships do not pronounce any opinion about it except saying that if it be true, the appellant has been able to secure by mortgages a considerable portion of the moneys advanced by him for the Gollaprole litigation.

The appeal fails and should be dismissed with costs. Their Lordships will humbly advise His Majesty accordingly.

Solicitor for Appellant: *Chapman Walkers.*

Solicitors for Respondent: *Messrs. Hy. S. L. Polak & Co.*

K.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE GOVINDA MENON.

Chelliah Servai .. *Petitioner**

Indian Penal Code (XLV of 1860), *sections* 395, 396, 397 *and Criminal Procedure Code (V of* 1898), *sections* 238 *and* 403—*Acquittal for an offence under section* 396, *Indian Penal Code—Bar of fresh trial and conviction under section* 395 *or* 397, *Indian Penal Code.*

Offences under sections 395 and 397, Indian Penal Code, are minor offences under section 238, Criminal Procedure Code, when considered in relation to an offence under section 396, Indian Penal Code, and an accused who already had the benefit of an acquittal for an offence under section 396, Indian Penal Code, cannot be tried again and convicted for an offence under section 395, or section 397, Indian Penal Code, on the same set of facts. Section 403, Criminal Procedure Code, is a bar to a fresh trial.

Case referred for the orders of the High Court under section 438, Criminal Procedure Code, by the Sessions Judge of Ramnad, at Madura, in his letter dated 27th November, 1947.

*Cr.R.C. No. 1332 of 1947. 2nd April, 1948.
(Case referred No. 39 of 1947).

N. T. Raghunathan for the Accused.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—In *Muppana Appana* v. *Emperor*[1], Horwill and Shahabuddin, JJ., have held that when a person is charged and tried for an offence under section 396, Indian Penal Code, he can be validly and legally convicted of a minor offence under sections 395 and 397, Indian Penal Code, even though the offence under section 396, Indian Penal Code, was triable with the aid of assessors and that under section 395, Indian Penal Code or 397, Indian Penal Code, only with a jury. In my opinion an offence under section 395 or 397, Indian Penal Code, is a minor offence within the meaning of section 238, of the Criminal Procedure Code, when considered in relation to an offence under section 396, Indian Penal Code. Such being the case, the accused who already had the benefit of acquittal for an offence under section 396, Indian Penal Code, on the same set of facts cannot now be tried and convicted for an offence under section 395 or 397, Indian Penal Code. Section 403, Criminal Procedure Code, is a bar to a fresh trial. The reference is accepted and the accused is discharged.

This conclusion will necessarily entail the opinion that the conviction of the others of the offence under section 395 or 397 on the second trial is illegal. The attention of the Provincial Government will be drawn to the circumstances for appropriate action under section 401 of the Criminal Procedure Code.

K.C. *Reference accepted and accused discharged.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAGESA SASTRY.

Vappuluri Venkata Ramamurthi .. *Petitioner**

v.

Pappala Venkayya and others .. *Respondents.*

Madras Estates Land Act (I of 1908)*—Grant of* 8 *acres for services rendered—Grantee having powers of alienation and hereditary enjoyment—Small* kattubadi *fixed—Proprietors having no right to land at any time—Grantee a landholder within the meaning of the Act.*

Land comprising about 8 acres was given to one *S* under a document described as a permanent cowle containing the recitals that the grant was for services rendered by *S* to the proprietors, that *S* was entitled to enjoy the property hereditarily with full powers of alienation, that the proprietors shall have no right to the land at any time and the only right which the proprietors reserved was to recover the small sum of two rupees described as *kattubadi*. The successors in interest of *S* filed a suit to eject the defendants and for arrears of rent. The defendants pleaded that they were ryots entitled to occupancy rights and that the Civil Court had no jurisdiction.

Held, that the grant is an Inam grant and not a mere lease of jeroyiti land on favourable terms, that the grantee (petitioner) is a landholder within the meaning of the Madras Estates Land Act and the defendants, ryots with occupancy rights, and therefore the Civil Courts had no jurisdiction.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the District Court of Vizagapatam, dated 23rd November, 1945 in C.M.A. No. 10 of 1945 preferred against the order of the. Court of the District Munsiff of Yellamanchilli in O.S. No. 63 of 1944.

E. Venkatesam for Petitioner.

P. Satyanarayana Raju and *M. B. Rama Sarma* for Respondents.

The Court delivered the following

JUDGMENT.—The petitioner is the plaintiff in O.S. No. 63 of 1944 on the file of the District Munsiff of Yellamanchilli. The suit was filed by him to eject the defendants and for the recovery of arrears of rent. It was contended by the defendants that the plaintiff was a landholder within the meaning of Madras Estates Land Act that they (the defendants) are ryots entitled to occupancy rights and could not be ejected and that the claim for arrears of rent would not lie in the Civil

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1. 1947 M.W.N. (Crl.) 101.

* C. R P. No. 520 of 1946. 6th July, 1948.

Court. The learned District Munsiff held that the plaintiff was only a landholder and upheld the contention of the defendants. While holding therefore that the prayer for ejectment could not be granted he directed that the plaint should be returned for presentation to the proper Court inasmuch as there was a claim for arrears of rent. The plaintiff appealed to the District Judge of Vizagapatam. He too agreed with the view of the District Munsiff and confirmed the order. This revision petition is filed by the plaintiff on the ground that both the Courts have misconstrued the legal position and that on a proper interpretation of Ex. D. 2, which is the document creating rights in favour of the plaintiff's predecessor, it should be held that the plaintiff himself should be regarded as the ryot entitled to occupancy rights and that the defendants, who took a lease of the suit land from the plaintiff, were not entitled to occupancy rights.

The question at issue depends upon the proper construction of Ex. D. 2. Ex.D.2 describes itself as a permanent cowle given in favour of Subba Rao, by the proprietors of Thimmapuram village. It recites that they (the proprietors) have, because of the help rendered to them in litigation by Subba Rao, given him four *visams* of land described in the document, under a permanent cowle, with a condition however that a sum of Rs. 2 per year should be paid to them as *kattubadi* and that Subba Rao should improve the land extensively and enjoy the same freely from son to grandson in succession with rights of gift, sale, etc. It is stated earlier in the document that the property was left uncultivated to a large extent and that breaches were formed on account of recent heavy rains and wind and that the property was in need of repairs. The document further states,

> " Whenever, in case the payment of *kattubadi* relating to the said land is delayed we shall recover only the said *kattubadi* but we shall not claim the land at any time."

This was in the year 1897. It would appear that in 1911 there was a usufructuary mortgage of these lands in favour of the present plaintiff for a sum of Rs. 500 and in that document, Ex. D. 3, the mortgagors refer to the property mortgaged as property given to Subba Rao " under a permanent cowle, that is, darmilla inam wet land." It is so stated again in the particulars of the land mortgaged. Reference may also be made to Ex. D. 1, which is an annual statement of occupation and cultivation field-war for fasli 1353. In column 1 it is stated that the suit lands are darmilla inam. Both the lower Courts have relied upon the description of the suit lands as darmilla inam in Exs. D. 1 and D 3. Mr. Venkatesam, the learned counsel for the petitioner contends that the proper interpretation of Ex. D. 2 would only lead to the conclusion that it was a mere lease of jeryoti land on favourable terms to Subba Rao and that it was not a post-settlement grant by way of inam. He further contends that the later documents of 1911 and 1943, Exs. D. 3 and D. 1, cannot be looked at for construing Ex. D. 2, which is the document of title. I am inclined to agree with the contention that Ex. D. 1 and Ex. D. 3 cannot be looked at and that the question has got really to be decided on the terms of Ex. D. 2 alone. Confining our attention to the terms of the document, Ex. D. 2, it is dificult to hold that it is a mere lease on favourable terms and not an inam grant creating an under-tenure. It seems to me that the plaintiff's title under this document is to a permanent under-tenure of a portion of a village on a small annual payment of Rs. 2 described as *Kattubadi* in the document. The reference to the services rendered by Subba Rao to the proprietors, the small amount of *Kattubadi* fixed having regard to the extent of the lands given, which is about 8 acres approximately, the provision that Subba Rao shall be entitled to enjoy the property hereditarily with full powers of alienation, and the further significant clauses that the only right which the proprietors reserve to themselves is a right to recover only the sum of Rs. 2 the *Kattubadi* amount and that they *shall have no right to the land* at any time would all seem to indicate that this is an inam grant and not a mere lease of jeryoti land on favourable terms. On this interpretation of the document it follows that the grantee is merely a landholder within the meaning of the Madras Estates Land Act, and that the defendants in possession will be the ryots who are entitled to occupancy rights. It is conceded that this is well established by the decision of the

Judicial Committee in *Narayanaraju* v. *Suryanarayudu*[1]. It follows that the judgments of the lower Courts are correct. This petition is accordingly dismissed with costs.

V.P.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO.

Sukraji Bikaji .. *Appellant**

v.

Kundammal Packraj .. *Respondent.*

Tort—Slander—Tom tom that a person's goods are being sold by public auction—No innuendo as to insolvency of that person.

The plaintiff sued the defendant for damages for slander as the latter got a tom tom made in the following words : " S. B.'s goods (*S.B.* was the plaintiff) are being sold by public auction at 3 P.M. on 27th October, 1944." On a question whether these words suggest the innuendo of the insolvency of the plaintiff,

Held, that the mere statement that the goods were being sold by public auction without the addition that they were sold in pursuance of a decree or through the Official Receiver did not by itself suggest the inference that the goods were sold by public auction because the owner of the goods did not pay his debts. The words complained of did not suggest the innuendo that the plaintiff was not solvent and that his goods were being brought to sale by auction by the creditor.

Appeal against the decree of the District Court, East Godavari at Rajamundry, in A.S. No. 17 of 1946, preferred against the decree of the Court of the District Munsiff, Rajamundry, in O. S. No. 251 of 1944.

R. Thirumalai Thathachariar for Appellant.

Respondent not represented.

The Court delivered the following

JUDGMENT.—The plaintiff sued the defendant for damages for slander. The complaint is that the defendant got a tom tom made in the following words

" Sukraj Bikajee's goods (Sukraj Bikaji is the plaintiff) are being sold by public auction at 3 p.m. on 27th October, 1944 ".

According to plaintiff these words constituted slander and that he had suffered damage. The plaintiff's suggestion is that these words suggest the innuendo that the plaintiff was not solvent and that his goods were being brought to sale by auction by the creditor. The first Court accepted the contention of the plaintiff and granted a decree for Rs. 500 as damages. On appeal the learned District Judge reversed this decision holding that the words do not *per se* constitute slander. I agree with the conclusion of the learned District Judge. I find nothing in the words to suggest that the plaintiff was an insolvent and that therefore his goods were being sold by auction. It is significant that in the announcement by P.W. 3, the drummer who did the tom tom it was not even said that the goods were being sold at the instance of the defendant. Usually a creditor has no right to sell the goods of the debtor himself. The mére fact that the goods were being sold by auction without the addition that the goods were sold in pursuance of a decree or through the Official Receiver does not by itself in my opinion suggest the inference that the goods were sold by auction because the owner of goods did not pay his debts. The contention urged on behalf of the appellant that the words do convey that meaning is, in my opinion, far-fetched and cannot be accepted. Even taking the background suggested on behalf of the appellant, I am unable to see innuendo in the words used by P.W. 3 when the auction was advertised.

There is no ground for interference with the decision of the learned District Judge. The second appeal fails and is therefore dismissed.

No leave.

V.S. ——— *Appeal dismissed.*

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1. (1939) 2 M.L.J. 901 : L.R. 66 I.A. 278 : I.L.R. (1940) Mad. 1 (P.C.).

* S. A. No. 2285 of 1946. 8th July, 1948.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAJAMANNAR, *Officiating Chief Justice*, AND MR. JUSTICE SATYANARAYANA RAO.

Arjuna Mudaliar .. *Appellant**

v.

Lakshmi Ammal and others .. *Respondents.*

Specific performance—Suit for—Averment as to plaintiff's readiness to perform the contract in accordance with the decision of the Court—Sufficiency—Long lapse of time in enforcing agreement—If and when fatal to plaintiff's suit.

In a suit for specific performance the plaintiff has, no doubt, to allege that he is ready and willing to perform his part of the contract. But it cannot be said that an averment that the plaintiff had no objection to perform the contract in accordance with the decision of the Court is not a sufficient averment of his readiness and willingness to perform his part of the contract.

Mere delay does not by itself preclude the plaintiff from obtaining specific performance if his suit is otherwise in time. The delay must be such that it may be properly inferred that the plaintiff has abandoned his right or on account of the delay there must have been such a change of circumstances that the grant of specific performance would prejudice the defendant. From long delay alone without anything further, an abandonment of rights could not be presumed.

Appeal under clause 15 of the Letters Patent from the judgment and decree of Chandrasekhara Aiyar, J., dated 28th March, 1947, in S.A. No. 284 of 1946 preferred to the High Court against the decree of the Court of the Subordinate Judge of Vellore, dated 15th August, 1945, in A.S. No. 18 of 1945 preferred against the decree of the Court of the District Munsiff of Arni dated 25th April, 1944, in O.S. No. 469 of 1942.

M. K. Harihara Aiyar for Appellant.

V. V. Raghavan and *G. T. Ramanujachari* for Respondents.

The judgment of the Court was delivered by

The Officiating Chief Justice.—The plaintiff is the appellant. He and his deceased brother, one Ramaswami Mudali, and the latter as the guardian of his minor son the third defendant, sold the suit properties to the second defendant on 9th January, 1920, by registered sale deed Ex. D. 1, for a sum of Rs. 300. On the same day, the second defendant and his wife, the first defendant, executed in favour of the vendors an agreement, Ex. P-1, agreeing to reconvey the properties on the vendors paying on any day the principal of Rs. 300, the sale price, and interest accrued on it at the rate of Re. 1 per Rs. 100 per mensem. Ramaswami Mudali died, and defendants 3 and 4 are his sons and the fifth defendant is his widow. The plaintiff instituted the suit out of which this appeal arises in the Court of the District Munsiff of Arni on 4th September, 1942, claiming one of two alternative reliefs. His first claim was on the basis that the sale deed and the agreement to reconvey formed part of the same transaction, and together amounted in law to a mortgage by conditional sale. On this footing, he claimed redemption. In the alternative, he claimed specific performance of the agreement to reconvey. The contesting defendants 1 and 2 denied that the transaction amounted to a mortgage and pleaded that the suit was barred by limitation because the agreement was sought to be enforced after the expiry of a reasonable time. The plaintiff alleged that in calculating the amount payable to the defendants he would be entitled to the benefits of Madras Act IV of 1938, but the defendants denied that he was so entitled.

The learned District Munsiff of Arni who tried the suit dismissed it. He held that as the agreement to reconvey was unregistered it cannot in any way affect in law the registered conveyance and the two together could not amount to a mortgage by conditional sale. He further held that the relief of specific performance could not be granted as there was no averment by the plaintiff of his willingness to perform his part of the contract and also because of his laches, as the transaction was so far back as 1920. The plaintiff appealed to the

* L. P. A. No. 37 of 1947. 24th March, 1948.

Subordinate Judge of Vellore who concurred with the District Munsiff in dismissing the suit but on a ground different from the grounds on which the District Munsiff based his decision. The learned Subordinate Judge held that the plaintiff would not be disentitled to the relief of specific performance because of delay but because one of the parties to the agreement to reconvey, namely, the present third defendant, was not joined as a plaintiff; and as he did not also pray for specific performance, the plaintiff alone would not be entitled to a decree. The plaintiff again appealed to this Court in S.A. No. 284 of 1946. Chandrasekhara Aiyar, J., agreed with the lower Courts in dismissing the plaintiff's suit, but not exactly on the ground on which the learned Subordinate Judge negatived the plaintiff's claim. The learned Judge held that the plaintiff was not entitled to specific performance because he had not expressed his readiness and willingness to perform his part of the contract when such an averment was the foundation for an action for specific performance and also because there had been a long and unreasonable delay in enforcing the claim, and it would be inequitable to grant a decree for specific performance after the lapse of 22 years.

The plaintiff is again the appellant in the Letters Patent Appeal.

Undoubtedly, in a suit for specific performance the plaintiff has to allege that he is ready and willing to perform his part of the contract. But we do not agree with the learned Judge that it is difficult to spell out such an averment from the plaint. It is true that he raised various pleas as regards the amount rightly payable to the contesting defendants 1 and 2, but finally in paragraph 16 he stated this :

> "Though the plaintiff is entitled to claim larger reliefs from the defendants, the plaintiff has no objection to pay the defendants any sum that the Court should be pleased to fix."

In view of this averment, the decisions in *Rustomali* v. *Ahider Rahaman Mia*[1], and *Bindeshri Prasad* v. *Mahant Jairam Gir*[2], relied on by the learned advocate for the contesting respondents (defendants 1 and 2) have no application. The plaintiff is not asserting a right to perform the contract not as it actually was but as it is alleged to be by him. Though he puts forward his own case, he makes it clear that he is ready and willing to perform the terms of the contract in accordance with the decision of the Court. No authority has been cited to us that an averment that the plaintiff had no objection to perform the contract in accordance with the decision of the Court is not a sufficient averment of his readiness and willingness to perform his part of the contract. Such an averment the plaintiff has made in this case. On this point we agree with the learned Subordinate Judge.

The learned Judge held that the delay of 22 years in enforcing the agreement was fatal to the plaintiff's suit. It is now well established that mere delay does not by itself preclude the plaintiff from obtaining specific performance if his suit is otherwise in time. The delay must be such that it may be properly inferred that the plaintiff has abandoned his right or on account of the delay there must have been such a change of circumstances that the grant of specific performance would prejudice the defendant. Their Lordships of the Judicial Committee pointed out in the leading case of *Lindsay Petroleum Co.* v. *Hurd*[3], when lapse of time and delay are most material.

> "Where it would be practically unjust to give a remedy either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted; in either of these cases lapse of time and delay are most material."

Vide also *Athikarath Nanu Menon* v. *Eravathanikat Komu Nayar*[4]. With great respect to the learned Judge, we must say that we have not been referred to any authority in which it had been held that from long delay alone without anything further, an abandonment of rights could be presumed.

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1. (1940) 45 C.W.N. 837.
2. (1887) L.R. 14 I.A. 173 : I.L.R. 9 All. 705 (P.C.).
3. (1873) L.R. 5 P.C. 221, 239.
4. (1897) I.L.R. 21 Mad. 42.

Now in this case, there is no evidence whatever from which it could be inferred that the plaintiff had abandoned his right. The learned Judge himself observes that it is probable that the parties thought that the transaction amounted to a mortgage and there was a period of 60 years to redeem the mortgage and recover possession. If this was likely to be the consciousness of the parties, then certainly the delay of 22 years cannot lead to an inference of an abandonment of his rights by the plaintiff. Likewise, there is no evidence that on account of the lapse of time defendants 1 and 2 would be prejudiced if the plaintiff is now granted specific performance. No rights of third parties have intervened, and it is not suggested that there are any special circumstances which make it unequitable that the plaintiff should be granted the relief to which he would be entitled on foot of the agreement to reconvey. On this point we agree with the learned Subordinate Judge that the delay is no bar to the maintainability of the suit.

It was contended by the learned advocate for the contesting respondents that the agreement to reconvey is void because it offends against the rule of perpetuities. But this contention cannot be accepted in view of the decision of this Court in *Charamudi* v. *Raghavulu*[1].

The plaintiff will, therefore, be entitled to specific performance of the agreement to reconvey. The Madras Agriculturists Relief Act cannot possibly apply to the case, and the plaintiff, before he gets a conveyance must, in accordance with the terms of the agreement, deposit into Court the sum of Rs. 300 with interest thereon at the rate of 12 per cent. per annum from the date of the agreement upto the date of the plaint and thereafter at 6 per cent. per annum upto the date of the deposit. The time for deposit will be three months from this date. Having regard to the long lapse of time, the plaintiff will not be entitled to any extension of time which we have now granted to deposit the money. There will be a decree for specific performance. The appellant will be entitled to his costs from the contesting respondents 1 and 2 in the Letters Patent Appeal. But there will be no order as to costs in the second appeal and in the Courts below.

V.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

The Public Prosecutor .. *Appellant**

v.

K. M. Ibrahim Sahib .. *Respondent.*

Indian Arms Act (XI of 1878), *sections* 19 (c) *and* 20—*Person holding licence to possess arms in an Indian State bringing cartridges into British India from Ceylon—Intention to hide the arms—Offence punishable.*

The doing of an act mentioned in clauses (*a*), (*c*), (*d*) or (*f*) of section 19 of the Arms Act with an intention indicating that the act should not be known to a public servant is sufficient to make it an offence. Where a person holding a licence to possess arms within an Indian State brought live cartridges by sea from Ceylon into British India and tried to hide them, but his act was detected, on the question whether he committed an offence under section 19 (*c*) and section 20 of the Indian Arms Act,

Held, the bringing into British India of arms was an act contemplated under section 19 (*c*) even if it was not an offence under the same section and as there was an intention on the part of the accused to hide his act from the observation of the Customs Authorities or public servants, he was guilty of an offence under section 20 of the Act.

Appeal under section 417, Criminal Procedure Code, 1898, against the acquittal of the aforesaid respondent (accused) by the Assistant Sessions Judge of the Court of Session, Ramnad division at Sivaganga in S.C. No. 59 of 1947.

The Appellant in person.

V. T. Rangaswami Aiyangar and *R. Santhanam* for Respondent.

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1. (1915) 28 M.L.J. 471 : I.L.R. 39 Mad. 462.

* Crl. Appeal No. 45 of 1948. 21st July, 1948.

The Court delivered the following

JUDGMENT.—The Public Prosecutor, Madras, appeals against the acquittal of the respondent by the learned Assistant Sessions Judge of Sivaganga of an offence under sections 6 and 19 (*c*) as well as under section 20 of the Indian Arms Act (XI of 1878). There cannot be much dispute about facts. The respondent who held a licence for possessing arms in the then Indian State of Pudukottah was found, on return from Ceylon at the Dhanushkodi pier to be in the possession of 25 live cartridges. He tried to hide them but the Customs Authorities were able to detect his act. The learned Assistant Sessions Judge has held that since he is entitled to possess ammunition in the State of Pudukottah for which he held a valid licence, he has not imported in contravention of the provisions of section 6 and therefore no offence under section 19 (*c*) was committed. The learned Judge also holds that since it cannot be said that an offence under section 19 (*c*) has been committed, no offence under section 20 has also been committed.

It is unnecessary to consider the questions as to whether the act committed by the respondent amounts to an offence under section 6 read with section 19 (*c*) because *ex concessis* it will be difficult to say that it is not an offence under section 20.

Section 20 is in the following terms:

"Whoever does any act mentioned in clause (*a*), (*c*), (*d*) or (*f*) of section 19, in such manner as to indicate an intention that such act may not be known to any public servant as defined in the Indian Penal Code, or to any person employed upon a railway or to the servant of any public carrier,

and whoever, on any search being made under section 25, conceals or attempts to conceal any arms, ammunition or military stores,

shall be punished with imprisonment for a term which may extend to seven years, or with fine, or with both."

Therefore the doing of an act indicating an intention that the act may not be known to the public servant is sufficient to make it an offence. Even if the act of the respondent was not an offence under section 19 (*c*) it was certainly an act as contemplated by section 19 (*c*). He has brought cartridges by sea from Ceylon into British India. That being so he has committed an act under section 19 (*c*) and the finding of the learned Judge is that there was an intention on his part to hide his act from the observation of the Customs Officers or other public servants. That being so it has to be held that the respondent is guilty of an offence under section 20 of the Arms Act. The appeal is therefore allowed and the respondent convicted of the offence under section 20. He is sentenced to pay a fine of Rs. 1,000 or in default rigorous imprisonment for six months.

K.C. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. P. V. RAJAMANNAR, *Officiating Chief Justice* AND MR. JUSTICE SATYANARAYANA RAO.

Abdul Shukoor Sait .. *Appellant**

v.

The Official Assignee of Madras and others .. *Respondents.*

Presidency Towns Insolvency Act (III of 1909), sections 7 and 85 (2)—Sale of property of insolvent with the consent of the mortgagee—Default in paying full amount—Application for order cancelling sale—Consent order passed by Court—Sale by Official Receiver in lots—Execution of several conveyances—Application by Official Receiver for directions—Maintainability—Claim of intending purchaser to specific performance of barred by time—Effect.

The property of an insolvent was the subject of a mortgage and with the consent of the mortgagee there was an order by the Insolvency Court to dispose of it in favour of the appellant for a certain amount. The appellant paid a portion of the said amount as advance but defaulted in paying the balance. The Official Assignee thereupon applied to the Court for an order cancelling the contract of sale in favour of the appellant. An order was made therein by consent of parties and it provided that in spite of default the property might be treated as sold to the appellant for the sum originally fixed and that portions of the property might thereafter be sold by the appellant and that the Official

* O. S. A. No. 40 of 1946. 18th March, 1948.

Assignee might execute a conveyance on receipt of a certain amount as the price of each ground of land sold. A third person guaranteed the performance by the appellant of the conduct of the sale and the conditions of the order passed by the Court. The property was subsequently disposed of in lots and the Official Assignee executed conveyances. The guarantor on behalf of the appellant entered into an agreement with another person for sale of a certain lot and made a part payment to the Official Assignee. Subsequently the intending purchaser paid the balance of the consideration and called on the Official Assignee to execute the conveyance first in favour of his nominee and on his refusal to do so, in his own favour. The appellant having opposed the execution of the conveyance, the Official Receiver sought the directions of the Court. On a contention as to the maintainability of such an application,

Held, that the application was maintainable as it was merely intended to obtain directions regarding the previous order passed by the Court about the conduct of the sale of the property of the insolvent.

Held also, that the application of the Official Assignee was not rendered incompetent by reason of the fact that the claim of the intending purchaser to enforce specific performance of the agreement of sale in his favour was barred by limitation.

On appeal from the Judgment and Order of Clark, J., dated 5th August, 1946, and passed in the exercise of the Insolvency Jurisdiction of the High Court in Application No. 342 of 1946 in I.P. No. 79 of 1926.

A. Viswanatha Aiyar for Appellant.

The Official Assignee of Madras, *A. Sundaresan, M. S. Venkatarama Aiyar* and *V. Natesan* for Respondents.

The Judgment of the Court was delivered by

The Officiating Chief Justice.—This is an appeal from the order of Clark, J., giving directions to the Official Assignee of Madras to execute a sale deed in favour of one Dr. M. A. Hussain of an extent of about 10 grounds comprised in a property known as "Rutland Gate." The property belonged to one P. Veeraperumal Pillai who had been adjudicated an insolvent in 1926. It was the subject of a mortgage and with the consent of the mortgagee there was an order by the insolvency Court to dispose of it in favour of the appellant for a sum of Rs. 1,60,000. The appellant paid an advance of Rs. 10,000 but defaulted in payment of the balance of consideration. The Official Assignee thereupon applied to Court for an order cancelling the contract of sale in favour of the appellant. An order by consent was passed on this application by Mockett, J., on 14th September, 1938. The Court directed that in spite of the default, the property might be treated as sold to the appellant for a sum of Rs. 1,60,000; and that a part of the property should be sold by the Official Assignee to one S. S. Rajan for a sum of Rs. 61,000. Adjusting the original deposit of Rs. 10,000 already paid by the appellant and a further sum of Rs. 30,000 to be paid by him before the making of that order, the following provision was made for the payment of the balance, *viz.*, Rs. 59,000 which, till payment, was to bear interest at 7½ per cent. per annum. The appellant was to dispose of the property in lots or otherwise and on every sale had to make payments to the Official Assignee as against a conveyance by the Official Assignee of the property sold of Rs. 400 per ground for every ground sold and until the development of the property was completed a sum of Rs. 200 on every ground sold, which should be kept in a separate account and utilised for the development of the property. The order also provided for a commission of three quarter per cent. to be paid to the Official Assignee on the sales executed by him in consideration of the services rendered by him. One Zachariah Ismail Sait guaranteed the performance by the appellant of the conduct of sale and the conditions of the order made by Mockett, J. It is common ground that in pursuance of the order almost the whole of the property was disposed of in lots and the Official Assignee on payment as provided by the order, executed conveyances to the several purchasers found by the appellant.

On the 24th October, 1939, Zachariah Ismail Sait, the guarantor on behalf of the appellant, entered into an agreement with Dr. Hussain to convey an extent of about 10 grounds at Rs. 730 per ground. On the same day he passed on a cheque for Rs. 7,000 received from Dr. Hussain in part payment to the Official Assignee and requested him to send a stamped receipt direct to the party as usual. The purchaser, after waiting for sometime called upon the Official Assignee to execute

a conveyance and finally sent a cheque for Rs. 985 being the balance of the sale price. He complained in more than one letter of the delay in getting the conveyance. On 3rd April, 1941, the Official Assignee wrote to him saying that he was willing as a special case, that a conveyance should be executed in his favour on payment of the balance of the purchase price. It was in pursuance of this letter that the cheque for Rs. 985 above mentioned was sent. It appears from the correspondence that Dr. Hussain wanted the sale deed to be executed in favour of his nominee but this the Official Assignee was not willing to do without a specific order of Court. In his letter dated 26th May, 1941, the Official Assignee states as follows:

"Further, as intimated to you personally, my office account shows that the amount is credited only in your name. Unless the Court made an order that the sale deed could be executed in favour of anybody else, I am not prepared to execute the sale deed in favour of anybody else. In these circumstances, if you are not prepared to take the sale deed in your own name, it is up to you to move the Court."

There is no dispute that after the disposal of practically the entire property, the excess amount remaining after taking into account all necessary disbursements both in favour of the Official Assignee and the Corporation was paid over to the appellant and of course the amount paid by Dr. Hussain was also included in arriving at the amount. After failing to obtain a conveyance from the Official Assignee in favour of his nominee, Dr. Hussain applied to the Official Assignee for a conveyance in his favour but the appellant was opposed to such a course. The Official Assignee was therefore compelled to approach the Court with an application for directions in the matter. The material facts are all set out in the report filed by the Official Assignee on the 19th July 1946 along with his application. Clark, J., overruled the objection raised by the appellant and has directed that the Official Assignee should execute the conveyance to Dr. Hussain. Hence the appeal.

The three objections raised before Clark, J., were again pressed before us. The first objection was that the application was not maintainable under section 7 of the Presidency Towns Insolvency Act as the matter did not relate to insolvency proceedings and lay completely outside the province of insolvency jurisdiction. For this position, the learned advocate for the appellant relied upon a statement of the law in Mulla's Commentaries, page 53 and on the decision in Re *Arnold*: Exparte *the Official Receiver*[1], In re *Ignatius Rohdrick*[2], Ex parte *Lyons*: In re *Lyons*[3] and *Palanivelu Odayar* v. *The Official Receiver, West Tanjore*[4]. There cannot be much dispute about the scope of section 7 of the Act that it would not apply to matters totally unrelated to the administration of the estate of the insolvent and distribution of his assets among the creditors. It would certainly not relate to disputes arising between third parties simply because the disputes are in a remote way connected with insolvency proceedings. In our opinion the answer to the objection really is this: the Official Assignee in his application does not pray for any decision on a question of priority; nor does he want any adjudication of the rights of parties. To this extent it may be that section 7 of the Act was not the appropriate provision for the application. The application would more appropriately fall under section 85, sub-section (3) of the Presidency Towns Insolvency Act which says that the Official Assignee may apply to the Court for directions in relation to any particular matter arising under the insolvency. In essence it is true that the sale of the insolvent's property subject to a mortgage free of that mortgage is really a sale outside the insolvency. Nevertheless an application was made in this case to the learned Judge sitting in insolvency and an order by consent was obtained from Mockett, J., sitting in insolvency on which order the appellant bases his claim. What the Official Assignee seeks in his application is only for direction from the Court which passed the order on 14th September, 1938. He prays for directions in pursuance of that order. We therefore did not think it necessary to refer in detail to the several decisions cited by the learned advocate for the appellant.

1. (1891) 66 L.T. 121.
2. I.L.R. (1939) 2 Cal. 434.
3. (1872) L.R. 7 Ch. Ap. 494.
4. (1931) 61 M.L.J. 763.

The next objection was, even assuming that the application was maintainable, it was barred by limitation. A decision of the Full Bench of this Court in *Muthuswami Chetty* v. *Official Assignee, Madras*[1], was relied on for the proposition that an application under section 7 of the Presidency Towns Insolvency Act must be deemed to be a suit to which the provisions of the Indian Limitation Act would apply. If Dr. Hussain had filed a suit for a specific performance, so the argument ran, it would have been barred by time, and therefore this application by the Official Assignee must equally be held to be barred by time. In our opinion the learned Judge was right in overruling this objection. The fact that if Dr. Hussain had sued for specific performance he might be out of time does not necessarily prevent an officer of Court under directions from the Court from doing what would be just and proper. The bar of limitation is only a bar to the enforcement of claims. The lapse of time does not necessarily extinguish either a debt or a claim. The Official Assignee as an officer of Court is quite justified in applying to the Court for directions and the learned Judge was justified in making what he considered a proper order having regard to the fact that Dr. Hussain had paid the entire purchase price.

The last objection was based upon the language of the consent order dated the 14th September, 1938; but it appears to us that the language, far from supporting the appellant, lends support to the view that conveyances by the Official Assignee to the several purchasers were contemplated. Paragraph 4 of the order says:

"That the purchaser shall as soon as possible dispose of the property as purchased by him in lots or otherwise and on every sale made shall make the following payments to the Official Assignee, as against a conveyance by the Official Assigeee of the property sold"

and paragraph 5 provides that on the *sales* executed by the Official Assignee he shall be entitled to a commission. In view of this language it cannot be contended that only one conveyance by the Official Assignee in favour of the appellant was all that was contemplated and that it was for the appellant in his turn to execute conveyances for the several lots for which he found purchasers. We agree with the learned Judge that the order specifically contemplates conveyances to the several purchasers by the Official Assignee.

As all the objections taken by the appellant fail, the appeal must be dismissed with costs of respondents 4 to 7. The Official Assignee will be allowed the costs of the printed papers purchased by him.

B.V.V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SATYANARAYANA RAO.

A. S. Mohammad Ibrahim Ummal *alias* Shahul Hameed Ummal of unsound mind by next friend M. T. S. Md. Thambi .. *Petitioner**

v.

Shaik Mohammad Marakayar and another .. *Respondents.*

Civil Procedure Code (V of 1908), section 151, Order 16, rule 14 and Order 32, rule 15—Person alleged to be of unsound mind—Determination of question of unsoundness of mind—Examination of medical expert—Direction for examination of person of unsound mind by expert.

Under Order 32, rule 15, Civil Procedure Code, the Court has the right and jurisdiction to enquire into the question, in a case where a person was not already adjudged to be of unsound mind, whether the person was really of unsound mind or not and whether by reason of such unsoundness of mind or mental infirmity the party was incapable of protecting his or her interest. And for this purpose it is open to the Court to seek assistance of medical experts and it can compel the party to attend the Court for deciding the question. It can also direct the person alleged to be of unsound mind to be subjected to the examination of the expert.

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1. (1936) 71 M.L.J. 289 : I.L.R. 59 Mad. 1020 (F.B.).

* C.R.P. No. 1420 of 1947. 2nd April, 1948.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Tuticorin dated 19th August, 1947, and made in I. A. No. 241 of 1947 in O. S. No. 70 of 1946.

The Advocate-General (*K. Rajah Aiyar*), *B. Pocker* and *Mahboob Alikhan* for Petitioner.

S. Ramachandra Aiyar and *M. Krishna Bharathi* for Respondents.

The Court delivered the following

JUDGMENT.—This petition is to revise the orders passed by the learned Subordinate Judge of Tuticorin in I. A. No. 241 of 1947, in O. S. No. 70 of 1946. The plaintiff is the petitioner before me.

The suit, O. S. No. 70 of 1946 was instituted on the 15th November, 1946, on behalf of one Mohamad Ibrahim Ummal *alias* Shahul Hameed Ummal who was described as a person of unsound mind by her mother as next friend. Ibrahim Ummal succeeded to a portion of her father's estate after his death on the 17th November, 1929. She was married to the second defendant in the suit on 3rd March, 1938. The first defendant is her step-brother. During the minority of the said Ibrahim Ummal her mother managed her property and during the course of her management she became liable to pay to this said Ibrahim Ummal a large amount. A suit, O. S. No. 4 of 1940, on the file of the Sub-Court was instituted for an account of the moneys which came into the hands of the mother and for recovery of the amount after it was ascertained. That suit was ultimately compromised and under that compromise the present plaintiff became entitled to some of her mother's property. On the 12th January, 1943, Ibrahim Ummal executed a registered power of attorney in favour of her husband, the second defendant, and in pursuance of the power conferred upon him under the said power of attorney the second defendant alienated under a sale deed dated 7th February, 1943, some of the items of property which are the subject-matter of the present suit. The step-brother, the first defendant, instituted suit O. S. No. 51 of 1945, against the present plaintiff represented by her husband as the guardian-ad-litem for recovery of a large amount of money on foot of a promissory note alleged to have been executed in his favour by the plaintiff. That suit also was ultimately compromised whereunder the first defendant became entitled to recover a sum of nearly Rs. 12,000 and odd from the plaintiff. In the present plaint it is alleged in paragraph 4 that:

> "the plaintiff has been from birth a person of unsound mind in the sense that she was of very weak intellect and mental infirmity of such a character that she could not understand what she was doing and form a rational judgment as to the effect of her action on her own interests. The plaintiff has been in that condition all these years and continues to be so even now."

On these allegations the power of attorney, the sale deed in favour of the first defendant by the second defendant and the compromise decree in O. S. No. 51 of 1945 were attacked in the plaint as void on the ground that at all material times the plaintiff was of unsound mind and was not in a position to understand the effect of the transactions. Reliefs appropriate to the allegations in the plaint were claimed in paragraph 15 of the plaint. The defendants 1 and 2 denied the allegations in the plaint by separate written statements and also questioned the right of the next friend to institute the suit on the ground that the plaintiff Ibrahim Ummal was not of unsound mind. It would be seen that practically the same allegations are the foundation for the attack against the sale deed and the compromise decree and the right of the next friend to institute the present suit. Therefore the question of the right of the next friend to institute the suit on behalf of Mohammad Ibrahim Ummal as well as the question of the validity and binding nature of the suit transactions are intimately connected and depend upon a decision of one issue of fact, *viz.*, whether the said Mohammad Ibrahim Ummal was of unsound mind or not as alleged in paragraph 4 of the plaint.

The mother died on the 24th December, 1946. Thereafter one Mohammad Thambi filed I. A. No. 23 of 1947 to add him as the next friend of Ibrahim Ummal

and to permit him to conduct proceedings in the suit. On that application the learned Subordinate Judge made an order appointing him as the next friend as a result of an endorsement made on behalf of the defendants by their pleader on the petition (I. A. No. 23 of 1947) to the following effect:

"The defendants agree that without prejudice to the contentions of the defendants regarding the right of the present next friend to sue on behalf of the plaintiff and the question of the plaintiff's sanity or otherwise the petitioner may be appointed as next friend for the limited purpose of the enquiry as contemplated by *Kasi Doss* v. *Kassim Sait.*[1]

The main issues in the suit are two:

(1) Is the plaintiff unsound in mind or incapable of protecting her interest?

(2) Is the power of attorney executed by the plaintiff to the second defendant null and void owing to unsoundness of mind?

The present next friend took the plaintiff Muhammad Ibrahim Ummal to Madras after the death of the mother, and got her examined from 17th January, 1947 to 30th January, 1947 by the Superintendent of the Government Mental Hospital, Madras, Dr. J. Dhairyam. In this examination he was assisted also by a lady doctor attached to the Mental Hospital, Madras, by the Head Nurse, by Dr. Miss Madhuram, Superintendent, Government Gosha Hospital, Madras and Dr. Rama Rao, Superintendent of an X'Ray Institute, Poonamallee High Road, Kilpauk. As a result of his examination the doctor gave a certificate to the effect that the said Ibrahim Ummal was in his opinion:

"a congenital mental defective bordering between an imbecile and a feeble minded person. According to the tests and examinations she is more in the grade of an imbecile than in that of a feeble minded person."

After this certificate an application I. A. No. 171 of 1947 was filed on behalf of the plaintiff under Order 26, rule 4, Civil Procedure Code, for examining the aforesaid five persons on commission. That application was opposed by defendants 1 and 2 but the Court ordered the examination of the witnesses on commission by its order dated 18th April, 1947. After the examination of the witnesses and the return of the commission warrant, the first defendant filed the present application, I. A. No. 241 of 1947, on 28th June, 1947, praying that Lt. Col. Dr. G. R. Parasuram should be appointed as commissioner to examine and report about the mental condition of Muhammad Ibrahim Ummal. An endorsement was made on that petition later on the 10th August, 1947, by the counsel for the first defendant that he did not press for the examination by Dr. Parasuram but that the Court should appoint a competent person for that purpose. One of the grounds urged in support of the petition was that even Dr. Dhairyam deposed in the evidence before the Commissioner that it would have been better if he had been appointed as a Commissioner to examine the girl. Allegations were also made to the effect that the previous history of the girl was not completely and fully placed before the doctor to enable him to give a considered opinion and that as his examination from 17th January, 1947 to 30th January, 1947 was only in his private capacity and not as an in-patient of the Government Hospital it would be more satisfactory to have the lady examined by an independent mental expert and to have his evidence made available to the Court for a satisfactory decision on the crucial question in the case. In spite of the opposition by the next friend the learned Subordinate Judge in an order which in my opinion was a well-considered and just order, held that it was desirable in the interests of justice that the lady should be examined by an expert appointed by Court whose opinion would be impartial and unbiassed and above board. He was of opinion that in a case of this description where the question raised was beset with considerable difficulty particularly as the Court had to decide the degree of the feebleness of mind of the plaintiff as she definitely was not an idiot or imbecile, it was essential to have the assistance of independent expert medical opinion. In the result he directed that an expert should be appointed as a Commissioner to examine the plaintiff and that for that purpose the plaintiff

1. (1892) 2 M.L.J. 215: I.L.R. 16 Mad. 344.

should be produced before such Commissioner by the next friend. The matter was adjourned by him for ascertaining and fixing a suitable mental expert for that purpose.

It is against this order that the present revision petition has been preferred to this Court.

The main question that was argued on behalf of the petitioner was that the Court had no jurisdiction to make the order. It was urged that though the Court had the power and jurisdiction to direct a party to be present in Court and to examine such a party and though the Court had also the power to examine an expert witness in order to assist the Court to enable it to reach a satisfactory decision it was not open to the Court to direct that the plaintiff should submit herself for an examination to such an expert. The question for consideration is whether this contention is tenable.

Order 32, Rule 15, Civil Procedure Code applies the procedure contained in rules 1 to 14 of that order to persons adjudged to be of unsound mind and to persons who, though not so adjudged, are found by the Court on inquiry, by reason of unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued. Under this rule it would be seen that the Court has the right and jurisdiction to enquire into the question, in a case where a person was not already adjudged to be of unsound mind, whether the person was really of unsound mind or not. That this jurisdiction does not rest on any statutory rule but is part of the inherent jurisdiction of the Court is clear from the decision of *Lee* v. *Ryder*[1]. In that case a motion was made by the plaintiff in the action to discharge an order obtained for a commission to appoint a guardian to an aged person who was afflicted with mental infirmity. The fact of infirmity was disputed but the Vice-Chancellor (Sir John Leach) made the following Order :

"This Court doth order, that it be referred to Mr. Cross, one, &c., to inquire whether the defendant, John Taylor is competent to answer the plaintiff's bill, without the appointment of a guardian for that purpose ; and for the purpose of such inquiry it is ordered that the defendant John Taylor do attend the said Master from time to time as he shall direct. And the said Master is to be at liberty to call in such medical assistance as he may think necessary in making such inquiry ; and the said Master is to state the result of the said inquiry, with his opinion thereon, to the Court, whereupon such further order shall be made as shall be just."

This decision was pronounced in 1822. In the rules of the Supreme Court there is a provision in Order 16, rule 17, somewhat analogous to the provision in Order 32, rule 15, Civil Procedure Code. The rule reads as follows :

"Where lunatics and persons of unsound mind not so found by inquisition might respectively, immediately before the 1st November 1875, have sued as plaintiffs or would have been liable to be sued as defendants in any action or suit, they may respectively sue as plaintiffs in any action by their committee or next friend according to the practice of the Chancery Division."

That is to say, this rule also, as does rule 15 of Order 32, draws a distinction between the two classes of persons, persons who were already adjudged of unsound mind and persons who were not so adjudged. It has to be noted that this rule (Order 16, rule 17) does not provide an enquiry by Court as does rule 15 of Order 32, but all the same in construing this rule the Courts in England held that the Court had ample power to enquire into and adjudicate upon the question of the unsoundness of mind of either the plaintiff or the defendant as the case may be. This was established by the decision in *Howell* v. *Lewis*[2], a judgment of Kekwich, J. In that case the jurisdiction of the Chancery Court in such matters which was expounded with clearness by James, L.J., in *Beall* v. *Smith*[3] was referred to as well as the decision in *Lee* v. *Ryder*[1] the learned Judge observed at page 673 as follows :

"Thereupon the Vice-Chancellor made the order, which is set out at the bottom of the page and which, in short, directed an enquiry whether the defendant was competent to defend in his own person or whether a guardian ought to be appointed. That seems to give me a guide to what I should do in this case."

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1. (1822) 6 Madd. 294 : 56 E.R. 1103.
2. (1891) 65 Law Times, 672.
3. (1873) 9 Ch. Ap. 85 : 29 Law Times 625.

If I may repeat the learned Judge's observations, these decisions give me also a guide to what should be done in a case of this description. In the present case the question arises not only under Order 32, rule 15, but also as a substantial issue in the suit as the basis of attack levelled against the impugned transactions is the same. The Court has therefore ample jurisdiction to enquire into the question whether the plaintiff was really by reason of unsoundness of mind or mental infirmity incapable of protecting her interest or not. For this purpose as pointed out by the Vice-Chancellor in *Lee* v. *Ryder*[1] it is open to seek medical assistance.

The place of medical evidence in such matters was considered by Neville, J., in *Richmond* v. *Richmond*[2]. The learned Judge points out :

"With regard to the question of whether in any, or what degree, she is capable of managing her own affairs and being bound by her own contracts and by her own acts, that, in my opinion, is always a question for the Court to decide before which the matter comes. I say that, because, although I did not interrupt at the time, both in the affidavits and the parol evidence given here it is obvious that an idea obtained that that was a question for the doctors to decide, and that the question was whether the doctors thought that she was capable of managing her own affairs or whether they did not. In my opinion that is not so ; it is for the Court to decide, although the Court must have the evidence of experts in the medical profession who can indicate the meaning of symptoms and give some general ideas of the mental deterioration which takes place in cases of this kind. I think that is a matter of importance to bear in mind, because, although the witnesses in the present case are the most competent men to be found to give an opinion upon questions of insanity from a medical aspect of the case, I think their evidence here has shown pretty well that they are not the best persons in the world to decide a question which depends upon the weighing of evidence and the materiality of the facts that come before them."

The Court therefore is perfectly justified in seeking the assistance of experts.

As regards the power of the Court to compel the attendance of the plaintiff it was not disputed before me on behalf of the petitioner that the Court possesses such a power and, indeed, it could not be disputed, in view of the clear language of Order 3 rule 1, Civil Procedure Code. The proviso to that rule says :

"Provided that any such appearance shall, if the court so directs, be made by the party in person."

This proviso was construed by this Court both in *Vaigunthathammal* v. *Valliamman*[3] and the later case in *Ayya Nadan* v. *Seeni Ammal*[4]. In *Ayya Nadan* v. *Seeni Ammal*[4], Krishnan, J., says at page 293 :

"Order 3, rule 1 proviso is wide enough to enable the Court to direct any party to the suit to appear in person whether he be a minor or a major or of sound or unsound mind and it may be done at any stage of the suit; *see Vaigunthathammal* v. *Valliamman*[3]."

The Court has also ample power under Order 16, rule 14, Civil Procedure Code, to examine not only the parties and the witnesses summoned by them but also other persons whom the Court thinks are necessary. If so much is conceded or established the only point is, has the Court no jurisdiction to make that power effective ? It is said that an expert may be examined but the expert should not have the necessary data to form his opinion by examining the plaintiff. I think the contention so stated reduces the power of the Court to a mockery. If a jurisdiction exists in a Court, the Court has always the right and duty to exercise that power as effectively as possible. It is an inherent jurisdiction of the Court to make its power effective even though there is no specific provision in the Code or elsewhere to cover that particular power. It is to cover such cases, I think, section 151, Civil Procedure Code, was enacted. I am therefore unable to accept the contention of the learned Advocate-General that the Court in such cases is helpless and is not entitled to direct that the plaintiff should be subjected to the examination of an expert whom the Court appoints. It is also strenuously urged by the learned Advocate-General on behalf of the petitioner that even if such an order is made it is open to the next friend to nullify the effect of that order by not obeying it as there is no provision for enforcing such an order. It is unnecessary for me at this stage to deal with this somewhat extraordinary contention as I think that when

1. (1822) I.L.R. 6 Madd. 294 : 56 E.R. 1103.
2. (1914) 111 L.T. 273.
3. (1917) I.L.R. 41 Mad. 256.
4. (1920) 11 L.W. 289.

such a situation arises the Court would find adequate means of enforcing its order. If the next friend chooses to disobey the order it would be open to the Court to take such steps as it thinks proper in the circumstances.

The only other point that requires consideration is that the order of the learned Judge has the effect of putting the plaintiff to considerable inconvenience by taking her from place to place far away from her residence and without the assistance of her nearer relatives. No doubt it would be inconvenient if the plaintiff were to be taken away for a long time from her usual place of residence and from her surroundings depriving her of the help and assistance of her relatives. I have no doubt that when the expert is selected by the Court below, the Court will see that minimum inconvenience is caused to the plaintiff and it is only if it becomes impossible to have her examination at a place near by and necessitates her removal to the place of the expert that she should be directed to be taken to such a place. Of course the Court will see that she is given ample assistance and help and that minimum inconvenience is caused to her. I thought that it would be possible for the parties to come to an understanding on this matter but they were not able o agree. For the reasons given above I think this revision petition must fail and hould be dismissed with costs.

B.V.V. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO.

Balaramireddigari Soma Reddi and another .. *Appellants**

v.

Gowkanapalle Thippa Reddi .. *Respondent.*

Madras Agriculturists' Relief Act (IV of 1938), sections 8, 9 and 13 and Indian Evidence Act (I of 1872), section 92—Promissory note executed after the Act came into force—Plea that it was a mere voucher of prior borrowing to which sections 8 and 9 of Madras Agriculturists' Relief Act apply—Maintainability—Allegation of misrepresentations by plaintiff—Admissibility of oral evidence.

The suit promissory note was of 1940 after Act IV of 1938 came into force and was the last of a series of renewals, the original borrowing having been in 1922. The defendant raised the plea that it was not supported by consideration and was merely intended to serve as a voucher for the previous borrowing and that the plaintiff made fraudulent misrepresentations and prevailed upon the defendant to execute the note making him believe that it would not be enforced if it was found that nothing was due under the Act or that only such sum as would be legally found due would be taken. On a question as to the maintainability of the plea and admissibility of oral evidence in support of it,

Held, that such a plea was open to the defendant and that oral evidence of the fraudulent misrepresentations would be admissible.

Suryanarayana v. *Alawandara Rao,* (1945) 2 M.L.J. 565 followed.

Appeal against the decree of the District Court of Cuddappah, dated 29th August, 1945, in A. S. No. 98 of 1943, preferred against the decree of the Court of the Temporary Subordinate Judge of Cuddappah in O. S. No. 25 of 1943 (O. S. No. 19 of 1942, District Court, Cuddappah).

Kasturi Seshagiri Rao for Appellants.

C. Rangaswami Aiyangar for Respondent.

The Court delivered the following

JUDGMENT.—The defendants are the appellants. The respondent instituted the suit out of which this second appeal arises for the recovery of a sum of Rs. 3,891-12-0 alleged to be due on a promissory note executed by the first defendant in favour of the plaintiff and the promissory note is dated 21st August, 1940. The second defendant is the son of the first defendant. The plaint itself admits that the borrowing by the first defendant commenced in 1922 and there were renewed promissory notes in between the suit promissory note and the original borrowing

*S.A. No. 2289 of 1945. 6th July 1948.

of 1922. The plea of the defendants was that though the promissory note was executed after Madras Act IV of 1938 came into force they were "agriculturists" entitled to relief under the Act. The circumstances under which the suit promissory note came to be executed are set out in paragraph 3 of the written statement of the first defendant, which states that the suit promissory note was not supported by consideration and that it was intended merely to serve as a voucher for the previous borrowing, that the plaintiff made fraudulent misrepresentations and prevailed upon the first defendant to execute the suit promissory note by making him believe that he would not enforce the suit note if on legal advice it was found that nothing was due under the said Act or that he would take only such sum as might be legally found due. This plea was overruled by the learned Subordinate Judge without giving any reasons and a decree was granted in favour of the plaintiff. There was an appeal to the District Court and the learned Judge thought that the matter was covered by section 92 of the Evidence Act and that under that section the defendant was not entitled to raise the plea which he did in his written statement. His view was that oral evidence in support of the arrangement pleaded by the defendant was inadmissible in evidence in view of the language of section 92. In the result he dismissed the appeal by the defendants.

In my opinion the view of the Courts below is obviously wrong. The matter is really concluded by a decision of a Bench of this Court in *Suryanarayana* v. *Alawandara Rao*[1] where it was pointed out that a debt incurred after the commencement of Madras Act IV of 1938 cannot be scaled down except in accordance with section 13. But in a suit on such a debt the defendant may plead that the document executed after the commencement of the Act was a mere voucher acknowledging a debt incurred prior to the commencement of the Act to which section 8 or section 9 of the Act would apply. If so much is pleaded and established, the excess over the amount due under the prior document on applying section 8 or 9 may be treated as an amount in respect of which there is a failure of consideration. This, in my opinion, is exactly the plea of the first defendant in paragraph 3 of the written statement. He further adds that there was also a fraudulent misrepresentation. As the Courts below have misdirected themselves in law in ruling out oral evidence and in not considering the plea of the defendants, the decrees of the Courts below are set aside and the suit remanded to the District Court (as there is no temporary Sub-Court) for proper trial in the light of the observations contained in this judgment and in the judgment reported in the case cited above. The defendants are entitled to their costs throughout and irrespective of the result of the suit. The further costs will be provided by the decree to be passed in the suit. The Court-fee paid on the memorandum of Second Appeal and also in the appeal to the lower Court will be refunded.

Leave to appeal is refused.

V.P.S. — *Appeal allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR FREDERICK WILLIAM GENTLE, *Chief Justice*, MR. JUSTICE SATYANARAYANA RAO AND MR. JUSTICE GOVINDA MENON.

Shankar Bhatta .. *Appellant**

v.

Shankar Upadhya and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 34, rule 6—Applicability—Mortgage decree in 1941 in respect of a mortgage of 1931—Application for personal decree in respect of unsatisfied balance—Maintainability.

A suit on a mortgage of 1931, which contained a personal covenant, was filed and a decree was obtained in 1941 and in pursuance of the decree the hypotheca was sold. Cl. 5 of the mortgage decree provided that in respect of the unsatisfied balance the mortgagee should be at liberty

* S. A. No. 712 of 1946. 27th October, 1947.

1. (1945) 2 M.L.J 565.

where such remedy is open to him under the terms of the mortgage as is not barred by time to apply for a personal decree against the mortgagors for the balance. There was an unsatisfied balance. An application was made under Order 34, rule 6, Civil Procedure Code, for a personal decree against the mortgagors and their brother who, though a defendant in the suit, was not a party to the mortgage.

Held, by the time the suit on the mortgage was instituted, any remedy by virtue of recourse to the personal covenant was barred. Since the remedy under personal covenant was barred, the mortgagee had nothing by reference to the mortgage deed which could avail him to recover any balance. Further, there cannot be recourse against the brother who was not a party to the mortgage deed and so who was not under any obligation regarding the personal covenant in it.

Appeal against the decree of the District Court of South Kanara dated 10th October, 1945, in A.S. No. 341 of 1944 presented againt the decree of the Court of the District Munsiff of Kundapur dated 26th June, 1944, in R.I.A. No. 53 of 1943 in O.S. No. 48 of 1941.

K. P. Adiga for Appellant.

K. Srinivasa Rao for Respondent.

(In pursuance of an order of reference dated 18th April, 1947, by Happell, J., this appeal coming on for hearing)

The Court delivered the following judgments.

The Chief Justice.—This second appeal is preferred from the decision in appeal of the learned District Judge of South Kanara, who reversed the learned District Munsiff of Kundapur, in a matter arising out of a mortgage suit. The appeal first came before Happell, J., whose attention was drawn to two decisions of this Court, *Rajagopalaswami Naicken* v. *Palaniswami Chettiar*[1], and *Sabapathi Pillai* v. *Chockalinga Pillai*[2]. Each is a decision of a Division Bench and they are considered to be in conflict. Both of them were referred to in *Purushothama* v. *Raya Pandaram*[3]. It was in consequence of the considered conflict that this appeal has been posted before a Full Bench. In my view reference to the authorities abovementioned is in no way required and this appeal can and should be decided simply upon the construction of the decree in the suit.

The appeal arises out of a mortgage suit in which the present first respondent was the mortgagee. The mortgagors were two persons, brothers of the third defendant in the suit and the sole appellant before this Court. The mortgage was effected on the 1st of December, 1931 by which Rs. 500 was advanced secured upon the properties belonging to the joint family of which the mortgagors, the first and second defendants, and the present appellant, were members. The mortgage deed contained a personal covenant which is usually found in documents of that description. A mortgage suit was instituted in 1941. On the 5th March, 1941, there was a preliminary decree containing the usual provisions. The sum ascertained due in respect of principal, interest and costs, upto the date of the plaint, was Rs. 690-6-5. In pursuance of the decree the hypotheca was sold. It realised Rs. 650 and after deduction of the costs of the sale, the balance being set-off against the amount of the judgment debt, there still remained about Rs. 150 unsatisfied. The mortgagee made an application before the learned District Munsiff of Kundapur asking for a personal decree against all the judgment debtors in respect of the balance. This was made in pursuance to Order 34, rule 6 of the Civil Procedure Code. The application was dismissed. On appeal by the mortgagee to the learned District Judge of South Kanara, the order of the learned District Munsiff was set aside and directions were given for a personal decree in respect of all the judgment-debtors, including the present appellant, for recovery of the undischarged balance. This appeal is preferred by the third defendant in the suit who as pointed out above, was not a mortgagor and who, it would follow, was in no way bound or obliged by the personal covenant contained in the mortgage deed.

Considerable argument has been addressed regarding a number of decisions, including those previously cited, and also the effects of the provisions of Order

1. (1931) 62 M.L.J. 93 : I.L.R. 55 Mad. 332.
2. (1913) 25 M.L.J. 552.
3. (1944) 2 M.L.J. 178 : I.L.R. 1945 Mad 165 (F.B.).

34, rules 12 and 13 of the Civil Procedure Code. As mentioned earlier, in my view, those matters need require no consideration and I propose shortly to state my reasons.

Clause 5 of the decree provides that if the money realised by the sale of the hypotheca should not be sufficient for payment in full of the amount payable to the mortgagee, he, the mortgagee, should be at liberty, where such remedy is open to him under the terms of the mortgage and is not barred by any law for the time being in force, to apply for a personal decree against the defendants for the amount of the balance. "The amount payable to the plaintiff," mentioned above, is the sum of Rs. 690-6-5 ascertained to be the sum due for principal, interest and costs. The mortgage deed was executed in 1931. The suit on the mortgage deed was not instituted until 1941. By that time, it is not disputed, any remedy by virtue of recourse to the personal covenant was barred. Clause 5 of the decree enables the mortgagee-respondent, in respect of any unpaid balance, to have recourse only to such remedy as is open to him under his mortgage which is not barred by any law for the time being in force. It must follow that since the remedy under the personal covenant is barred the mortgagee has nothing by reference to the mortgage deed, which can avail him to recover any balance. Clause 5 gives the mortgagee only a remedy, which is not barred, pursuant to the mortgage deed. He has now lost that remedy. So far as the appellant is concerned he has a further objection. He was not a party to the mortgage deed and is not under any obligation regarding the personal covenant contained in it and, consequently, in addition to the matters already pointed out, there cannot be any recourse against him.

It is for the above reasons, that, in my view this apeal should be allowed so far as the appellant is concerned and the order of the learned District Judge set aside and that of the learned District Munsiff restored. The appellant will have the costs here and in the Court below, payable by the mortgagee respondent.

Satyanarayana Rao, J. :—I agree.

Govinda Menon, J. :—I agree.

V.S. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL, AND MR. JUSTICE GOVINDARAJACHARI.

Pyndah Ramakrishnaiah ... *Appellant**

v.

The Official Receiver, East Godavari at Rajamundry and others .. *Respondents.*

Will—Construction—Devise to a person after the life of another—Succession Act (*XXXIX of* 1925), *section* 119.

The two material clauses in a will were as follows :

" Clause 5 : The entire moveable and immoveable properties belonging to me, excluding what I have given herein and what I am going to give in future, the remaining entire properties shall pass to my wife *P.S.*"

" Clause 12 : The house wherein I am residing shall, after the death of my wife, pass to my fourth son Pyda Satyanarayana Murthi."

P.S. died before the death of the testator.

On a contention that as clause 12 did not expressly give the wife a life interest, it could not operate immediately on the death of the testator and so under clause 5 the wife obtained an absolute interest in the property, which would ultimately devolve upon her sons,

Held, negativing the contention, that since the testator intended that the bulk of the property should go to his wife *P.S.* absolutely, the fact that in clause 12 he gave the particular property to Pydah Satyanarayana Murthi after her death was an indication that he intended clause 12 to be an exception to the general clause 5 whereby he gave the bulk of his property to his wife absolutely.

Strictly construing clause 5, the widow would not be entitled to an absolute interest in the particular property on the death of the testator, even if the legacy covered by clause 12 failed. Further,

* S. A. No. 2190 of 1945. 18th March, 1948.

when property is devised to a person after the life of another, the remainderman has a vested interest upon the death of the testator under section 119 of the Indian Succession Act.

Appeal against the decree of the District Court, East Godavari at Rajahmundry, in A.S. No. 78 of 1942 preferred against the decree of the Court of the Subordinate Judge, Coconada, in O.S. No. 27 of 1934.

Ch. Raghava Rao, N. Rammohan Rao and *Srimati G. Durga Bai* for Appellant.

M. S. Ramachandra Rao and *D. Narasaraju* for Respondents.

The Judgment of the Court was delivered by

Horwill, J.—This second appeal is by the first defendant, who contends that under the will of his father, the second defendant was not entitled to any exclusive right in the family house under clause 12 of the will.

The two material clauses are clause 5 and clause 12. Clause 5 is as follows :

"The entire moveable and immoveable properties belonging to me, excluding what I have given herein and what I am going to give in future, the remaining entire properties shall pass to my wife Pydah Sattiraju."

Clause 12 is as follows :

"The house wherein I am residing shall, after the death of my wife, pass to my fourth son Pydah Satyanarayanamurthi (second defendant)."

The argument of Mr. Raghava Rao for the first defendant is that clause 12 does not expressly give the wife a life interest ; so that clause 12 could not operate immediately on the death of the testator and so under clause 5 the wife obtained an absolute interest in the property, which ultimately devolved upon her sons. Pydah Sattiraju died before her husband. It is however conceded by the learned advocate for the appellant that the question for consideration is the same as if the wife had survived her husband.

It is conceded that in certain simple cases, such as where a person bequeathes property to his heir-at-law *B* on the death of *A*, a Court would hold that by necessary implication there was a grant to *A*, with the remainder to *B* ; because otherwise there would be something in the nature of an intestacy, there being nobody to take the property upon the testator's death. The learned advocate for the appellant has drawn our attention to the relevant articles in Halsbury, Volume 34, page 427 on the subject, and to Theobald on Wills, Chapter 52. One of the exceptions to the rule that a life estate may be presumed where there is a gift of the remainder to the heir-at-law, is where there is a residuary legatee. In the case of residuary legacy there would be no intestacy if a life estate was not presumed ; because the residuary legatee would enter into immediate possession. Even to this exception there are however exceptions, *e.g.*, where the general construction of the document would indicate that *A* should have a life estate. Such an example is given in Theobald where there is a gift to a residuary devisee after the death of *A*, *A* should then take a life estate by implication, the reason being that the very wording used indicates that the testator did not intend with regard to that particular gift that the residuary devisee should take the property immediately on the testator's death, but only after the life of *A*.

It seems to us that very much the same reasoning would apply to the case under consideration. Since the testator intended that the bulk of the property should go to his wife absolutely, the fact that in clause 12 he gave the proprty to the second defendant after her death was an indication that he intended clause 12 to be an exception to the general clause 5, whereby he gave the bulk of his property to his wife absolutely. That clause 12 is intended to be a definite exception to clause 5 is also shown by the wording of clause 5 in which the testator conveyed : "The entire moveable and immoveable properties belonging to me *excluding what I have given herein*," which means that he did not intend clause 5 to operate with regard to the items of property specifically mentioned in the will, one of which was the house which was the subject of clause 12 ; so that strictly construing clause 5, the widow would not be entitled to an absolute interest in this house on the death of the testator, even if the legacy covered by clause 12 failed. Again, in construing clause 12 we must have regard to the circumstances existing when this will was

drawn up. The testator's wife was of course living with him in the house to which clause 12 relates; and he naturally desired that his wife should continue to live in the house after his death. Clause 12 sets out his clear intention that his wife should continue to reside in the family house in which she had always been residing with her husband and that it was only after her death that the property should pass to the second defendant. This is an illustration of the general principle laid down in Halsbury, volume 34, Article 475, where the learned author said :

> "Thus, life estate has been held to be impliedly conferred on a person where the will contains a gift after the death of that person. and the Court has from the context of the will inferred an intention on the part of the testator that that person should enjoy the property in the meantime."

The learned advocate for the first defendant has referred us to certain cases which have dealt with some of the exceptions to the rule of implying a life estate from a gift after a person's death, in which it had been held that no life estate had been granted. We are not however directly concerned with the circumstance whether Pydah Sattiraju acquired a life interest in the house which is the subject of clause 12; because she is now dead, but with the right of the second defendant to possession and enjoyment of the property now that she is dead. In none of the authorities cited by Mr. Raghava Rao has it been held that since *A* has no life estate, *B*, who was to enjoy the property after *A*'s life, could not enjoy the remainder. It seems to us that when property is devised to a person after the life of another, the remainderman has a vested interest upon the death of the testator under section 119 of the Succession Act.

S.A. No. 2190 of 1945 is therefore dismissed with the costs of the second defendant. Advocate's fee Rs. 300.

V.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. RAJAMANNAR, *Officiating Chief Justice*, AND MR. JUSTICE SATYANARAYANA RAO.

Kambham Ramamurthy .. *Appellant**

v.

Sagiraju Tirupatiraju .. *Respondent.*

Security bond—Decree in favour of minor in 1927—Money withdrawn by guardian on giving security—Bond executed in favour of Court—Suit in 1941 by minor on attaining majority to recover money withdrawn by guardian—Decree—Application to execute in the original suit to recover amount mentioned in the security bond—Maintainability—If barred by section 48, Civil Procedure Code—Article of Limitation Act applicable—Proper form of security bond.

A minor represented by his maternal grandfather obtained a decree for a certain sum in O.S. No. 351 of 1927 and the grandfather as next friend was allowed to draw out that sum under Order 32, rule 6, Civil Procedure Code on the execution of a security bond, under which the executant undertook to pay any amount that may be found to be payable to the minor if within 3 years of his attaining majority he raised any dispute and claimed to recover any money from his guardian in respect of the decree amount. This bond was not executed in favour of the presiding Judge of the Court nor in favour of any person but in favour of the Court. The minor after becoming a major in January, 1941, instituted a suit in 1941 against his erstwhile guardian for rendition of account and for recovery of the amount payable to him on the taking of an account. The guardian died pending the suit and his wife was brought on record as his legal representative. An *ex parte* decree was passed in favour of the respondent against the assets of the guardian in the hands of the legal representative. When the quondam minor filed in 1942 an execution application in O.S. No. 351 of 1927 to recover the amount mentioned in the security bond, on the question whether the procedure adopted by him was in accordance with law and whether it was not barred under section 48, Civil Procedure Code.

Held, that in no sense can his application be said to be in execution of the decree in O.S. No. 351 of 1927. That decree had been satisfied long ago and what is now sought to be enforced is not the liability of judgment-debtor in that suit and as such section 48 of the Civil Procedure Code had no application whatever to the case. Though the application was not maintainable as an execution application it was really an application invoking the inherent powers of the Court to enforce

*L.P.A. No. 64 of 1946. 19th March, 1948.

the security bond filed before it and has to be treated as an independent application in O.S. No. 351 of 1927. The Article of the Limitation Act which is most proper to apply to the case is Article 181 and as the application was filed within three years of the minor attaining majority, it was in time, for it could not be said that time began to run even before he attained majority.

Their Lordships directed that in future no security bond should be accepted by any Court unless it was executed in favour of a person, be he the presiding officer of the Court or the Chief Ministerial officer of the Court.

Appeal under clause 15 of the Letters Patent against the judgment and order of the High Court dated 26th April, 1946, in A.A.A.O. No. 268 of 1945 preferred against the order of the Court of the Subordinate Judge, Coconada dated 14th April, 1945, in A.S. No. 29 of 1945 preferred against the order dated 15th January, 1945, in E.P. No. 40 of 1944 in O.S. No. 351 of 1927, District Munsiff Court of Peddapuram.

P. Somasundaram for Appellant.

R. Venkatasubba Rao for Respondent.

The judgment of the Court was delivered by

The Officiating Chief Justice.—This is an appeal under clause 15 of the Letters Patent from the judgment of Happell, J., allowing an appeal filed against the order of the learned Subordinate Judge of Coconada who reversed the order of the District Munsiff of Peddapuram on an application filed by the respondent to enforce a security bond executed by the appellant. The respondent, when he was a minor represented by his maternal grandfather, obtained a decree in O.S. No. 351 of 1927 on the file of the Court of District Munsiff of Peddapuram for a sum of Rs. 1,020. The maternal grandfather as next friend was allowed to draw out the money under Order 32, rule 6, Civil Procedure Code, on the execution of a security bond by the appellant. By that bond, the appellant undertook to pay any amount that may be found to be payable to the plaintiff if within 3 years of his attaining majority he raised any dispute and claimed to recover any money from his guardian in respect of the decree amount. Unfortunately, this bond which was accepted by the District Munsiff, Peddapuram, was not executed in favour of the District Munsiff as it ought to have been. Actually the bond does not purport to be in favour of any person. The difficulty in this case has arisen purely on account of this circumstance.

The respondent became a major on the 10th January, 1941, and on the 8th August, 1941, he instituted a suit, O.S. No. 175 of 1941 against his erstwhile guardian, his maternal grandfather, for rendition of account and for recovery of the amount which may be found payable to him on the taking of the account. The guardian died pending the suit and the grandmother was brought on record as his legal representative. On the 23rd December, 1941, an *ex parte* decree was passed in favour of the respondent against the assets of the deceased grandfather in the hands of the grandmother. Thereafter, on the 23rd March, 1942, the appellant filed an execution application in O.S. No. 351 of 1927 to recover the amount mentioned in the security bond. This petition, however, was dismissed on the 14th June, 1943, owing to a technical defect in the decree. Subsequently, there was an amendment of the decree and again, on the 9th December, 1943, the appellant filed another application for execution in O.S. No. 351 of 1927, E.P. No. 40 of 1944 out of which the present appeal arises.

The learned District Munsiff of Peddapuram, overruling the objections raised by the appellant, held that the respondent could proceed to recover the amount claimed by sale of the properties secured under the security bond. He held that that as the surety bond was not in favour of any officer of the Court but in favour of the Court itself, it could not be assigned, but the procedure indicated in the ruling of the Judicial Committee in *Raj Raghubar Singh* v. *Jai Indra Bahadur Singh*[1], must be adopted and the bond must be enforced under the inherent powers of the Court.

1. (1919) 38 M.L.J. 302 : L.R. 46 I.A. 228 : I.L.R. 42 All. 158 (P.C.).

He held that the application in question could not be deemed to be an application to execute the decree in O.S. No. 351 of 1927 and therefore could not be said to be barred by the 12 years rule under section 48, Civil Procedure Code. On appeal the learned Subordinate Judge reversed the decision of the District Munsiff and dismissed the respondent's application on the ground that it was barred under section, 48 Civil Procedure Code. There was an appeal to this Court which was heard by Happell, J., who set aside the decision of the Subordinate Judge and restored the order passed by the District Munsiff and directed the application to be restored to file and to be heard and determined on the merits. Two questions were raised before him : namely, (1) whether the procedure adopted by the appellant to enforce the security bond was in accordance with law and (2) whether in any case, the petition was not barred under section 48 of the Civil Procedure Code by reason of the fact that it had been filed more than 12 years after the date of the decree in O.S. No. 351 of 1927. On both these questions, the learned Judge gave his decision in favour of the respondent.

The second point can be disposed of easily. In our opinion, it is clear that section 48, Civil Procedure Code has no application whatever to the present case. In no sense can the application of the respondent be said to be an application for the execution of the decree in O.S. No. 351 of 1927. That decree had been satisfied long ago. What the respondent is now seeking to enforce is not the liability of the judgment-debtor in that suit. Whether the application can be said to be barred by reason of any other provision in the Indian Limitation Act will be dealt with later on after deciding the other question, namely, the procedure to be adopted in cases where a security bond like the present has not been executed in favour of the presiding officer of the Court. If the security bond had been so executed in favour of an officer of Court, then the obvious procedure for the respondent was to obtain an assignment of the bond and to file a suit on it. This procedure, of course, should be understood to refer to security bonds like the present which are executed under Order 32, rule 6, Civil Procedure Code or executed in circumstances which will not fall within the scope of section 145 of the Civil Procedure Code. It was not contended before us, and rightly, that section 145 applies to the enforcement of a bond like that in the present case.

The position then is this : The procedure laid down in section 145 of the Civil Procedur Code cannot apply, and a suit cannot be filed on the security bond after it had been assigned. Mr. Somasundaram, the learned advocate for the appellant, contended that the proper procedure would be to file a suit to have the liability determined and the bond enforced. There is no direct decision to support this contention. We do not consider that the observations in *Kurugodappa* v, *Soogamma*[1], should be understood to lay down the procedure to be followed in all cases of bonds under Order 32, rule 6, Civil Procedure Code. We find from an examination of the papers in that case that the bond in that case was executed in favour of the Subordinate Judge of Bellary. Having regard to that fact, the observations of Spencer, J., at page 43, that the remedy was a regular suit are not inconsistent with what was laid down in *Raj Raghubar Singh* v. *Jai Indra Bahadur Singh*[2].

There is no authority that it is, nor does it appear to us to be necessary, that the person seeking to enforce a security bond like the present should file a suit to determine the extent of the liability under the bond. According to the terms of the bond, the appellant undertook to pay any amount which may have to be paid to the respondent in pursuance of a dispute which he may raise within three years of his attaining majority with regard to the sum of Rs. 1,020 withdrawn by his guardian. If the amount so payable is determined after a contest and without any suspicion of fraud or collusion in a suit properly laid and conducted by the erstwhile minor on attaining majority against his guardian, we fail to see why he cannot seek the help of the Court in which the security bond was filed to enforce

1. (1917) I.L.R. 41 Mad. 40 at 43.
2. (1919) 38 M.L.J. 302 ; L.R. 46 I.A. 228 : I.L.R. 42 All. 158 (P.C.).

the liability undertaken by the surety. In this case, however, the facts are different in important particulars. The suit filed by the respondent against his guardian was not contested ; the decree was *ex parte* and passed against the legal representative of the guardian and confined to such of his assets as could be traced to the possession of his legal representative, the grandmother. The appellant charges that the proceedings were collusive. On these facts, it cannot be said that a liability has been established which the appellant cannot challenge in an application to enforce the security bond executed by him.

It now remains to consider whether the application filed by the respondent was maintainable as an execution application. In our opinion, it was not. It was really an application invoking the inherent powers of the Court to enforce the security bond filed before it. On that ground, however, we do not think it just to dismiss the application. It shall be treated as an independent application in O.S. No. 351 of 1927 and dealt with accordingly.

The article of the Limitation Act which appears to us to be most proper to apply to the present case is Article 181. This is the view taken by two learned Judges, each sitting alone in *Jamundas Ravuji Sait* v. *Krishnan*[1], and *Annamalai Chettiar* v. *Sundaresa Iyer*[2]. Questions may arise as to when exactly time commences to run in applying this Article, but such questions do not arise in this case as the application was filed well within three years of the date on which the respondent attained majority, and it cannot in any event be contended that time began to run against the respondent before he attained majority. The language of the bond negatives any such contingency. We therefore find that treated as an independent application for the enforcement of the surety bond by the Court in which it was filed, the application was in time.

As we have already mentioned, it cannot be said in this case that the liability of the guardian to pay any sum of money out of the money withdrawn by him has been established in such a way as to be binding on the appellant. It will be for the Court disposing of the application on the merits to go into that question. We understand the directions of Happell, J., to indicate this.

We wish to point out that it is a matter of regret that in spite of the clear pronouncement of the Judicial Committee in *Raj Raghubar Singh* v. *Jai Indra Bahadur Singh*[3], so early as 1919 and in spite of the forms contained in the Civil Rules of Practice relating to bonds to be executed by the guardians under the Guardians and Wards Act, security bonds should continue to be taken not in favour of the presiding officer or any other officer of Court but in a form in which the bonds cannot be said to be executed in favour of anybody unless by implication they must be deemed to have been executed in favour of the Court, which, as has been pointed out by the Privy Council, is not a juridical person capable of assigning such bonds. It is unfortunate that sufficient attention is not paid to this aspect, and the omission to adopt and use the correct form often results in inconvenience and hardship to parties, both seeking to enforce the bonds as well as those who will be liable under them. In future no security bond should be accepted by any Court unless it is executed in favour of a person, be he the presiding officer of the Court or the Chief Ministerial officer of the Court.

As we have held that the application of the respondent is maintainable and is within time, the order of the learned Judge remanding the appliction for disposal on the merits was right. The appeal, is, therefore, dismissed with costs.

V.S. *Appeal dismissed.*

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1. (1933) 65 M.L.J. 507.
2. (1943) 2 M.L.J. 444.
3. (1919) 38 M.L.J. 302 : L.R. 46 I.A. 228 : I.L.R. 42 All. 158 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. RAJAMANNAR, *Officiating Chief Justice,* AND MR. JUSTICE RAJAGOPALAN.

Kunjammal and another .. *Appellants**

v.

P. S. Rajagopala Iyer .. *Respondent.*

Appeal—Right of—Agreement between parties to abide by decision of Court—Question of fact in each case whether right of appeal abandoned—Case of no evidence—Decision based upon statements from the bar—Right of appeal abandoned.

A mere agreement between the parties that the Court may dispense with certain rules of procedure and evidence without giving up the right of appeal does not deprive the parties of the right of appeal, but it is a question of fact in each case whether the circumstances merely amounted to deviation more or less from the ordinary procedure or whether the agreement between the parties was that the Court should give a decision more in the nature of an award than an adjudication on the evidence in the case, complete or incomplete; and the intention can only be ascertained by the events which happened in the particular case.

Where in a suit for maintenance, the defendant (husband) denied his liability in his written statement, but at the time of the trial agreed as a matter of compromise to give the plaintiff such amount as may be fixed by the Court and both sides left the question to be determined by the Judge not on any evidence—actually no evidence had been adduced—but on statements made by counsel from the Bar,

Held, it was a case where there was no evidence on which the appellate Court could come to a conclusion different from that of the trial Court and the appellant was not entitled to attack in appeal the decree passed by the trial Court.

Case-law discussed.

Appeal under clause 15 of the Letters Patent preferred to the High Court against the judgment and decree of Chandrasekhara Aiyar, J., dated 28th October, 1946 in C.C.C.A. No. 47 of 1945.

K. Aravamuda Aiyangar for Appellants.

K. Srinivasan for Respondents.

The Judgment of the Court was delivered by

The Officiating Chief Justice.—The only question in this Letters Patent Appeal is whether the learned Judge, Chandrasekhara Aiyar, J., was right in holding that the appellants could not attack the decree passed by the learned City Civil Judge. The learned Judge on a consideration of what happened before the City Civil Judge who tried the suit held that the appellants could not be heard to dispute in appeal the rate of maintenance fixed by the learned Judge. The suit was filed by the appellants, the first appellant being the wife and the second appellant being the minor daughter of the respondent. They claimed maintenance for both and marriage expenses for the second appellant. The respondent filed a written statement denying his liability to pay any maintenance. When the suit came on for trial what happened before the learned Judge is best set out in his own words in paragraph (4) of his judgment,

"Though the allegations of abandonment and ill-treatment made in the plaint were denied by the defendant in his written statement, still at the time of trial, as a matter of compromise, the defendant considered plaintiff's right to maintenance and agreed to give them such amount as may be fixed by Court. Both sides left the question of quantum of maintenance, past and future, to be determined by me on the statements made by the respective counsel at the bar, as regards the income of the defendant and the needs and requirements of the plaintiffs and did not let in any oral evidence."

It may also be mentioned that neither was any documentary evidence let in.

It is contended by the learned advocate for the appellants that this was not a case in which the Court acted *extra cursum curiae* but at the most disregarded certain rules of procedure and evidence, and the parties never intended to give up the right of appeal either expressly or by necessary implication. The proposition of law

*L.P.A. No. 35 of 1947. 5th April, 1948.

that a mere agreement between the parties that the Court may dispense with certain rules of procedure and evidence without giving up the right of appeal does not deprive the parties of the right of appeal is well established : (Vide *Sankaranarayana* v. *Ramaswamiah*[1], and the leading cases of *Pisani* v. *Attorney General for Girbralter*[2], and *Burgess* v. *Morton*[3]; but it is a question of fact in each case whether the circumstances merely amounted to a deviation more or less from the ordinary procedure or whether the agreement between the parties was that the Court should give a decision more in the nature of an award than an adjudication on the evidence in the case, complete or incomplete. The intention can only be ascertained by the events which happened in the particular case, and the decisions cited by the learned advocate for the appellants can only help in supplying the general principles.

In the present case there are two important circumstances which must be borne in mind. The first is this. The defendant had filed a written statement denying liability to pay separate maintenance to his wife. He also alleged that he was still willing to take back his wife. Nevertheless when the case came up for trial he conceded the plaintiffs' right to maintenance not expressly or impliedly in abandonment of a part of his plea, but, as expressly stated by the learned Judge as a matter of compromise, and evidently it was part of the compromise that he would agree to give the plaintiffs such amount as may be fixed by Court. Secondly, both sides left the quantum to be determined by the learned Judge not on any evidence which had so far been adduced by either side—actually no evidence had been so adduced—but to be determined on the statements made by counsel from the Bar. Now, clearly statements of counsel from the Bar, though they may be entitled to all consideration, can never be evidence in the case. To ask the Court to give a decision based merely on statements of Counsel at the Bar is certainly not a slight departure from the ordinary practice. It puts the Court entirely out of its course. The statements by Counsel have not been recorded, a fact which certainly has a bearing on the intention of the parties, namely, whether they intended to challenge the decison of the Court by way of appeal. It will be a legitimate question to ask, on what material could the parties attack a decision of the Court when there was no record of what had been stated by Counsel at the Bar?

In *Venkata Somayajulu* v. *Venkanna*[4], what happened was this : The plaintiff had been examined in chief. Some documents had been filed. Then at the defendant's request the District Munsiff made a local inspection of the site. The parties thereafter requested the Court to give a decision on the evidence already on record and intimated that they proposed to adduce no further evidence. The learned Judge, Venkatasubba Rao, J., held that the parties only abridged the trial by seeking a decision on incomplete evidence, and this being no more than some deviation from the ordinary procedure, the judgment was not *extra cursum curiae*. The learned Judge, however, on a construction of the document held that the right of appeal had been clearly and unequivocally waived. This decision reveals the necessity of examining the facts of each case for the application of the general principle. In *Sankaranayana* v. *Ramaswamiah*[1], the terms of the agreement signed by the plaintiff and two of the defendants were as follows :

"We agree to the matter being decided according to the opinion which the Court might entertain on the aforesaid local inspection without going into any further evidence."

The learned Judges, Schwabe, C.J. and Wallace, J., held that the agreement did not amount to an agreement that the Court should act *extra cursum curiae*. The learned Judges expressed their dissent from two Bench decisions of this Court in *Nidamarthi Mukkanti* v. *Thammana Ramayya*[5], and *Chengalroya Chetti* v. *Raghava Ramanuja Doss*[7]. In the latter case where the terms of the agreement were,

"We shall abide by any kind of decree passed by the Courts after a personal inspection of the place in dispute,"

1. (1922) 44 M.L.J. 258 : I.L.R. 47 Mad. 39.
2. (1874) L.R. 5 P.C. 516.
3. (1896) A.C. 136, 137.
4. (1934) 66 M.L.J. 622 : I.L.R. 58 Mad. 31.
5. (1902) I.L.R. 26 Mad. 76.
6. (1918) 37 M.L.J. 100.

it was felt by Sadasiva Aiyar and Spencer, JJ., that the trial Court had acted thereafter as arbitrator. Apart from this the observations of Schwabe C.J., at page 44 did not help the appellants in this case. The learned Chief Justice appears to make a distinction between questions of fact and questions of law. In that very case before him,

> " if an appeal had been attempted on the ground that the learned Munsiff took a wrong view of the facts or that the procedure of dispensing with the evidence was irregular,"

he was prepared to accept the argument that the parties had agreed not to take any such point and that argument would be right; but the learned Judge thought that there was nothing in the words to indicate that the parties intended to give up all rights of appeal on questions of law which might arise or did arise in the case. Applying this distinction to the present case it follows that the learned City Civil Judge if he erred at all, erred only on fact. No question of law arises. In this view, we do not feel more need be said about this decision which to a great extent is inconsistent with the decisions of two Division Benches in *Nidamarthi Mukkanti* v. *Thammana Ramayya*[1], and *Chengalroya Chetti* v. *Raghava Ramanujadoss*[2], as well the decision of the Bombay High Court in *Jumnadas* v. *Gordhandas*[3]. The learned advocate for the appellants cited to us *Moulvi Zahirul Said Alvi* v. *R. S. Seth Lachminarayan*[4], which, we find, has no application to this case, because it may not be accurate to speak of the decree in this case as a consent decree. It was not as if the actual rate of maintenance was a rate to which the parties consented.

We entirely agree with the remarks of Chandrasekhara Aiyar, J., that there are no materials in the shape of evidence which could be acted upon, on the strength of which the appellate Court can safely come to a different conclusion from that of the lower Court. Added to this is the first circumstance set out at the beginning of this judgment, namely, that the concession by the defendant of the plaintiffs' right to maintenance was a matter of compromise and bound up with the procedure which was agreed to by both sides and which left the Court free to pursue a course which was not in any sense judicial.

The appeal is therefore dismissed with costs.

V.P.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HAPPELL AND MR. JUSTICE PANCHAPAGESA SASTRI.

Kizhekke Kizhukkott Kunhothi and another .. *Appellants**

v.

Payikkat Mammad Koya and others .. *Respondents.*

Mortgage—Kanom—Redemption suit—Decree passed—Failure to execute—Fresh suit for redemption—Maintainability—Malabar Compensation for Tenants' Improvements Act (I of 1900), section 6—Transfer of Property Act (IV of 1882), section 60.

The right of redemption provided by section 60 of the Transfer of Property Act is available to the jenmi or a person claiming through him even as regards kanom documents. There is nothing in the Malabar Compensation for Tenants' Improvements Act to take away the right of redemption which is available to the mortgagor under section 60 of the Transfer of Property Act. A second suit for redemption of a kanom lies notwithstanding the existence of a previous decree for redemption which has not been executed and has been allowed to become barred by limitation. Even if the earlier decree is specifically passed not only for the mortgage amount but also for compensation for improvements and arrears of rent it will not affect the question.

Appeal against the decree of the District Court of North Malabar in A. S. No. 30 of 1945 preferred against the decree of the Court of the District Munsiff of Quilandy in O. S. No. 1299 of 1943 and petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to

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1. (1902) I.L.R. 26 Mad. 76.
2. (1918) 37 M.L.J. 100.
3. (1896) 8 Bom. H.C. (P.J.) 615.
4. (1931) 60 M.L.J. 648 (P.C.).

* S. A. No. 2151 of 1945 and C.M.P. No. 1422 of 1948. 23rd April, 1948.

admit the certified copy of the decree in O. S. No. 375 of 1931 on the file of the Court of the District Munsiff of Quilandy as evidence in S. A. No. 2151 of 1945 on the file of the High Court.

C. K. Viswanatha Aiyar for Appellant.

S. Venkatachala Sastri for Respondents.

The case came up in the first instance before *Satyanarayana Rao, J.*, who then made the following

ORDER.—The question raised in this second appeal is whether a second suit for redemption of a kanom is maintainable after the right of the plaintiff to execute the decree in the first suit had become barred by limitation. If there is no complication of the provisions of the Malabar Compensation for Tenants' Improvements Act, 1899 (I of 1900), in view of the decision of the Privy Council in *Raghunatha Singh* v. *Hansraj Kunwar*[1] overruling the decision of a Full Bench of this Court in *Vedapuratti* v. *Vallabha Valia Raja*[2], (a case of kanom) the answer must be in the affirmative. In *Viroopaksham* v. *Chembu Nayar*[3] the subsequent Full Bench had left open the question of the effect of the provisions of the Act on the decision of *Raghunath Singh* v. *Hansraj Kunwar*[1], as on the facts of that case the plaintiff in the earlier suit was different from the plaintiff in the later suit, though it definitely laid down that the decision in *Vedapuratti* v. *Vallabha Valiya Raja*[2] was overruled by *Raghunath Singh* v. *Hansraj Kunwar*[1]. Under section 60 of the Transfer of Property Act, the right of redemption is extinguished by the Act of parties or by a decree of Court. There is no question here of the extinguishments of the right of redemption by act of parties. The decree in the earlier suit is not produced and there is nothing to indicate in the admission of the plaintiff in the plaint relied on by the defendant, that the decree operated to extinguish the right of redemption. Among the decisions relied on in the judgment of the Court below *Mayan Kutti* v. *Kunhammad*[4], was before the decision in *Raghunath Singh* v. *Hansraj Kunwar*[1], and it practically followed the Full Bench decision in *Vedapuratti* v. *Vallabha Valiya Raja*[2], since overruled by the Privy Council. Further the suit was based in that case on a lease and does not appear to be one for redemption of a kanom. In *Gopalan* v. *Sankaran Nair*[5], again the suit was based in a lease and was not one for redemption. No doubt the Malabar Compensation for Tenants' Improvements Act brings within its purview suits for redemption ; but the provisions of that Act are intended in my view to provide for a final determination between the parties of the amount payable on redemption taking into account the mortgage amount and the value of the improvements and arrears, if any, of rent and do not regulate the right of redemption which is entirely governed by Transfer of Property Act. A suit of this description is always treated as one for redemption and not as a suit between the lessor and the lessee. Even the Court-fee is levied under section 7 (*ix*) of the Court-Fees Act and not under section 7 (*xi*) (*cc*). Of course, if a decree is once passed and if the plaintiff is not otherwise entitled to file a second suit for redemption he is bound to work out his rights under the decree including the revaluation of the improvements and arrears of rent accrued due since the date of the decree in execution of that decree and a separate suit for that purpose is barred under section 6 (4) of the Act. That is no indication of the extinction of the right of redemption. The fact that a single decree is passed in such a suit not only for the mortgage amount, but also for improvements and arrears of rent does not affect the question, as there is nothing in such a decree providing that in default of payment the right of redemption is extinguished. In the words of the Judicial Committee in *Raghunath Singh* v. *Hansraj Kunwar*[1].

"the right to redeem is a right conferred upon the mortgagor by enactment, of which he can only be deprived by means and in manner enacted for that purpose, and strictly complied with."

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1. (1934) 67 M.L.J. 813 : L.R. 61 I.A. 362 : I.L.R. 56 All. 561 (P.C.).
2. (1902) 12 M.L.J. 128: I.L.R. 25 Mad. 300 (F.B.).
3. (1937) 1 M.L.J. 83 : I.L.R. (1937) Mad. 545 (F.B.).
4. (1917) 34 M.L.J. 167: I.L.R. 41 Mad. 641.
5. (1945) 1 M.L.J. 326.

As the question is an important one and is of frequent occurrence, I think there should be an authoritative decision by a Bench. The matter will be placed before the Honourable the Chief Justice for orders.

On this reference the appeal came up before the Bench and the Court delivered the following

JUDGMENT :—The question raised in this second appeal is whether a second suit for redemption of a kanom is maintainable after the right of the plaintiff to execute the decree in the first suit had become barred by limitation. As the question is an important one and is of frequent occurrence the second appeal has been posted for decision by a Bench.

A brief resume of the facts is necessary to appreciate the contentions raised by the parties. The property in the suit which originally belonged to the father of the 4th defendant was demised in favour of defendants 1 and 2 under a kanom *marupat* dated 4th June, 1916. Defendants 1 and 2 were enjoying the lands under the said *marupat*. The *jenm* right of the 4th defendant was later on purchased by the plaintiffs in the present action, under a registered deed dated 7th October, 1926. They filed a suit O.S. No. 375 of 1931 on the file of the Court of the District Munsiff, Quilandy, against defendants 1 and 2 for surrender of the possession of the property demised, together with the arrears of purappad due from 11th February, 1927, to 11th February, 1931. That suit was for redemption of the *kanom* demise. The plaintiffs offered to pay the *kanom* amount of Rs. 240 and also the value of the improvements made by the *kanomdars* and claimed a set-off of the arrears of rent towards the amounts due to the *kanomdars* as aforesaid. They obtained a decree on 9th September, 1932, wherein it was declared that the *kanomdars* were entitled to the *kanom* amount of Rs. 240 and to the value of the improvements Rs. 1,110-3 4 and that the plaintiffs were entitled to arrears of rent and costs and also future rent at the rate of Rs. 50-12-5 a year from Makaram 1106 till delivery of possession or until the expiry of three years from the date of the decree. A set-off was allowed by the decree and the plaintiffs were directed to pay into Court, on or before the 9th of March, 1933, or any later date upto which time for payment may be extended by the Court, the balance after set-off. It was also provided that for the balance, if any, due to the plaintiffs the *kanomdars* would be liable. Clause 3 of the said decree provided that

> "in default of payment as aforesaid, the 1st defendant therein may apply to the Court for a final decree that the plaintiffs shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the schedule."

The said decree was, however, never executed by the decree-holders and the *kanomdars* continued to be in possession and enjoyment of the properties. The decree-holders therein have now instituted the present suit O..S. No. 1299 of 1943 on the file of the District Munsiff's Court, Quilandy, out of which this second appeal arises, praying for the ascertainment of the value of improvements made by the *kanomdars* in possession of the property and seeking a decree for possession on their paying into Court the *kanom* amount and the value of the improvements, and they claimed a set-off of the arrears of purappad from January-February 1928 to 11th January 1943 towards the amounts that may be found due from them to the *kanomdars*. They also claimed future rent till the date of surrender of the properties. In paragraph 5 of their plaint they refer to the earlier suit O.S. No. 375 of 1931 and state that their petition for extension of time for the deposit of the *kanom* amount and the value of the improvements allowed by that decree had been dismissed by the Court and it became impossible to deposit the same for the time being. In paragraph 6 it is stated that the property is even now being held and cultivated and also caused to be cultivated by defendants 1 and 2 under the aforesaid *marupat* and no *pattam* has been received by them ever since 1928. Paragraph 7 avers that even if the 12 year period has elapsed since the date of the decree in O.S. No. 375 of 1931 this suit is by no means barred by limitation.

It is stated in paragraph 12 that the cause of action arose on 11th June, 1928, when the term of the lease expired and on 11th February, 1928, when the *pattam* was allowed to fall into arrears. The Court-fee paid is as on a suit for redemption

of a mortgage for Rs. 240 the amount of the *kanom*. In set terms there is no reference in the plaint to a right of redemption as in the case of an ordinary mortgage. The plaint, however, is substantially a suit for redemption of the *kanom* and prays for a decree in accordance with the provisions of the Transfer of Property Act and the special provisions of the Malabar Compensation for Tenants' Improvements Act (Madras Act I of 1900). The plaint was instituted on 28th December, 1943. The main defence raised by the written statement of the contesting defendants was that this second suit for recovery of possession along with arrears of *pattam* on the strength of the *kanom marupat* is not sustainable because of the existence of the decree in the earlier suit, O.S. No. 375 of 1931, and that the only right of the plaintiffs is to work out that decree in execution and as the execution of that decree has become barred by limitation the plaintiffs cannot now obtain possession by a second suit, for redemption or for possession whatever it may be.

Before the District Munsiff, Quilandy, the decree in O.S. No. 375 of 1931 was not produced and hence he held that it was not shown that by the terms of that decree the second suit for redemption was barred. He found that the value of the improvements amounted to Rs. 696-12-7 and that the arrears of rent payable by defendants to the plaintiffs after setting off the *kanom* amount of Rs. 240 and the value of improvements came to Rs. 144-8-7. He accordingly passed a decree that the defendants in possession of the properties do surrender possession to the plaintiffs with all improvements thereon free from the encumbrances if any created by them. The decree also directed that defendants 1 and 2 the *kanomdars*, do pay plaintiffs the said arrears of rent Rs. 144-8-7 with subsequent interest thereon and also future rent at Rs. 50-4-0 a year till date of delivery of possession or until the expiry of three years from the date of the decree whichever event occurs first. The first defendant appealed against this decree to the District Court of North Malabar. The learned District Judge held that the admissions in the plaint set out earlier sufficiently show, though the decree itself was not before the Court that the right of redemption had become extinguished as the first decree was not executed in time and was allowed to become barred. He further held that although a second suit for redemption would lie in ordinary cases of mortgages, notwithstanding that a decree in an earlier suit for redemption has been allowed to become barred by not executing the same in time, still the position was different with respect to the redemption of a *kanom* demise by reason of the special provisions of the Malabar Compensation for Tenants' Improvements Act. He followed the decision in *Mayankutti* v. *Kunhammed*[1], which according to him is still good law and a later decision of this Court in *Gopalan* v. *Sankaran Nair*[2]. In this view he allowed the appeal and dismissed the suit with costs. The plaintiffs have preferred this second appeal and contend that the view of the learned District Judge is erroneous and that the decision of the Judicial Committee in *Raghunath Singh* v. *Hansraj Kunwar*[3], is equally applicable to cases of redemption of *kanom* demise and that there is nothing in the Malabar Compensation for Tenants' Improvements Act which necessitates a contrary view.

Before us there is an application by the respondents to receive by way of additional evidence a certified copy of the decree in O.S. No. 375 of 1931 on the file of the District Munsiff's Court, Quilandy. Mr. C. K. Viswanatha Aiyar, counsel for the appellants, does not oppose the application. As we feel that a copy of the decree is necessary to enable us to pronounce judgment, we have allowed the application and directed that the said certified copy of the decree may be received as additional evidence. Relevant portions of the said decree have been extracted earlier in this judgment.

It is now well settled by the decision of the Full Bench in *Virupaksham* v. *Chembu Nair*[4], that the earlier decision of the Madras High Court in *Vedapuratti* v. *Vallabha Valiya Raja*[5], must be taken to have been overruled by the decision of the Privy

1. (1917) 34 M.L.J. 167 : I.L.R. 41 Mad. 641.
2. (1945) 1 M.L.J. 326.
3. (1934) 67 M.L.J. 813 : L.R. 61 I.A. 362 : I.L.R. 56 All. 561 (P.C.).
4. (1937) 1 M.L.J. 83 : I.L.R. (1937) Mad. 545 (F.B.).
5. (1902) 12 M.L.J. 128: I.L.R. 25 Mad. 300 (F.B.).

Council in *Raghunath Singh* v. *Hansraj Kunwar*[1]. Under section 60 of the Transfer of Property Act the right of redemption can be extinguished only either by the act of the parties or by decree of a Court. As stated by their Lordships In *Raghunath Singh* v. *Hansraj Kunwar*[1] at page 569.

"The right to redeem is a right conferred upon the mortgagor by enactment, of which he can only be deprived by means and in manner enacted for that purpose, and strictly complied with."

There is no question here of extinguishment of the right of redemption by the act of parties. The decree in the earlier suit which has now been received by way of additional evidence does not show that any right of redemption is extinguished. Clause 3 of the said decree gave liberty to the *kanomdars* to apply to the Court for a final decree in default of payment of the redemption amount but there is nothing to show that any such application for the passing of a final decree was ever made or that such a decree was ever passed. It would follow therefrom that there is no extinguishment of the statutory right of redemption either by the act of the parties or by decree of the Court. This suit for redemption therefore must be held to be sustainable by reason of the decision of the Judicial Committee aforesaid if we treat the present suit as an ordinary suit for redemption of an ordinary mortgage, not complicated by the provisions of the Malabar Compensation for Tenants Improvements' Act of 1900.

It is however contended by Mr. Venkatachala Sastri, counsel for the respondent that the decision in *Raghunath Singh* v. *Hansraj Kunwar*[1], is not applicable to suits for redemption of Malabar *kanoms* in view of the fact that the *kanom* is not a mere mortgage but is mainly a lease. He contends that the provisions of the Transfer of Property Act as regards redemption of mortgages will not apply and even if a *kanom* partakes of the character of a mortgage to some extent a suit in ejectment of the *Kanom* lessee is exclusively governed by the provisions of the Malabar Compensation for Tenants' Improvements Act and that the provisions of sections 5 and 6 thereof would preclude a second suit in ejectment by the *jenmi* where there has already been a decree for redemption in his favour in an earlier suit on the same *kanom marupat* and such decree has been allowed to become time-barred without any execution proceedings being taken thereunder. As regards the first contention that the *kanom marupat* is merely a lease or a special kind of tenure and not a mortgage in any real sense, it is now too late to uphold such a view. That *kanom* is a mortgage and is liable to be redeemed as such has repeatedly been recognised and it is sufficient to refer to the decision in *Ramunni* v. *Brahma Datta*[2], which deals with the question of the sustainability of a second suit for redemption of a *kanom* where an earlier decree for redemption has been allowed to become barred.

Even in *Vedapuratti* v. *Vallabha Valiya Raja*[3], where a Full Bench of this Court had held that a second suit for redemption would not lie in similar circumstances on the ground of *res judicata* the suit was for redemption of a Malabar *kanom*. A Bench of this Court has held in *Kanna Kurth* v. *Sankara Varma Raja*[4], that a *kanom* is an anomalous mortgage within the meaning of section 98 of the Transfer of Property Act and that a *kanom* deed requires attestation for its legal validity. For purposes of stamp duty payable on the instrument of *kanom* it has been treated as a usufructuary mortgage. (See *Reference under Stamp Act, section* 46[5].)

The Court-fee payable upon a suit for redemption of *kanom* is also under section 7, clause (*ix*) of the Court-fees Act. See *Mooppil Nair* v. *Ammalu Amma*[6], and *Zamorin of Calicut* v. *Narayana*[7]. In second appeal No. 1503 of 1928 it was held that a clause in a *kanom* document that if the *kanom* was not redeemed at the end of the term the transaction should operate as a sale was a clog on the equity of redemption and therefore invalid. The contention that the provisions of the Transfer of Property Act as regards the right of redemption and other allied provisions

1. (1934) 67 M.L.J. 813 : L.R. 61 I.A. 362 : I.L.R. 56 All. 561 (569) (P.C.).
2. (1892) I.L.R. 15 Mad. 366.
3. (1937) 1 M.L.J. 83 ; I.L.R. (1937) Mad. 545 (F.B.).
4. (1920) 40 M.L.J. 282: I.L.R. 44 Mad. 344.
5. (1899) I.L.R. 22 Mad. 164 (F.B.).
6. (1926) M.W.N. 324.
7. (1882) I.L.R. 5 Mad. 284 (F.B.).

regarding mortgages simplicitor would not govern the rights of parties under a *kanom* demise cannot, therefore, be sustained. This substantive right of redemption provided by section 60 of the Transfer of Property Act is available to the *jenmi* or a person claiming through him even as regards *kanom* documents. There is nothing in the provisions of the Malabar Compensation for Tenants' Improvements Act, 1899, Madras Act I of 1900, to take away the right of redemption which is available to the mortgagor under section 60 of the Transfer of Property Act. The first contention of the counsel for the respondent is, therefore, repelled.

The more difficult question, however, whether the provisions of the Madras Act I of 1900 would preclude the sustainability of a second suit for redemption of a *kanom* in circumstances stated above, falls to be determined. In the Full Bench decision in *Viroopaksham* v. *Chembu Nayar*[1], the question was referred to but it was unnecessary for the Full Bench to deal with it because on the facts of the case before the Full Bench the earlier decree for redemption which had become barred by limitation was in a suit by a melcharthdar while the later suit was by the *jenmi*. It was pointed out that as the *jenmi* was not the plaintiff in the former suit, there was no decree in his favour and that he had an independent right of his own to redeem the *kanom*, at any rate, in cases where the melcharthdar had precluded himself by his conduct from exercising the right of redemption. In the present case, however, the plaintiffs in the later action were the plaintiffs in the earlier suit who had obtained a decree for redemption which they allowed to become barred by limitation. The question which was left open by the Full Bench arises for decision now and has to be considered.

Learned counsel for the respondent relies on the decision in *Mayan Kutti* v. *Kunhammad*[2], where the plaintiff's father had sued the defendants on a lease deed dated 1st September, 1871, and had obtained a decree in ejectment on 22nd August, 1895. That decree was allowed to become time barred. Long afterwards on 15th June, 1914, the plaintiff filed a suit in ejectment against the tenants who continued to be in possession under the original lease notwithstanding the earlier decree. The suit was dismissed by the District Munsiff and the District Judge on appeal on the ground that it was barred by limitation viewed as a suit on a lease by a landlord against a tenant for the recovery of possession after the determination of the tenancy. It was contended that the suit was also based on title, apart from the lease and that it was in time. That contention was also negatived on the ground that more than 12 years had elapsed even from the date of the decree in the earlier suit. On second appeal this Court held that the suit was not sustainable as the cause of action had merged in the earlier decree and that the remedy of the plaintiff was only to work out that decree in execution and that if he had not enforced his decree his rights are gone. The earlier decision of this Court in *Kutti Ali* v. *Chindan*[3], was dissented from and was regarded as overruled by the later Full Bench decision in *Vedapuratti* v. *Vallabha Valiya Raja*[4]. The decision pointed out that the scheme of the Madras Act I of 1900 was to leave the decree passed under the Act for ejectment on payment of compensation, to be governed by the law of limitation with regard to the execution of decrees, and that it was not intended to interfere with the general principle, that a man who sues on his cause of action and obtains a decree and allows that decree to become barred has no further remedy. This decision, on which strong reliance was placed by the counsel for the respondent, does not deal with the right of redemption of a *kanom*, as the suit there was based only on an ordinary lease. Moreover this decision proceeds on the authority of the Full Bench decision in *Vedapuratti* v. *Vallabha Valia Raja*[4], which is no longer good law, as it has been overruled by the decision of the Judicial Committee in *Raghunath Singh* v. *Hansraj Kunwar*[5]. If there is a sustantive right of redemption in favour of *jenmi* under section 60 of the Transfer of Property Act and if that right

1. (1937) 1 M.L.J. 83 : I.L.R. (1937) Mad. 545 (F.B.).
2. (1917) 34 M.L.J. 167 : I.L.R. 41 Mad. 641.
3. (1900) I.L.R. 23 Mad. 629.
4. (1902) 12 M.L.J. 128 : I.L.R. 25 Mad. 300 (F.B.).
5. (1934) 67 M.L.J. 813 : .L.R. 61 I.A. 362 : I.L.R. 56 All. 561 (P.C.).

of redemption is capable of being exercised in a second suit except where it has been extinguished by the act of parties or by a decree of th Court then it is difficult to see how the decision in *Mayan Kutti* v. *Kunhammad*[1], can be relied on in a case relating to redemption of mortgages inclusive of Malabar *kanoms*. Whatever may be the case with reference to the right of ejectment by a landlord against his tenant, based on a mere lease document, by reason of the special provisions of the Madras Act I of 1900, there is nothing in the terms of sections 5 and 6 of the said Act which is inconsistent with or takes away in any manner, the exercise of the right of redemption by a second suit where the general law allows the same. No doubt even with respect to redemption suits relating to *kanoms* the provisions of the Malabar Compensation for Tenants' Improvements Act would have to be applied as the term "tenant" includes also mortgagee in possession of land and the term 'ejectment' includes redemption or recovery of possession of land mortgaged. Provision is made, therefore for working out the rights of the *kanomdars* to payment of the value of the improvements and of the *jenmis* for recovery of arrears of rent and future rent due from the *kanomdars* in possession. Under section 5 of the Act a tenant to whom compensation is due shall, notwithstanding the determination of the tenancy or the payment or tender of the mortgage money be entitled to remain in possession until ejectment in execution of a decree or order of Court. Clause 2 of section 5 provides that,

> "a tenant so continuing in possession shall during such continuance hold as a tenant subject to the terms of his lease or of the mortgage, as the case may be."

Section 6 clause 3 provides for revaluation of the improvements with reference to the condition of improvements at the time of the execution of the decree and the adjustment of subsequent rents from the date of the decree to the date of ejectment in execution proceedings and allows the Court to vary the decree accordingly. Section 6 clause 4 which is an important clause in relation to the present question in controversy is as follows:

> "Every matter arising under sub-section (3) shall be deemed to be a question relating to the execution of a decree within the meaning of clause (c) of section 244 (now section 47) of the Code of Civil Procedure."

It is only questions arising under sub-section (3) of section 6 that cannot be the subject-matter of a separate suit later on by reason of section 6 sub-section 4 of the Act and section 47, Civil Procedure Code.

Suits for rent for period subsequent to the date of the decree would no doubt be barred as it is clear from the sub-sections of section 6 that rent accruing due after the passing of the decree should be set-off against the value of the improvements payable to the tenant at the time of ejectment in execution proceedings under the decree. It was so held in S.A. No. 1301 of 1943 by Horwill, J., but as pointed out in that decision itself by the learned Judge it was unnecessary there to deal with the further question whether any suit in ejectment would lie where in an earlier suit the decree was allowed to become barred. The decisions in *Mooriath Variath* v. *Meledath Kunja Nangayaramma*[2], and *Kunhipalu* v. *Jathavedan Nambudiri*, unreported decision in Appeals Nos. 374 and 375 of 194?, on the file of this Court on which Mr. Venkatachala Sastri relies did not deal with the point now under discussion and therefore are not useful. They merely hold that the tenant who continues to be in possession notwithstanding the decree in ejectment is not liable for *mesne profits* till he is ejected in execution as he cannot be held to be in wrongful possession of the property. Under the very terms of section 5 of the Act he is entitled to be in possession till the compenstion is paid to him and till he is ejected in execution thereafter. Reliance was also placed on the decision of the Bench in *Gopalan* v. *Sankaran Nair*[3]. There the action was based on a lease pure and simple and it was not a case of a *kanom*. There was an earlier suit in ejectment and for arrears of rent on the basis of the lease document in which a

1. (1917) 34 M.L.J. 167 I.L.R. 41 Mad. 641.
2. (1919) 37 M.L.J. 206.
3. (1945) 1 M.L.J. 326.

decree was passed on 19th December, 1932. That was confirmed on appeal on 28th October, 1935. That decree, however, was not executed. On 10th September, 1939 the tenants made a deposit of the arrears of rent for faslis 1346 and 1347 and the previous decree was amended according to the terms of the Madras Act IV of 1938. The landlord subsequently filed a suit for recovery of rent for the years from 1939 to 1942. Dealing with the contention based on the provisions of section 6 of the Madras Act I of 1900 the lower Courts held that the earlier decree was barred by limitation, that the lease sued on did not subsist by reason of that decree and that the suit was barred by the application of section 47 of the Code of Civil Procedure and that under section 6 (4) of the Malabar Compensation for Tenants' Improvements Act the right of the landlord to rent for the years subsequent to the decree had to be determined as a matter arising in execution and cannot form the subject of a separate suit. On appeal to this Court their Lordships after analysing the provisions of sections 5 and 6 of the Act observed :

"When the landlord has obtained a decree for the eviction of the tenant subject to the payment of compensation for improvements a statutory tenancy is created for the period during which the decree may be pending execution. During the statutory tenancy, the relations between the parties are governed by the terms of the lease sued on. If the landlord does not immediately pay the value of the improvements as determined at the time of the decree, the tenant acquires a right to revaluation of the improvements and the payment of any excess and the landlord obtains the right to set off against these improvements any future rent. But any question relating to the increase in the value of improvements and the amount of future rent to be set off against these improvements is to be determined by the executing Court as a matter arising in execution. It follows, therefore, that the lower Courts were right in holding that the present suit for rent (for the years from 1939 to 1942) is barred under section 47, Civil Procedure Code."

Their Lordships further state

"We may add that in our opinion the decision in *Raghunath Singh* v. *Hansraj Kunwar*[1], has no application having regard to the provisions of the special Act."

It may be noted that in the above decision their Lordships have dealt only with the right to recover rent for future years within the period of 12 years from the date of the decree during which execution was possible under section 48, Civil Procedure Code. There was no question of a second decree for possession of the properties. Their Lordships' observations as regards the non-applicability of the decision in *Raghunath Singh* v. *Hansraj Kunwar*[1], is attributable to the circumstance that the case before them was not for redemption of a mortgage or even one in ejectment by landlord against tenant. We must, therefore, hold that that decision does not govern the present case.

An examination of the relevant provisions of sections 5 and 6 of the Act shows clearly that there is nothing therein which can be said to operate to extinguish the right of redemption

"which right is conferred upon the mortgagor by enactment and of which he can only be deprived by means and in manner enacted for that purpose and strictly complied with."

There is no indication in the terms of the Act of the extinction of the right of redemption. Even if a decree is specifically passed in such a suit, not only for the mortgage amount but also for compensation for improvements and arrears of rent, it does not affect the question. There is nothing in such a decree which provides that in default of payment the right of redemption is extinguished. We are, therefore, of opinion that this second suit for redemption of a *kanom* lies notwithstanding the existence of the previous decree which has been allowed to become barred by limitation. This suit is filed well within the time allowed for a redemption of mortgage and is not also otherwise unsustainable.

It is not necessary to deal in this case with the question whether a second suit in ejectment by the landlord against the tenant based on a lease document pure and simple (as distinguished from a *kanom*) to which the Madras Act I of 1900 is applicable is sustainable or not, where an earlier decree in ejectment on the same lease has been allowed to become barred. The decision in *Mayan Kutti* v. *Kunhammad*[2], may require reconsideration. Even under the terms of section 5 of the Special

1. (1934) 67 M.L.J. 813 : L.R. 61 I.A. 362 : I.L.R. 56 All. 561 (P.C.).
2. (1917) 34 M.L.J. 167 : I.L.R. 41 Mad. 641.

Act there is a statutory tenancy created during the period of the continuance of possession by the judgment-debtor in the earlier decree, the tenancy being on the terms of the original lease or mortgage in his favour. In such circumstances subsequent possession of the original tenant cannot be regarded as adverse to the landlord. It may well be that there is a fresh cause of action in ejectment notwithstanding that the earlier decree for possession has been allowed to become barred. That was the view of the Division Bench in *Chowakkaran Keloth Makki Keyi* v. *Koomulli Madhavi Amma*[1]. It is true that the provisions of section 6, clause 4 were not referred to in that judgment but nonetheless their Lordships held that the second suit in ejectment would lie on the basis of a fresh cause of action. This decision is, however, dissented from in the latter decision *Mayan Kutti* v. *Kunhammad*[2], already referred to. No doubt there appears to be an apparent contradiction between the terms of section 5, clauses 1 and 2 of the Madras Act I of 1900. According to clause 1 (1),

> " Every tenant to whom compensation is due shall, *notwithstanding the determination of the tenancy* or payment or tender of the mortgage money if any be entitled to remain in possession until ejectment in execution of a decree or order of Court."

Clause 2 says that,

> " during such continuance the tenant shall hold as a tenant subject to the terms of his lease or of the mortgage."

Clause 2 cannot be explained away by stating that it is merely a provision regulating the terms and conditions subject to which the judgment-debtor continues to be in possession for the only purpose of the subsequent adjustment or rights between the decree-holder and the judgment-debtor at the time of execution in respect of re-valuation of the improvements and future rents. If that alone was what was intended, the language should have been different and more specific and limited. As it is, the judgment-debtor is to hold the property as a tenant. A statutory tenancy, therefore with all the usual incidents of " landlord and tenant " must be deemed to have come into existence between the parties by reason of the operation of the said clause. If that is the correct position it may very well be held that notwithstanding the merger of the original cause of action in the earlier decree on the basis of the lease there arises a fresh cause of action for ejectment against statutory tenant on the determination of the statutory tenancy. It is however, unnecessary to deal with this question finally as the present case is not with reference to a lease pure and simple. It arises in relation to a *kanom marupat* which must be treated as also a mortgage creating the relationship of a mortgagor and a mortgagee between the parties with the appropriate rights of redemption, foreclosure and sale.

We are, therefore, of opinion that the learned District Judge was wrong in holding that the present suit is barred under section 6 (4) of the Madras Act (I of 1900). We set aside the decree of the learned District Judge and restore the decree of the trial Court. The appellant will get the costs of this Court and of the lower appellate Court from the 1st respondent.

B.V.V. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. RAJAMANNAR, *Officiating Chief Justice.*

Chaganty Katamraju .. *Petitioner**

v.

Madavarappu Paripurnanandam .. *Respondent.*

Civil Procedure Code (V of 1908), *sections* 152 *and* 153—*Mistake in description of item in plaint schedule and decree schedule—Application to amend description of item in the schedules after disposal of second appeal by the High Court—Permissibility.*

Where an application was filed to amend the description of an item of property in the plaint schedule and the decree schedule in a suit which was ultimately disposed of by the High Court in

1. (1915) 29 I.C. 559. 641.
2. (1917) 34 M.L.J. 167 : I.L.R. 41 Mad.

* C. M. P. No. 172 of 1947. 9th April, 1948.

second appeal by substituting for a wrong survey number the correct survey number, the objections raised were (1) that there was a long delay and (2) that High Court could not grant the application to amend the plaint schedule after the disposal of the suit.

Held, that the application to the High Court was not to amend the pleadings as such but only to correct an error which had crept into the decree by way of clerical mistake or accident and as on the merits there was no valid objection to the grant of the relief the application must be allowed in spite of the long delay as there was no avoidable delay on the part of the applicant and as by the delay circumstances have not intervened which would make it inequitable to grant the application.

Petition praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to issue an order directing the amendment of the description of item I called Jaggaraju Madi Lanka in the schedules to the decree and plaint in O.S. No. 110 of 1937 on the file of the Court of the District Munsiff of Ramachandrapuram (A.S. No. 16 of 1944, Sub-Court Rajamundry—S.A. No. 1607 of 1945 on the file of the High Court) by substituting its correct survey number, both old and resurvey namely, Re-Survey No. 23/1, corresponding to revision Survey No. 27/1 of the extent of 1 acre 35 cents for old Survey No. 23 corresponding to Re-Survey No. 17/1.

P. Somasundaram for Petitioner.

V. V. Sastri for Respondent.

The Court delivered the following

JUDGMENT.—This is an application to amend the description of item 1 of the plaint schedule and the decree schedule in a suit which was ultimately disposed of by this Court in S.A. No. 1607 of 1945, by substituting for old survey No. 23 corresponding to Re-Survey No. 17/1 Re-survey No. 23/1 corresponding to revision Survey No. 27/1. The petitioner was the plaintiff in a suit which was for recovery of several items of property on the allegation that they were properties which originally belonged to one Chelamayya and the plaintiff and defendants 1 and 2 were the nearest reversioners of the said Chelamayya. The third defendant was made a party as evidently interested in item 1, and the case proceeded in both the lower Courts and in this Court on the footing that the third defendant was interested in item 1 of the plaint schedule. After the disposal of the second appeal by this Court, the plaintiff discovered that an error had crept into the description of the first item. The description in the plaint schedule was that it comprised 1 acre 35 cents out of R.S. No. 17/1 corresponding to Re-Survey No. 23. The correct description should have been Re-Survey No. 23/1 corresponding to Revision Survey No. 27/1. That this is the correct description is clear from the sale deed in favour of the third defendant and the written statement filed by him in the suit. This mistake in the plaint schedule was never brought to the attention of the Court at any time, and the litigation proceeded on the footing that what the plaintiff was claiming was the property in the possession of the third defendant. It was not for instance alleged in any of the written statements that item 1 was a property which did not belong to the estate of the last male holder.

This application is strongly opposed by the third defendant on two grounds: (1) that there has been very long delay, and (2) that the Court is not competent to grant this application for amendment of the plaint schedule after the disposal of the suit. As regards the first objection, undoubtedly there has been delay, if by delay is meant the time which has elapsed since the institution of the suit. But as I have already mentioned, this mistake evidently escaped the attentin of parties till very recently. There is therefore no avoidable delay on the part of the petitioner. It has not been shown that on account of this delay circmustances have intervened which would make it inequitable to grant the appliction. It is difficult to follow the other objection. What is now sought in this application is not an amendment of the pleadings as such; it is really an application to correct an error which has crept also into the decrees. The wide language of sections 152 and 153 of the Civil Procedure Code, would in my opinion, cover a case like the present. The correction of an error need not always amount to an amendment of a pleading. I do not think it correct to treat this application as an application under Order 6,

rule 17. The passage cited by the learned advocate for the respondent from Halsbury's Laws of England, volume 26, at page 56 namely,

"An amendment may be allowed at any stage of the proceedings even after trial, but not after judgment, except on appeals"

evidently refers to a material and substantial amendment of the pleading. At page 57 occurs the following statement of the law which is in terms identical with sections 152 and 153 of the Civil Procedure Code,

"The Court or a Judge may, at any time, and on such terms as to costs or otherwise as may be thought just, amend any defect or error in any proceedings . . . . . The Court or a Judge may also at any time correct clerical mistakes in judgments or orders, or errors arising therein from accidental omissions."

The application in this case is only to correct such an error, and as on the merits there is no valid objection to the grant of this relief, I am not impressed by any technical objection.

The petition is allowed.

K.C. *Petition allowed.*

[PRIVY COUNCIL]

(On appeal from the Chief Court of Oudh).

PRESENT:—LORD UTHWATT, LORD OAKSEY AND SIR JOHN BEAUMONT.

Sardar Nawazish Ali Khan .. *Appellant**

v.

Sardar Ali Raza Khan .. *Respondent.*

Mahomedan Law—Wills—Devise for life with a power of appointment—If recognised in Muslim law—Creation of limited interest—Validity and effect.

Powers of appointment, so special a feature in English law, are not recognised in Muslim law. To add to the testamentary capacity of Muslims the right to create powers of appointment might seem to encroach on the sphere of the Legislature.

Muslim law admits only ownership unlimited in duration, but recognises interests of limited duration in the use of property.

There is no difference between the several schools of Muslim law in their fundamental conception of property and ownership. A limited interest takes effect out of the usufruct under any of the schools. If it is a gift of the corpus, then any condition which derogates from absolute dominion over the subject of the gift will be rejected as repugnant, but if upon construction the gift is held to be one of a limited interest the gift can take effect out of the usufruct, leaving the ownership of the corpus unaffected except to the extent to which its enjoyment is postponed for the duration of the limited interest.

Where a bequest is to three successive tenants for life and then to the successor appointed under the power conferred by the will, the power of appointment is invalid as opposed to Muslim Law.

Bai Motivahoo v. *Bai Mamoobai*, (1897) L.R. 24 I.A. 93 : I.L.R. 21 Bom. 709 (P.C.), distinguished.

Strangman, K. C. and *Pullan* for the Appellant.

Monckton, K. C. and *Jopling* for the Respondent.

Their Lordships' Judgment was delivered by

SIR JOHN BEAUMONT.—These are consolidated appeals from a judgment and decree of the Chief Court of Oudh, dated the 12th January, 1943, which modified a decree of the said Court in its Original Civil Jurisdiction, dated the 30th October, 1937. Sardar Nawazish Ali Khan will be referred to hereinafter as "the Appellant," and Sardar Ali Raza Khan as "the Respondent".

The family to which the parties belong are Shiah Mohammadans of the Ashna Ashari Sect governed by the Imamia law.

The litigation which led up to these appeals arose out of the Wills of Nawab Sir Nawazish Ali Khan and Nawab Nasir Ali Khan, who were related to the parties to these appeals as shown in the pedigree following :—

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* P.C. Appeal No. 18 of 1945. 26th February, 1948.

- NAWAB ALI RAZA KHAN (died 24th June, 1865).
  - Sir Nawazish Ali Khan, K. C. I. E. (died 1890).
    - Hidayat Ali Khan (born about 1878; died 25th Oct., 1924)
      - Sardar Nawazish Ali Khan (born 1901) (Appellant)
      - Mohd. Hosain (born 1902)
  - Nawab Nasir Ali Khan (died 19th Nov., 1896).
    - Khan Bahadur Sardar Mohammad Ali Khan (born about 1870)
      - Sirdar Ali Raza Khan (born 1892). (respondent)
      - Ali Khan (born 1894).
      - Mansur Ali Khan (born 1894).
      - And others born after 1894.
  - Nisar Ali Khan (died 1878).
    - Barkat Ali Khan (born 1856; died 11th April, 1912).
      - Ali Mohammadan Khan (born 1879; died 14th October, 1926).
    - Sir Fateh Ali Khan K. C. I. E. (born about 1863; died 28th October, 1923).
      - Nisar Ali Khan (born 1901) and three other sons younger.

The estates, the title to which is contested in these appeals, are first an estate in Oudh (hereinafter called "the Oudh estate") known as the Nawabganj Aliabad estate in the Rabraich District which was granted to Nawab Ali Raza Khan, and was shown as No. 151 in List I of the lists in the Schedule to the Oudh Estates Act, 1869, and No. 39 in List V, so that under section 8 of that Act, the intestate succession was regulated by the rule of primogeniture, and in accordance with the scheme laid down in section 22 of the Act. Secondly, an estate in the Punjab called the Rakh Juliana estate (hereinafter called the "Juliana estate") which was granted by the Government of India to Sir Nawazish Ali Khan.

Both these estates were owned by Sir Nawazish Ali Khan. He transferred the Juliana estate to his brother Nasir Ali Khan in his lifetime. By his will dated the 14th February, 1882, he bequeathed the Oudh estate to his said brother under the power conferred by section 11 of the Oudh Estates Act, 1869, which enabled him to make such a bequest, notwithstanding that under his family law he could only bequeath one-third of his property.

At the date of his death in 1890, Sir Nawazish Ali Khan had a son Hidayat Ali Khan, who would have succeeded to the Oudh estate under the Act of 1869, if Sir Nawazish Ali Khan had died intestate. This is relevant in connection with the descent of the Oudh estate.

On the 15th July, 1896, Nasir Ali Khan executed two wills, one disposing of the Oudh estate, and the other of the Juliana estate and another estate in the Punjab. It is common ground that the heirs assented to the Wills.

These wills are in substantially the same form. It will be sufficient to quote the material provisions of the will with regard to the Oudh estate:

"Now, under section 11 of Act I of 1869, I, by means of this will, do hereby appoint Nawab Fateh Ali Khan, son of my late brother Kawab Nisor Ali Khan, my executor and successor of all this Taluqdari estate with all the rights and interest aforesaid and do hereby authorise the executor that whatever Taluqdari powers over the above mentioned ilaqa and over all the properties moveable and immoveable I the said declarant have, my devisee, to wit, Nawab Fateh Ali Khan, after my lifetime shall have like myself the very same powers including, the power of possession and enjoyment as owner provided he be alive. Similarly after the lifetime of the devisee Nawab Fateh Ali Khan my son Nawab Mohammad Ali Khan shall, if alive, be his successor. He shall also have the very same powers as have been bestowed on Nawab Fateh Ali Khan by means of this deed of will. After the lifetime of my son Nawab Mohammad Ali Khan,

Nawab Hidayat Ali Khan son of the late Sir Nawab Haji Nawazish Ali Khan Saheb shall be his successor provided he be alive. After all these three successors the fit amongst the descendants of the successors shall succeed. The last devisee shall have power to nominate as his successor any one whom he might consider fit from amongst the descendants of each of the three successors and if the last devisee die without nominating a successor the male descendants of each of the three successors shall have power to appoint as successor whomsover they consider fit and superior amongst themselves. The line of successors shall continue according to this very rule. In the event of disagreement the Government shall have power to appoint as successor anyone amongst the descendants of each of the three successors whom it considers the fittest. And if any one amongst our family claims maintenance contrary to the wishes of the Taluqdars, to wit, my successors, he shall in no way be entitled as of right to get maintenance. The successors shall have power to give or not maintenance in the event of good conduct and obedience."

On the death of Nawab Nasir Ali Khan on the 19th November, 1896, (before the birth of the Appellant), Sir Fateh Ali Khan entered into possession of both properties. On his death on the 28th October, 1923, his son Nisar Ali Khan took possession thereof. Hidayat Ali Khan died in 1924. On the 9th December, 1925, Mohammad Ali Khan (who will be referred to hereinafter as " Mohammad ") instituted a suit claiming both the properties. This litigation was eventually taken in appeal to the Privy Council (*Nisar Ali Khan* v. *Mohammad Ali Khan*[1]) where it was decided that Fateh Ali Khan and Mohammad took life estates under the Wills. The Privy Council refused to consider what would happen after Mohammad's death.

As a result of this litigation Mohammad got possession of the Oudh estate and the Juliana estate.

By a document dated the 30th June, 1934, Mohammad, after reciting the wills of Nasir Ali Khan declared as follows :—

" Whereas according to the decision of the Privy Council, I the declarant, also in accordance with the said will, have been in possession of the property left by the late Nawab Nasir Ali Khan and on account of the death of the late Sirdar Hidayet Ali Khan Saheb son of the late Haji Sir Nawazish Ali Khan I, the declarant, in accordance with the will am the last legatee and am in every manner, subject to the said will, entitled and competent to nominate successor ; whereas I the declarant have reached my full age and consider it proper and necessary to abide by the said will executed by the late Nawab Nasir Ali Khan in order to remove future domestic disputes ; I the declarant therefore, in my unimpaired five senses, without repugnance and force, nominate as successor Nawabzada Nawazish Ali Khan son of late Sirdar Hidayet Ali Khan for this reason that although by the grace of God each of the three legatees mentioned in the Will dated 15th July, 1896, has male issues still, among all of them the said Nawabzada Nawazish Ali Khan is in every way, fit to be preferred for succession.............The said Nawabazada Nawazish Ali Khan shall also be bound to continue to pay to the descendants of the family of Nawab Nasir Ali Khan and Nawab Nawazish Ali Khan, deceased subject to (their) obedience, maintenance at the scale mentioned in section 25, Act I of 1869.

" Therefore I have with my own will and consent executed this document appointing successor according to the provision of schedule I, Article 7 of the Stamp Act by way of (appointment in execution of a power) so that it may serve as an authority and be of use when needed. Dated 30th June 1934—The scribe of the deed is Syed Hidayet Husain, Vakil, Said Wara Bahraich."

Mohammad died on the 3rd February, 1935, and on his death the Appellant obtained possession of both estates.

On the 25th September, 1935, the respondent instituted in the Chief Court of Oudh against the appellant the suit out of which these appeals arise. By his plaint the respondent claimed a decree for possession of the Oudh estate, the Juliana estate and other estates with which this appeal is not concerned, and consequential relief.

The questions which were argued on this appeal were :—

(1) Is it competent for a Shia Mohammadan governed by Imamia law by will to leave property to a person for his life and after his death to such members of a class as such person may appoint ? Or, to state the question in more general terms, does Shia law recognise powers of appointment of a character with which English law is familiar ?

(2) If the answer to the first question is in the affirmative can such power be exercised in favour of a person not born in the lifetime of the testator though born before the power is exercised ?

1, (1932) 63 M.L.J. 336 : L.R. 59 I.A. 268 : I.L.R. 7, Luck. 324 (P.C.).

(3) Is the document executed by Mohammad on the 30th June, 1934, a will? If so, does it comprise property of which Mohammad was absolute owner?

(4) What relief, if any, is the respondent (plaintiff in the action) entitled to?

A question was raised, but not seriously pressed, upon the construction of the wills of Nasir Ali Khan. It was suggested that the power to appoint a successor was given to the last of the three named tenants for life, namely, Hidayat Ali Khan. Their Lordships feel no doubt that the Courts in India were right in holding that the power was given to the last survivor of the three life tenants, and in the events which happened the power, if validly created, was vested in Mohammad.

Both the Courts in India held that the power of appointment given by the wills of Nasir Ali Khan was valid according to Shia Law, but that its purported exercise in favour of the appellant, who was not born in the lifetime of the testator, was invalid under the personal law so far as the Juliana estate was concerned, but valid so far as the Oudh estate was concerned under the Oudh Estates Acts. Both Courts held that the document of the 30th June, 1934, executed by Mohammad was a will. The trial Judge held that it gave to the appellant one-third of the Juliana estate to which Mohammad was entitled as heir at law of Nasir Ali Khan. The Chief Court in appeal held that the will was not intended to affect and did not affect, property of which the testator Mohammad was the absolute owner. With regard to the relief claimed in the suit the trial Judge dismissed the suit of the respondent on the ground that it was a suit in ejectment and the respondent had not proved his title to the whole of the property claimed. In appeal the Chief Court varied the decree of the lower Court by giving the respondent a decree for possession of one-fifth of the Juliana estate, the proportion of the estate to which he was entitled as one of the heirs of Mohammad.

The first question arising in this appeal, as to the validity of the power of appointment conferred by the wills of Nasir Ali Khan, is one of general importance in Islamic law. Both the Courts in India based their opinion that such a power is valid under Muslim law on the decision of the Privy Council in *Bai Motivahoo* v. *Bai Mamoobai*[1]. In that case the Board upheld a power of appointment conferred by the will of a Hindu holding that the question for consideration was whether there was anything against public convenience, anything generally mischievous or anything against the general principles of Hindu law, in allowing such a power. Applying a similar test in the present case the Courts in India held that a power of appointment can be conferred under Muslim law. Their Lordships are not satisfied that this is the correct test to apply in a case relating to the will of a Muslim. The origin of testamentary capacity in the case of Muslims is quite different from that in the case of Hindus. The Hindu texts make no reference to wills and this is natural since the normal state of Hindu society in ancient times was the joint family, and on the death of a member the property in which he had an interest passed by survivorship to the other members of the family. It was only after partition, and the acquisition of self-acquired property, became common that the necessity to make wills arose, and testamentary power amongst Hindus has been based on long usage and judicial decision [see *Tagore's case*[2]]. On the other hand wills have been recognised under Muslim law from the earliest times.

"Wills are declared to be lawful in the Quran and the traditions, and all our doctors, moreover, have concurred in this opinion" (Hamilton's Hedaya, Volume 4, page 468).

It would, however, appear that the Prophet was not in favour of unlimited testamentary power. It is recorded in the Hedaya (Vol. 4, p. 469) that he said to a follower when asked his opinion,

"You may leave a third of your property by will: but a third part, to be disposed of by will is a great portion; and it is better you should leave your heirs rich than in a state of poverty, which might oblige them to beg of others."

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1. (1897) L.R. 24 I.A. 93 : I.L.R. 21 Bom. 709 (P.C.).

2. (1872) I.A. Sup. 1, 47 at p. 67 (P.C.).

and at page 472 of the same volume there is a saying attributed to the Prophet, "God has allotted to every heir his particular right." Their Lordships have not been referred to, and are not aware of any work on Mohammadan law, or any judicial decision in support of the view that powers of appointment, so special a feature in English law, are recognised in Muslim law. The matter seems never to have been discussed. In such circumstances, and at this date, to add to the testamentary capacity of Muslims the right to create powers of appointment might seem to encroach on the sphere of the Legislature.

Their Lordships, however, would be very reluctant to differ from the Courts in India solely on the ground of lack of precedent, and they propose, therefore, to consider the question whether the grant of such a power of appointment as was contained in the wills of Nasir Ali Khan conflicts with the general principles of Muslim Law.

The Chief Court in appeal took the view that under the wills of Nasir Ali Khan the estate vested after his death in the three successive tenants for life; that on the exercise of the power of appointment it would pass immediately to the appointee; that there was no period during which the estate would be in abeyance; and that the rights of the heirs of the testator were not affected or prejudiced. In their Lordships' opinion this view of the matter introduces into Muslim law legal terms and conceptions of ownership, familiar enough in English law, but wholly alien to Muslim law. In general, Muslim law draws no distinction between real and personal property, and their Lordships know of no authoritative work on Muslim law, whether the Hedaya, or Baillie or more modern works, and no decision of this Board which affirms that Muslim law recognises the splitting up of ownership of land into estates, distinguished in point of quality like legal and equitable estates, or in point of duration like estates in fee simple, in tail, for life or in remainder. What Muslim law does recognise and insist upon, is the distinction between the corpus of the property itself (*ayn*) and the usufruct in the property (*manafi*). Over the corpus of property the law recognises only absolute dominion, heritable, and unrestricted in point of time; and where a gift of the corpus seeks to impose a condition inconsistent with such absolute dominion the condition is rejected as repugnant; but interests limited in point of time can be created in the usufruct of the property and the dominion over the corpus takes effect subject to any such limited interests.

"If a person bequeath the service of his slave, or the use of his house, either for a definite or an indefinite period, such bequest is valid; because as an endowment with usufruct, either gratuitous or for an equivalent, is valid during life; it is consequently so after death; and also, because men have occasion to make bequests of this nature as well as bequests of actual property. So likewise, if a person bequeath the wages of his slave, or the rent of his house, for a definite or indefinite term, it is valid, for the same reason. In both cases, moreover, it is necessary to consign over the house or the slave to the legatee, provided they do not exceed the third of the property, in order that he may enjoy the wages or service of the slave, or the rent or use of the house during the term prescribed, and afterwards restore it to the heirs" (Hedaya, Volume 4, page 527, Chapter 5, entitled "Of Usufructuary Will.").

This distinction runs all through the Muslim law of gifts—gifts of the corpus (*hiba*), gifts of the usufruct (*ariyat*) and usufructuary bequests. No doubt where the use of a house is given to a man for his life he may, not inaptly, be termed a tenant for life, and the owner of the house, waiting to enjoy it until the termination of the limited interest, may be said, not inaccurately, to possess a vested remainder. But though the same terms may be used in English and Muslim law, to describe much the same things, the two systems of law are based on quite different conceptions of ownership. English law recognises ownership of land limited in duration; Muslim law admits only ownership unlimited in duration, but recognises interests of limited duration in the use of property.

There is a full discussion of the law on this subject in the judgment of Sir Wazir Hasan in the case of *Amjad Khan* v. *Ashraf Khan*[1]. That case challenged the doctrine accepted by Hanafi lawyers that a gift to "A" for life conferred an absolute

1. A.I.R. 1925 Oudh 568.

interest on " A " ; a doctrine based on a saying of the Prophet (Hedaya Bk. III, p. 309).

" An amree or life grant is lawful to the grantee during his life and descends to his heirs. The meaning of amree is a gift of a house (for example) during the life of the donee, on condition of its being returned upon his death. An amree is nothing but a gift and a condition and the condition is invalid ; but a gift is not rendered null by involving an invalid condition."

Sir Wazir Hasan in his judgment examined the appropriate texts and all the relevant decisions of the Privy Council. He pointed out the distinction in Muslim law between the corpus and the usufruct, between the thing itself and the use of the thing. On the construction of the deed which was in question in the case before him, he came to the conclusion that the donor intended to confer upon his wife not the corpus, but a life interest only, that such life interest could take effect as a gift of the use of the property and not as part of the property itself, and that there was nothing in Muslim law which compelled him to hold that the intended gift of a life estate conferred an absolute interest on the donee. This case was taken in appeal to the Privy Council and is reported in *Amjad Khan* v. *Ashraf Khan*[1]. The Board agreed with Sir Wazir Hasan on the construction of the deed in question that only a life-interest was intended, and held that if the wife took only a life-interest it came to an end on her death and the appellant who was her heir took nothing, and if the life interest was bad the wife took no interest at all and the appellant was in no better case. There is also a discussion of the basis upon which a life interest under Hanafi law can be supported in the 3rd Edition of Tyabji's Muhammadan Law at pp. 487, *et seq* : That book as the work of an author still living, cannot be cited as an authority ; but their Lordships have derived assistance from the discussion.

Limited interests have long been recognised under Shia Law. The object of " Habs " is

" the empowering of a person to receive the profit or usufruct, of a thing with a reservation of the owner's right of property in it . . . . . I have bestowed on thee this mansion . . . . for thy life or my life or for a fixed period " is binding by *seisin* on the part of the donee. (Bail. : II, 226).

See also *Banoo Begum* v. *Mir Abed Ali*[2]. Their Lordships think that there is no difference between the several Schools of Muslim law in their fundamental conception of property and ownership. A limited interest takes effect out of the usufruct under any of the Schools. Their Lordships feel no doubt that in dealing with a gift under Muslim law, the first duty of the Court is to construe the gift. If it is a gift of the corpus, then any condition which derogates from absolute dominion over the subject of the gift will be rejected as repugnant ; but if upon construction the gift is held to be one of a limited interest the gift can take effect out of the usufruct, leaving the ownership of the corpus unaffected except to the extent to which its enjoyment is potsponed for the duration of the limited interest.

It remains to construe the wills of Nasir Ali Khan and to apply to them the rules of Muslim law. On the death of the first life-tenant his son and heir claimed that the gift to his father was of the corpus, relying on the use of the word " owner " (*malik*) and that all subsequent limitations were repugnant and void. This argument failed in all the Courts, and it was held that the will created three successive life-interests. As the will contained no gift of the corpus, that descended to the heirs of the testator subject to the interests of the life-tenants in the usufruct. On the death of the surviving tenant for life, two alternative constructions of the wills have been suggested. First, that the person to take under the power of appointment was to take absolutely. Secondly, that the sentence in the wills " The line of successors shall continue according to this very rule " means that the person to take under the power was to take for life and to possess a power of appointing a successor similar to that given to the survivor of the three tenants for life named in the wills, and that this arrangement was to continue for ever. If this be the meaning of the wills the power if valid would operate on the usufruct, but the question would

1. (1929) 57 M.L.J. 439 : L.R. 56 I.A. 213 : I.L.R. 4 Luck. 305 (P.C.).

2. (1907) I.L.R. 32 Bom. 172 at 179.

arise whether under Shia Law as administered in India and in the light of public policy it is competent for a testator to provide in perpetuity for a succession of tenants for life not born in his life-time. Their Lordships do not find it necessary to decide this question, because they are satisfied that the first suggested construction of the wills is the right one, and that the person nominated under the power was to take an absolute interest. The words of the sentence quoted above are vague and not capable, their Lordships think, of bearing the extended meaning sought to be attributed to them. They appear to be words of emphasis and repetition merely. The testator is saying that the line of succession which he has laid down, namely, to three successive tenants for life and then to the successor appointed under the power, is the line which is to continue from his death. If the successor is to take absolutely the power operates upon the corpus, and in their Lordships' view is clearly inconsistent with principles of Muslim law. It would interfere with the Muslim law of succession, and would involve that the heirs took the corpus of the property for a term, not merely of limited, but of uncertain, duration. The Chief Court found some support for its view that the power of appointment was valid in analogies drawn from *wakfs*. In their Lordships' opinion no such analogy exists in a case like the present which is not founded on trust. In *wakfs* the property is vested either notionally in Almighty God, or in the *wakif* or his heirs, and all beneficial interests take effect out of the usufruct.

For the above reasons their Lordships hold that the power of appointment contained in the wills of Nazir Ali Khan is invalid under Muslim law.

The next question for consideration is as to the nature and effect of the document of 30th June, 1934, executed by Mohammad, which both Courts in India held to be a will. No doubt in point of form it might be a will. But it is to be noticed that it purports only to exercise the power conferred by the wills of Nazir Ali Khan and to dispose of the property subject to the power. It contains no appointment of an executor, no gift of any property belonging to the testator, and no suggestion of revocability ; it was stamped under an article of the Stamp Act relating to appointments made by any writing not being a will and it is called a deed at the end of the document. In all the circumstances their Lordships think that the document was a deed and not a will. But if it be a will, their Lordships agree with the lower appellate Court that the document did not pass property which Mohammad took as heir of his father. It was one thing to choose the appellant, who was the senior male member of the senior branch of the family, to succeed to the leadership of the family and to the family estates, but quite another thing to decide that the appellant was better suited than Mohammad's own children to inherit Mohammad's own property. There is nothing to shew that Mohammad ever considered that question.

This disposes of the appeal of the appellant relating to the Juliana estate which belongs to the heirs of Mohammad under his personal law.

The cross-appeal of the Respondent relates to the Oudh estate. The Courts in India were of opinion that, apart from Muslim law, a power of appointment can be created under the wide power of disposition conferred by S. 11 of the Oudh Estates Act, 1869, which applies to all *Taluqdaris*, Hindu as well as Muslim. As against this view the respondent points out that neither the Act of 1869 nor the amending Act of 1910, mentions powers of appointment, and that sections 78 and 79 of the Succession Act, 1855, which relate to powers of appointment, are not included amongst the sections incorporated in the Act of 1869. Their Lordships do not find it necessary to decide this question because they are satisfied for the reasons now to be stated that if a power of appointment can be created under the Oudh Estates Act, the power sought to be conferred by the wills of Nasir Ali Khan does not fall within the Acts. The position is as follows.

Estates in List V descend on intestacy under the law of primogeniture in accordance with the scheme laid down in section 22 of the Act of 1869. Under section 11 of the Act the holder of such an estate might, however, dispose of the estate, either in his life-time or by will.

The estate in the hands of a person taking it by such a disposition only remained under the Act (so as to be capable of being dealt with or pass under the Act and, not under the personal law) if the transferee was a person who would have succeeded according to the provisions of the Act, if the transferor had died intestate. This was provided for by sections 14 and 15 of the Act of 1869 which were (so far as material) as follows :

> "14. If any Taluqdar or Grantee or his heirs or legatee hereafter transfer or bequeath the whole or any portion of his estate to another Taluqdar or Grantee or to such a younger son as is referred to in section thirteen, clause two, or to a person who would have succeeded according to the provisions of this Act to the estate or to a portion thereof if the transferor or testator had died without having made the transfer and intestate, the transferee or legatee and his heirs and legatees shall have the same rights and powers in regard to the property, to which he or they may have become entitled under or by virtue of such transfer or bequest, and shall hold the same subject to the same conditions and to the same rules of succession as the transferor or testator.
>
> "15. If any Taluqdar or Grantee or his heirs or legatee shall hereafter transfer or bequeath to any person not being a Taluqdar or Grantee the whole or any portion of his estate, and such person would not have succeeded according to the provisions of this Act to the estate or to a portion thereof if the transferor or testator had died without having made the transfer and intestate, the transfer of and succession to the property so transferred or bequeathed shall be regulated by the rules which would govern the transfer of, and succession to, such property if the transferee or legatee had bought the same from a person not being a Taluqdar or Grantee."

It was held by the Judicial Commissioners of Oudh in *Rai Jagatpal Singh* v. *Thakurain Balraj Kuar*[1], that any person mentioned in section 22 as a possible heir might be said to be "a person who would have succeeded according to the provisions of the Act to the estate." On this construction of the Act, Nasir Ali Khan would have had the power to dispose of the estate under section 11 of the Act. But it was decided by the Privy Council in *Thakurain Balraj Kunwar* v. *Rae Jagatpal Singh*[2], that on the true construction of section 14 of the Act of 1869, the expression

> "a person who would have succeeded according to the provisions of the Act" is equivalent to "the person or one of the persons to whom the estate would have descended according to the provisions of the special clause of section 22 applicable to the particular case";

and does not include any person mentioned in section 22 as a possible heir in a line of succession not applicable to the particular case.

It was admitted in the Chief Court on appeal and before the Board that, as a result of this decision, the Oudh estate was taken out of the Oudh Estates Act, 1869, by the will of Sir Nawazish Ali Khan. He gave the estate by will to Nasir Ali Khan. Nasir Ali Khan was the brother of Sir Nawazish Ali Khan and Sir Nawazish Ali Khan left a son surviving him. Accordingly Nasir Ali Khan was not the person to whom the estate would have descended if the testator had died intestate.

The position when the amending Act was passed was that under the will of Nasir Ali Khan there were three successive tenants for life with a purported power of appointment in the survivor which was invalid under the personal law, and subject thereto the estate was vested in Mohammad as the heir of Nasir Ali Khan. Then came the amending Act which by section 7, substituted a new section for section 14 of the Act of 1869, the effect of which was to restore the law to the state in which it was supposed to have been before the decision of the Judicial Committee in *Thakurain Balraj Kunwar* v. *Rae Jagatpal Singh*[2], by section 21. Section 7 was made retrospective, but with this important reservation :

> "nothing contained in the said section shall affect suits pending at the commencement of this Act, or shall be deemed to vest in or confer upon any person any right or title to estate or any portion thereof, or any interest therein which is at the commencement of this Act vested in any other person, who would have been entitled to retain the same if this Act had not been passed and the right or title of such other person shall not be affected by anything contained in the said section."

Assuming that the effect of the retrospective operation of section 7 of the Act of 1910 was to bring the Oudh estate again within the purview of the Act of 1869,

1. (1900) 3 O. C. 120.
2. (1904) L.R. 31 I.A. 132 : I.L.R. 26 All. 393 (P.C.).

so that the estate would descend according to the rule of primogeniture and not under the personal law, it is clear that to impose upon the interest of Mohammad a valid power of appointment the exercise of which would deprive him of his estate and which might be exercised by himself or others as future events might determine, would vest in other persons a right and title to the estate vested in him at the commencement of the Act of 1910. Their Lordships, therefore, are of opinion that the power of appointment contained in the Oudh will of Nasir Ali Khan was inoperative in relation to the Oudh estate.

As the power of appointment was invalid and ineffective as to both the Juliana estate and the Oudh estate, it is unnecessary to consider whether it could be exercised in favour of a person not born in the life-time of the creator of the power.

The question then arises to what relief the respondent is entitled. With regard to the Juliana estate the respondent claimed the whole estate for himself, relying on a custom which he failed to prove. Their Lordships agree with the Courts in India that it would be wrong to grant to the respondent an order for possession on behalf of himself and his co-heirs. The suit was neither framed nor fought as a representative suit. The Chief Court, as already noted, granted the respondent a decree for possession of one-fifth of the estate, a decree which their Lordships think would be difficult to enforce, and which ought not to be enforced, because, as appears from the judgment of the Chief Court, the respondent has sold his share in the Juliana estate. Their Lordships, however, think that the position can be dealt with by a declaratory order under section 42 of the Specific Relief Act.

With regard to the Oudh estate the respondent contended before the Board that it passed under the Oudh Estates Act, 1869, to himself as the eldest son of his father under the rule of primogeniture established by the Act. It appears that in the appeal to the Chief Court the respondent contended that the estate passed under the personal law and not under the Act, the argument being directed against the view which had prevailed in the trial Court that under the Act, though not under the personal law, the power of appointment could be exercised in favour of a person unborn in the life-time of the testator. Before this Board the appellant contended that the Oudh estate did not pass under the Act, but the argument advanced on his behalf failed to satisfy their Lordships that this was the effect of sections 7 and 21. The question is of interest to the appellant only as bearing on the proper form of order and their Lordships do not feel called upon to express a considered opinion as to the construction of the Act which would affect other parties. Their Lordships think that as between the parties to this appeal the respondent has shown his right to possession of the Oudh estate and an order can be made accordingly to possession of that estate, but such order will be without prejudice to any claim the heirs of Mohammad under the personal law other than the respondent may choose to make.

Their Lordships, therefore, will humbly advise His Majesty that the appeal of the appellant be dismissed, that the cross-appeal of the respondent so far as it relates to the Oudh estate be allowed and that the decree passed by the Chief Court in appeal on the 12th January, 1943, be set aside and that the decree passed by the said Court on its Original Side dated the 30th October, 1937, also be set aside. That there be a declaration that the power of appointment given by the two wills of Nasir Ali Khan to Mohammad as the survivor of the successors appointed by those wills was invalid both in respect of the Juliana estate and in respect of the Oudh estate; and that the Juliana estate descended on the death of Mohammad to his heirs according to his personal law. That in respect of the Oudh estate there be an order that the appellant deliver up possession to the respondent, but that such order be without prejudice to any claim which the heirs of Mohammad under his personal law other than the respondent may choose to make to the Oudh estate.

With regard to the costs the appellant has failed in his appeal, and the respondent has succeeded substantially in his cross-appeal. Under the decree of the

Chief Court parties were given proportionate costs throughout. The respondent as plaintiff claimed to be entitled to the whole of both estates, and according to the learned trial Judge the respondent wasted much time in producing a large number of witnesses whose evidence was not referred to in the course of the argument, and which has not been included in the record before their Lordships' Board. It is clear that the respondent largely increased the costs of the trial by raising a question on which he failed. Their Lordships think that, as the case leaves this Board, an order for proportionate costs would be difficult to work out. On the whole they think a fair order as to costs will be that the appellant Sardar Nawazish Ali Khan pay his own costs throughout and that he pay the respondent Sardar Ali Raza Khan half his costs throughout.

The claim to mesne profits raised by the respondent in his plaint was not dealt with by the Courts in India, since, in the view they took of the case, that matter did not arise. The claim will be referred back to the trial Court for disposal according to law.

Solicitors for Appellant : *Barrow, Rogers & Nevill.*

Solicitors for Respondent : *Hy. S. L. Polak & Co.*

K.S. *Appeal dismissed.*
Cross-appeal allowed in part.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAGESA SASTRY.

Kunda Chinna Dasappa and another .. *Appellants**

v.

Gopalakrishna Co., by managing partner Venkadari Gattu Venkatasubbiah .. *Respondent.*

Contract Act (IX of 1872), sections 135, 139 and 141—Surety for sum that may be decreed—Decree or certain sums—Stay of execution on furnishing security by the judgment-debtors—If time given by the decree-holder—Novation of liability—Surety if released.

During the pendency of a suit in connection with the proceedings relating to an attachment before judgment, one *S* stood surety on 15th April, 1935, for the payment of any amount for which a decree might be passed in the suit. The suit ended in a decree on 12th July, 1937, for the payment of certain sums. On the judgment-debtors applying for a stay of execution of the decree-it was ordered on their furnishing security of immoveable property which they did on 7th August, 1937. On 4th September, 1939, an application was filed for the adjudication of the surety *S* and he was adjudged an insolvent on 27th September, 1940. During the pendency of the petition for adjudication, the decree-holder filed an execution petition against *S* and got some of his properties attached and sold on 21st June, 1940 and part satisfaction of the decree was also entered up. Later, the decree-holder applied for execution against the judgment-debtors and prayed that the properties given by them as security might be sold. Eventually the decree-holder released the security and allowed the petition to be dismissed. He purchased by private sale from the judgment-debtors one item of the properties furnished as security and to that extent part satisfaction of the decree was entered up. In an application in the Insolvency of *S* by a creditor to have the proof of the decree-holder expunged on the ground that *S*, the insolvent owed no debt to him in the circumstances as the conduct of the decree-holder in taking security of immoveable property from the judgment-debtors operated as a novation of liability and a release of *S*, the surety insolvent, from his obligation.

Held : (1) There was no time given by the decree-holder within the meaning of section 135 of the Contract Act ; nor was there anything in the security bond executed by the judgment-debtors for the purpose of getting stay of execution of the decree which operated to release the surty *S* from his obligation or which amounted to a novation of liability or an extinction of the surety's liability.

(2) As the security which was given up came into existence after the suretyship obligation was created, it could not be postulated that the decree-holder did anything which was inconsistent with his duties to the surety within the meaning of section 139 of the Contract Act ; section 139 of the Contract Act must be read with section 141 and not in such a way as to abrogate it when it applies.

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*A.A.O. No. 238 of 1946. 22nd April, 1948.

Appeal against the order of the District Court of Cuddappah dated 12th September, 1945, and made in I. A. No. 71 of 1944 in I. P. No. 28 of 1939.

V. Ramaswami Aiyar for Appellant.

V. Venkataramiah for Respondent.

The Court delivered the following

JUDGMENT.—This is an appeal against the order of the District Judge of Cuddappah in I. A. No. 71 of 1944 in I. P. No. 28 of 1939. The respondent herein filed O. S. No. 75 of 1935 in the Court of the District Munsiff of Prodattur and obtained a decree against the defendants therein for payment of certain sums. There was an attachment before judgment during the pendency of the suit, and in connection with those proceedings one Seshagiri Rao stood surety

"for the payment of any amount for which a decree might be passed either *ex parte* or upon contest in the suit or in the appeal or in revision against all the defendants or any of them".

That document is E. P. No. 1 dated 15th April, 1935. In due course the suit ended in a decree on 12th July, 1937. It appears that the judgment-debtors filed a petition for stay of execution, and they were allowed to do so on their furnishing security of immovable properties which they did under the document Ex. P-2 dated 7th August, 1937. Meanwhile an application had been taken out by the decree-holder against the surety, but it was not pressed and was dismissed on 31st July, 1937. On 4th September, 1939, I. P. No. 28 of 1939 was filed for adjudication of Seshagiri Rao as an insolvent and there was an order of adjudication on the 27th September, 1940. During the pendency of the adjudication petition E. P. No. 534 of 1939 would appear to have been filed against the surety. Some of his properties were attached and sold on 21st June, 1940, and part satisfaction of the decree was entered up. Later E. P. No. 672 of 1940 was filed on 9th October, 1940, for execution of the decree against the judgment-debtors, and the prayer was for directing the sale of the properties which they had furnished as security under Ex. P-2. During the course of these proceedings, for some reason or other, the decree-holder released the security and allowed the petition to be dismissed. It appears also that one item of the properties furnished as security was purchased by the decree-holder by private sale from the judgment-debtors, and to the extent of the consideration part satisfaction of the decree was entered up.

The application before the District Judge out of which this appeal arises, was filed by the 21st creditor in the insolvency to have the proof of the respondent, who was creditor, No. 22, expunged on the ground that the insolvent owed no debt to him in the circumstances set out earlier. The contention was that the 22nd creditor, who was the decree-holder in O. S. No. 75 of 1935 must be deemed to have released the obligation of the surety as he consented to take the security of immoveable property given by the judgment-debtors under Ex. P-2, and that this transaction amounted to a novation of liability and operated to release the surety from his obligations. The second contention was that in any case, the giving up of the said security by the decree-holder was an act which under section 139 of the Contract Act put an end to the obligation of the surety. The District Judge rejected both the contentions and dismissed the application.

The appeal was originally filed by the petitioner in the lower Court, namely, creditor No. 21, but it appears that his own debt was later on expunged as non-existent, and he ceased to be a creditor of the insolvent; but another creditor who has now been impleaded as the second appellant is proceeding with the present appeal. It is stated on behalf of the respondent that this second appellant is no other than the son-in-law of the insolvent and has really no *locus standi* to continue this appeal. It is unnecessary to deal with this question, because, firstly, the facts have not been investigated, and secondly, in view of my decision on the other points, this point becomes unnecessary.

Mr. V. Ramaswami Aiyar for the appellant contends that the taking of the security by the decree-holder when the judgment-debtors furnished the same in

obedience to the order of Court making it a condition for their obtaining the stay of execution which they prayed for, amounts to the giving of time without the consent of the surety which would therefore operate to release the surety from his obligation. There is nothing on record to support the contention that the decree-holder voluntarily accepted this security or agreed to give time to the jdgment-debtors. The order was passed by the Court as a condition precedent to the granting of the stay which the judgment-debtors prayed for. This might well have been despite the opposition of the decree-holder. Moreover, there is no time given by the decree-holder within the meaning of section 135 of the Contract Act; nor is there anything in the terms of the security bond, Ex. P-2, which operates to release the surety from his obligation or which amounts to a novation of liability or an extinction of the surety's liability. The first contention therefore was rightly repelled by the District Judge.

The second point taken by Mr. V. Ramaswami Aiyar was that by reason of the conduct of the decree-holder in giving up the security in the course of his execution proceedings in E. P. No. 672 of 1940, he had done something which was inconsistent with the rights of the surety, and the eventual remedy of the surety himself was thereby impaired, and in consequence that attracted the provisions of section 139 of the Contract Act and the surety was discharged. In this particular case the security that was taken and released was not in existence at the time when the suretyship obligation was created, and therefore section 141 of the Contract Act does not apply. Illustration (*c*) specially shows that the giving up of such security taken at a time later than the creation of the surety's obligation does not operate to release the surety, in this respect the Indian law being different from the English law. Section 139 must be read along with section 141 and not in such a way as to abrogate section 141 when it applies. As, in the present case, the security which was given up came into existence later it could not be postulated that the decree-holder did anything which was inconsistent with his duties to the surety within the meaning of section 139. There are therefore no merits in the second contention either.

It is unnecessary to deal with the question whether the earlier order allowing attachment and sale of the surety's property operates as *res judicata* or not; nor with the other contentions which the respondent wants to urge.

The appeal is therefore dismissed with costs.

V.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Suddapalli Ramaiya and others .. *Appellants**

v.

Yelavarthi Suryanarayana .. *Respondent.*

Indian Limitation Act (IX of 1908), *section* 15 *and Articles* 109 *and* 120—*Suit for mesne profits—Execution proceedings to take delivery of property restrained—Section* 15 *of the Limitation Act, if applies—Acknowledgment of liability for mesne profits—Period for which mesne profits could be decreed.*

The plaintiff purchased certain property in execution of a mortgage decree on 22nd November, 1937, and the sale was confirmed in his favour on 18th February, 1938. Some of the defendants then filed a suit impugning the mortgage and both the trial Court and the appellate Court (High Court) dismissed the same. Pending the disposal of the appeal the defendants obtained an order of injunction restraining the plaintiff from interfering with their possession on 7th November, 1938, and the order was confirmed on 6th March, 1939. After the appeal was dismissed, the plaintiff obtained delivery of the property on 12th November, 1941, and sought during the course of execution to obtain mesne profits by way of restitution, and during these proceedings, on 8th December,

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*S.A. No. 2353 of 1945. 30th March, 1948.

1942, some of the defendants filed a counter in which *inter alia* they admitted that if at all, they were liable only from and after 6th March, 1939. The plaintiff's application for mesne profits was dismissed, whereupon he filed the present suit for the same from 22nd November, 1937, the date of his purchase to 12th November, 1941. The trial Court gave a decree for mesne profits only for three years prior to the date of the suit, but the appellate Court admitting the counter as additional evidence and treating the contents therein as an acknowledgment gave a decree from 7th November, 1938 the date of the order of injunction passed by the High Court.

Held, on appeal

(i) That section 15 of the Limitation Act did not, in so many words, apply to the facts of the case, for the institution of the present suit was not stayed by the injunction order and that the institution of a suit can never be said to be futile if it would thereby prevent the running of limitation.

(ii) It cannot be said that the defendant's possession was not wrongful and it could become rightful possession by the filing of the suit.

(iii) But even treating the counter as an acknowledgment, it was made on 8th December, 1942, and can therefore only be regarded as an acknowledgment of mesne profits that had not become time-barred by that date and the acknowledgment would entitle the plaintiff to mesne profits only from 8th December, 1939; and as it was not signed by all the defendants it would bind only those who signed it.

Appeal against the decree of the Court of the Subordinate Judge of Tenali, in A. S. No. 52 of 1945, preferred against the decree of the Court of the District Munsiff of Tenali in O. S. No. 325 of 1943.

M. S. Ramachandra Rao for Appellants.

N. V. B. Sankara Rao for Respondent.

The Court delivered the following

JUDGMENT.—The sixth defendant, who is the mother of defendants 4 and 5, mortgaged the suit property; and upon that mortgage a suit was brought and the property sold in Court auction and purchased by the decree-holder, who is the plaintiff, on 22nd November, 1937. A suit was thereupon filed by defendants 1 to 4 impugning the mortgage and asserting that the sixth defendant had no authority to mortgage the property. Their suit was dismissed in the trial Court; but they carried the matter in appeal to the High Court and obtained an injunction order on 7th November, 1938, restraining the plaintiff from interfering with their possession. That injunction continued in force during the pendency of the appeal, which was ultimately dismissed. The plaintiff took delivery of the property on 12th November, 1941. He then attempted during the course of the execution to obtain mesne profits by way of restitution; but his application was dismissed, it being held that his remedy lay only by way of a separate suit. The plaintiff thereupon filed the present suit for mesne profits from 22nd November, 1937, the date when he purchased the property, to 12th November, 1941. The trial Court held that the plaintiff was entitled to mesne profits only for a period of three years prior to suit, and therefore gave him a decree for the period from 1st December, 1940, (three years prior to the date of the filing of the suit) to 12th November, 1941, the date of delivery. Both parties preferred appeals. Many points of law were raised; and the plaintiff gave many reasons why he should have been given mesne profits for a longer period. He claimed that Article 120 of the Limitation Act applied and not Article 109. He pleaded that time could also be enlarged under sections 14 and 15 of the Limitation Act, and finally asked the Court to admit as additional evidence the counter filed by defendants 1 to 4 in the execution proceedings. The Court admitted this additional evidence and allowed an amendment of the plaint, and while rejecting arguments with regard to the applicability of section 14 and Article 120 of the Limitation Act to the facts of the case, held that the plaintiff was entitled to invoke section 15 of the Limitation Act and that the counter marked as Ex. P-12 amounted to an acknowledgment; and so gave the plaintiff a decree for the period from 7th November, 1938, the date of the order of injunction passed by this Court, up to the date of delivery.

It is argued in this Court that the lower appellate Court was wrong in applying section 15 of the Limitation Act and in permitting Ex. P-12 to be marked, and

that even if Ex. P-12 was properly marked, the recitals therein did not amount to an acknowledgment.

It is clear that section 15 of the Limitation Act does not in so many words apply to the facts of the case; for the institution of the present suit was certainly not stayed by the injunction order in question. That order was merely made to avoid any inconvenience that might arise by permitting the execution of the decree to proceed while the appeal in this Court was still pending. The lower Court relied on an observation of Sadasiva Aiyar, J., in *Muthukorakkai Chetty* v. *Madar Ammal*[1], which was approved in *D. Narain Roy* v. *Jogesh Chandra De*[2], in these words:

"Whenever proceedings are being conducted between the parties *bona fide* in order to have their mutual rights and obligations in respect of a matter finally settled, the cause of action for an application or for a suit the relief claimable wherein follows naturally on the result of such proceedings, should be held to arise only on the date when those proceedings finally settle such rights and liabilities."

In *Muthukorakkai Chetty* v. *Madar Ammal*[1], this question did not directly arise. The point that had to be considered was one of limitation in a proceeding to set aside a sale on the ground of fraud, instituted after the confirmation of the sale had been ordered. The majority of the learned Judges were of opinion that although an order for confirmation of the sale was passed; yet on account of the pendency of the proceedings to set aside the sale, the confirmation did not really take place until those proceedings had terminated. Sadasiva Aiyar, J., was however of opinion that the order of confirmation was in a state of suspension pending the other proceedings. In other words, he was of opinion that on some equitable grounds not strictly covered by section 15 of the Limitation Act, the period during which a *bona fide* litigation was pending could be excluded. Dealing with the argument that a suit could, nevertheless, have been filed, he said that the filing of such a suit was futile and unnecessary. The argument that a suit was futile and unnecessary was considered by another Full Bench of this Court in *Sundaramma* v. *Abdul Khadar*[3] in which the dictum of Sadasiva Aiyar, J., did not meet with approval. Jackson, J., with whom Sundaram Chetti, J., concurred, said:

"If the application is one which must be made in order to save the bar of limitation it is neither futile nor unnecessary."

This criticism of Sadasiva Aiyar, J.'s dictum received the approval of the Privy Council in *Narayan Jivan Gouda Patil* v. *Puttabi*[4]. Their Lordships were considering a matter arising out of a suit for injunction. During the pendency of the suit, an order of temporary injunction was passed. The defendant set up a case of adoption which was not accepted by any of the Courts in India; but their Lordships of the Privy Council held that the defendant had proved his case. The defendant thereupon attempted to obtain possession under section 144, Civil Procedure Code and was met with the plea that his claim was barred by limitation. The matter came before their Lordships again in appeal arising out of the section 144 proceedings; and it was held by them that the lower Courts had rightly found that the suit was barred by limitation. They further held that the period of limitation could not be enlarged by section 15 of the Limitation Act. The last but one paragraph in the judgment of their Lordships ends with this passage:

"Their Lordships are unable to appreciate this point, for the institution of a suit can never be said to be futile, if it would thereby prevent the running of limitation."

On the question of the Article of the Limitation Act to be applied, the learned counsel for the plaintiff contends that the possession of the defendants was not unlawful; because their possession was one which was permitted by the Court. Whatever decision may ultimately have been reached by the Court, it is argued, as long as the suit was pending and there was an uncertainty who was in rightful possession, it could not be said that any of the parties was in wrongful possession.

1. (1919) 38 M.L.J. 1: I.L.R. 43 Mad. 185 (F.B.).
2. A.I.R. 1924 Cal. 600.
3. (1932) 64 M.L.J. 664: I.L.R. 56 Mad. 490 (F.B.).
4. (1944) 2 M.L.J. 358 (P.C.).

It is difficult to appreciate this argument. If, for example, a person trespassed on another's property and the person dispossessed filed a suit for ejectment, pleading rightly that the defendant was in wrongful possession because he had trespassed on the property, could it be said that by the filing of the suit the wrongful possession of the defendant was converted into rightful possession? I find in none of the authorities cited before me any support for such an argument. The learned advocate for the plaintiff however relies on certain remarks of Pandrang Row, J., in *Sundararaja Ayyar* v. *Raghava Reddi*[1] to this effect :

" As regards the next point, it is urged by the advocate for the first defendant-respondent that Article 109 governs the present suit on the ground that his possession after the date of the preliminary decree continued to be or was wrongful. I am unable to accept this contention, for there can be no doubt that up to the decree and even during the appeal, his case was that possession was lawful, being based on a valid title acquired by him from the father of the plaintiff. Such possession cannot be said to be wrongful. After the decrees of the Courts by which it was held that he was entitled only to one-fourth of the property, his possession could not necessarily be deemed to be wrongful, for as a co-owner he could be lawfully in possession of the property on behalf of himself and other co-owners."

In reading this passage we must bear in mind the facts of that particular case, in which the person who had been in possession of the whole was entitled to possession of the whole as a joint owner; and his possession therefore could not be wrongful. I am not prepared to read this passage of the learned Judge as meaning that because a suit was pending and the Court could not know whose possession was rightful, any possession by any party during the pendency of the suit was rightful. In *Sitaramaswami* v. *Mahalakshmamma*[2], Wadsworth, J., held that the agreement between the parties made the party in possession a receiver, and that therefore his possession was on behalf of the rightful owner and could not in itself be wrongful. Clearly that case has no application to the facts of the present case.

The only other question for consideration is whether Exhibit P-12 was rightly admitted in evidence by the appellate Court; and if so, whether any part of it amounts to an acknowledgment of liability for mesne profits. On the first point, it is argued that this document could not have been admitted under any of the clauses of Order 41, rule 27. The plaintiff did not, it is said, give any good reason for not having filed the application in the trial Court and the appellate Judge did not state that it was required by him in order to fill some lacuna in the evidence. Further, the learned appellate Judge gave no reasons, as he was bound to do under rule 27 (2), for admitting the document. The questions of admitting this document and of permitting the amendment of the plaint were raised at the same time; but the discussion of the lower appellate Court related only to the question whether the plaintiff should be allowed to amend his plaint so as to base his claim on the acknowledgment as well as on the other cause of action. None of the parties had very much to say on the question of the admissibility of the document. It is true that the defendants filed a counter in which they stated that the document should not be admitted; but there the matter seems to have ended. It was the learned Judge's pre-occupation with the question whether the plaintiff should be allowed to amend his plaint and the absence of arguments on the other question that were responsible for the omission to give any reasons for the admission of the additional evidence. As to the desirability of admitting this evidence, all the documents relating to the earlier suit, the injunction order passed, and the fruitless execution proceedings should have been put before the Court in this suit, which arose directly out of the execution proceedings; and it may be said therefore that the failure to file this particular counter was an oversight which the appellate Court could rectify at the appellate stage. I am not therefore prepared to say that this document was wrongly admitted.

As the defendants were ultimately found to be in wrongful possession and they had been allowed to remain in possession by the Court pending the appeal and had furnished security for mesne profits, they could hardly deny in their counter any liability for mesne profits; and they did not do so. They said that the question

1. (1936) 43 LW. 706. 2. A.I.R. 1936 Mad. 170.

of mesne profits was not one to be considered in execution, but that a fresh suit should be filed. They went on to say in paragraph (4), with which we are immediately concerned :

"These respondents will not be liable for the profits from 22nd November, 1937, (the date of purchase) as the sale was confirmed only on 18th February, 1938, and no steps for delivery of the property were taken by the petitioner at any time. In any event, they will be liable from 6th March, 1939 (the date on which the High Court confirmed the order of injunction) when the order directing these respondents to furnish security was made by the High Court in C.M.P. No. 4708 of 1938."

I agree with the lower appellate Court that this is a clear admission of liability from 6th March, 1939.

There are two circumstances which prevent full effect being given to this acknowledgment. One is that this acknowledgment was made on 8th December, 1942 ; and can therefore only be regarded as an acknowledgment of mesne profits that had not become time-barred by that date. So this acknowledgment would entitle the plaintiff to mesne profits only from 8th December, 1939. Another point to be noticed is that this counter was signed by defendants 1 to 4 and not by the fifth defendant, and would therefore not bind him. It is argued that since the whole family was then joint, the acknowledgment by defendants 1 to 4 would bind the fifth defendant also. That clearly cannot be so, since defendants 1 to 4 did not sign on behalf of the family, but on behalf of their individual selves. If the counter had been filed by the manager of the family as manager, it would perhaps have bound all the members of the family. Such was not the case. This acknowledgment therefore entitles the plaintiff to a decree for mesne profits against defendants 1 to 4 from 8th December, 1939 to 12th November, 1941, the date of delivery, and against the fifth defendant from 1st December, 1940 to 12th November, 1941, as directed in the decree of the District Munsiff.

The decree of the lower appellate Court will be modified as above. All parties will bear their own costs in all the three Courts.

V.P.S. *Decree modified.*

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Allahabad).

PRESENT :—LORD SIMONDS, LORD MORTON OF HENRYTON AND SIR MADHAVAN NAIR.

Mohammad Khalil Khan and others .. *Appellants**

v.

Mahbub Ali Mian and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 2, rule 2—Scope and object of—Applicability—Correct test—Cause of action—Meaning—What are different and identical causes of action.

Order 2, rule 2, Civil Procedure Code, enacts that if a plaintiff fails to sue for the whole of the claim which he is entitled to make in respect of a cause of action in the first suit, then he is precluded from suing in a second suit in respect of the portion so omitted. The object of the rule is clearly to avoid splitting up of claims and to prevent multiplicity of suits.

The correct test in cases falling under Order 2, rule 2 is whether the claim in the new suit is in fact founded upon a cause of action distinct from that which was the foundation for the former suit. The cause of action means every fact which will be necessary for the plaintiff to prove if traversed in order to support his right to the judgment. It has no relation whatever to the defence that may be set up by the defendants nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set out in the plaint as the cause of action, or in other words to the *media* upon which the plaintiff asks the Court to arrive at a conclusion in his favour.

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* P. C. Appeal No. 12 of 1945. 31st May, 1948.

If the evidence to support the two claims is different, then the causes of action are also different.

The causes of action in the two suits may be considered to be the same if in substance they are identical.

Their Lordships' Judgment was delivered by

SIR MADHAVAN NAIR.—This is a consolidated appeal resulting from the consolidation of two appeals, Appeal No. 5 of 1942 and Appeal No. 6 of 1942, from two decrees of the High Court of Judicature at Allahabad dated 28th October, 1941, which affirmed two decrees, one of the Court of the Special Judge first class Shahjahanpur, and one of the Court of the Civil Judge, Shahjahanpur, both dated 14th January, 1939.

Appeal No. 6 of 1942 arises out of a suit (Suit No. 2 of 1938) instituted by Appellant No. 1 and one Fida Ali Khan, on whose death Appellants Nos. 2 to 5 were brought in as his representatives for the recovery of certain property in the Shahjahanpur District. The respondents Nos. 1 to 4 hereinafter called the Mahbub brothers, and their respective wives Nos. 5 to 8, to whom they had purported to transfer parts of the said property, were the Defendants in the said suit. The suit was dismissed by the Civil Judge, Shahjahanpur and the dismissal was confirmed by the High Court on appeal.

Appeal No. 5 of 1942 arises out of an application dated 27th July, 1936, by three of the Respondents in the above appeal under section 4 of the United Provinces Encumbered Estates Act, 1934 (United Provinces Act XXV of 1934). In their statement under section 8 of the Act, they claimed as their own the property claimed by the Appellants in Appeal No. 6. Appellant No. 1 and Fida Ali Khan filed objections under section 11 of the Act claiming the property as their own. Whilst these proceedings under the Act were pending they filed Suit No. 2 of 1938 above referred to. As that suit was dismissed the Special Judge held in the proceedings under the Encumbered Estates Act that they were not proprietors of the property claimed by them in the said proceedings. An appeal by the Appellants to the High Court in these proceedings was dismissed on 28th October, 1941, on the ground that their appeal against the decree in Suit No. 2 of 1938 had been dismissed.

The decision of the Board in Appeal No. 5 of 1942 will depend on its decision in Appeal No. 6 of 1942, which is the main appeal before the Board.

The only question for decision in the main appeal is whether the Suit No. 2 of 1938, instituted by Appellant No. 1 and Fida Ali Khan, since deceased, is barred by Order 2, rule 2, of the Code of Civil Procedure, 1908. Both Courts in India held that it was barred. If the question is decided in favour of the Appellants, the other issues left undecided by the High Court will have to be decided.

Order 2, r. 2, is as follows :—

(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action ; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim he shall not afterwards sue in respect of the portion so omitted or relinquished.

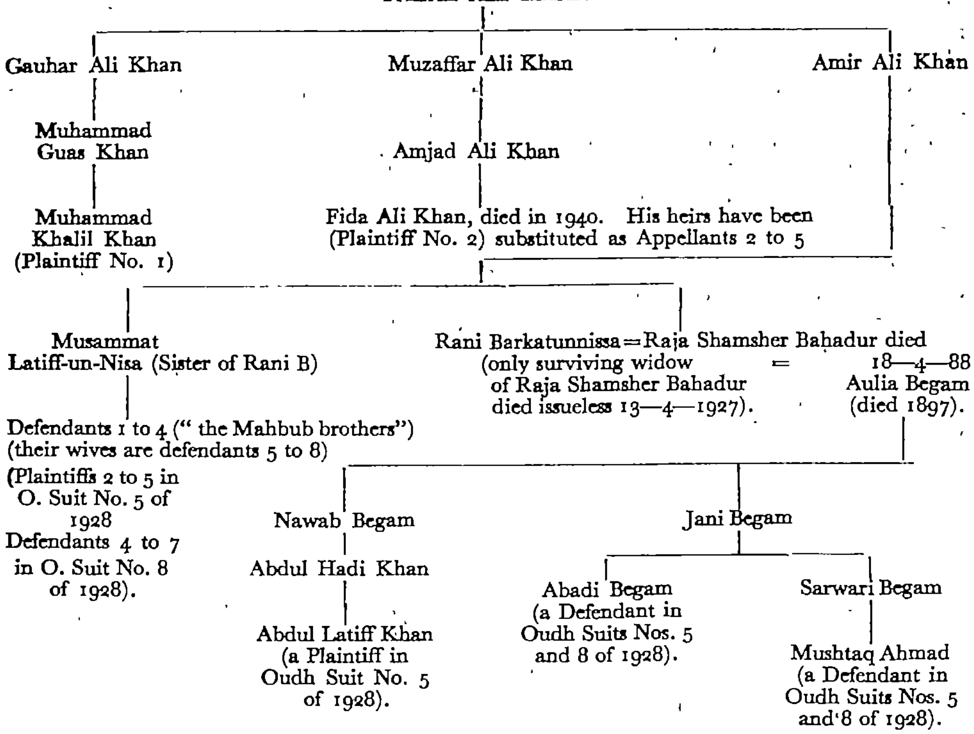
(3) A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs ; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

Explanation.—For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.

Illustration.

A lets a house to *B* at a yearly rent of Rs. 1,200. The rent for the whole of the years 1905, 1906 and 1907 is due and unpaid. *A* sues *B* in 1908 only for rent due for 1906. *A* shall not afterwards sue *B* for the rent for 1905 or 1907.

The following pedigree will serve to elucidate the relationship of the parties :—



Rani Barkatunnissa in the above pedigree, a Mohammedan lady of the Sunni sect, died on 13th April, 1927, leaving the land concerned in the appeal situate in the District of Shahjahanpur in the Province of Agra, and also land and property in the Districts of Sitapur and Hardoi in the Province of Oudh. She had obtained lands and property under the will of her late husband Raja Shamsher Bahadur dated 26th March, 1888. Rani Barkatunnissa was the third wife of her husband. His first wife was Aulia Begam ; his second wife died shortly after marriage and is not mentioned in the pedigree.

After the death of Rani Barkatunnissa various relations began to assert claims to her property. The Chief claimants were :—

(1) Mohammad Khalil Khan (Appellant No. 1 in Appeal No. 6) and Fida Ali Khan—Plaintiffs in Suit No. 2—her cousins on her father's side. Of these, Fida Ali Khan died in 1940, and as already mentioned is now represented by his heirs Appellants Nos. 2 to 5.

(2) Respondents Nos. 1 to 4 in Appeal No. 6 of 1942 (Mahbub brothers) her sister's sons.

(3) Musammat Abadi Begam, Mushtaq Ahmad and Abdul Latif, descendants of Raja Shamsher Bahadur and his first wife.

Following the death of Rani Barkatunnissa, mutation proceedings began in the Revenue Courts in respect of the Shahjahanpur and Oudh properties respectively ; and two suits also, namely, Suit No. 5 of 1928 and Suit No. 8 of 1928, were instituted in respect of the Oudh property in the Chief Court of Oudh.

On 12th May, 1928, the Assistant Collector of Shahjahanpur, ordered mutation of names in respect of the Shajahanpur property to be effected in favour of the applicants Mohammad Khalil and Fida Ali Khan on the ground that Rani Barkatunnissa was a Sunni and under the Sunni

law the nephews would exclude the sister's sons, the Mahbub brothers who were the objectors. This order was reversed in appeal by the Collector of Shahjahanpur on 20th June, 1928, on the ground that the decision in the Revenue Courts should be based on possession, and not on title which should be established in the Civil Court. Accordingly, mutation of names was ordered to be effected in the names of the Mahbub brothers. A second appeal by the applicants from the Collector's order was dismissed by the Commissioner on 29th October, 1928.

In respect of the Oudh property, after proceedings in the Revenue and Criminal Courts, Abadi Begam succeeded in getting mutation effected in her name by 28th March, 1928, and the whole of that property which had been under attachment was released to her.

On 12th May, 1928, Abdul Latif and the Mahbub brothers instituted Suit No. 5 of 1928, for possession of the Oudh property in the Chief Court of Oudh. The Defendants to that suit were Abadi Begam ; Mushtaq Ahmad ; Mohammad Khalil Khan and Fida Ali Khan (Plaintiffs in Suit No. 2 of 1938) and another. Shortly stated Abdul Latif claimed as heir of Raja Shamsher Bahadur under the "Sanad" and Act I of 1869 ; Mahbub brothers claimed as heirs of Rani Barkatunnissa under the Shia law. Abadi Begam and Mustaq Ahmad denied the claim of Abdul Latif and asserted that Abadi Begam was the heir under Act I of 1869. Mohammad Khalil Khan and Fida Ali Khan, amongst various grounds, stated that Rani Barkatunnissa was a Sunni, and they were her heirs under the Muhammadan Law.

On 14th September, 1928, Mohammad Khalil Khan and Fida Ali Khan and another filed a suit of their own, *viz.*, Suit No. 8 of 1928 in respect of the Oudh property. Their case in that suit was the same as their defence in Suit No. 5. The Defendants to this suit were Abadi Begam (Defendant No. 1), Mustaq Ahmad (Defendant No. 2), Abdul Latif (Defendant No. 3) and Mahbub brothers (Defendants Nos. 4 to 7) and one Ghulam Jelani.

Two facts may be noticed about Suit No. 8 :—(1) It was instituted by Mohammad Khalil Khan and Fida Ali Khan after their claim for mutation in respect of the Shahjahanpur property had been set aside in appeal by the Collector of Shahjahanpur, but before the decision of the Collector was confirmed on 29th October, 1928, by the Commissioner of the Rohilkand Division. (2) They confined their claim to the Oudh property and did not include in their claim the Shahjahanpur property, although that property also had belonged to Rani Barkatunnissa, and the Collector of Shahjahanpur had already decided against their claim on 20th June, 1928.

Suit No. 5 and Suit No. 8 were tried together by Nanavutty, J. The learned Judge on 15th April, 1929, delivered one judgment dismissing the claims of the Plaintiffs in Suit No. 5 and decreeing the claim of Mohammad Khalil Khan and Fida Ali Khan, holding that Rani Barkatunnissa, was a Sunni and that they were her heirs under the Muhammadan Sunni Law. The decision was confirmed by the Privy Council on 28th June, 1934, in *Abdul Latif* v. *Abadi Begam*[1].

On 18th February, 1929, after all the evidence in the connected suits had been recorded and after Counsel for the plaintiffs in Suit No. 5, who were defendants Nos. 3 to 7 in Suit No. 8, had finished his arguments in both cases, and whilst Counsel for the plaintiffs in Suit No. 8, who were defendants Nos. 4, 5 and 9 in Suit No. 5, was in the midst of his arguments, the plaintiffs in Suit No. 8 made what the learned Judge called a "belated application" under Order 16, Rule 7, of the Civil Procedure Code to amend the plaint by including in it their claim to the entire immoveable property in the District of Shahjahanpur left by Rani Barkatunnissa. The rule empowers the Court to allow either party to alter or amend his pleadings. The petitioners asked that if the application for amendment were to be disallowed, permission be given to them to file a separate suit. The learned Judge rejected both requests by order dated 21st February, 1929.

1. (1934) 67 M.L.J. 894 : L.R. 61 I.A. 322 ; I.L.R. 9 Luck. 421 (P.C.).

On 29th January, 1938, Mohammad Khalil Khan and Fida Ali Khan filed the present suit, Suit No. 2 of 1938, claiming possession of the property in Shahjahanpur against the Mahbub brothers and their wives to whom they had purported to transfer the property. It will be remembered that Mahbub brothers were Defendants Nos. 4 to 7 in Suit No. 8 of 1928 which had been instituted by the same plaintiffs Mohammad Khalil Khan and Fida Ali Khan, in respect of the Oudh property.

In paragraph 1 the Plaintiffs stated as follows :—

" (1) Rani Barkatunnisa Begam deceased *taluqdar*, who belonged to the Sunni faith, was the owner in possession of the property in district Shahjahanpur, specified as given below in addition to *taluqa* Saadatnagar in district Sitapur and *taluqa* Deoria in district Hardoi. She died on the 13th of April, 1927, leaving behind her nephews, the plaintiffs as her heirs, under the Muhammadan Law. They became the owners of the property, *i.e.*, the estate of Rani Barkatunnisa Begam, deceased aforesaid, specified as given below, according to the Hanifi School of Muhammadan Law. Defendants Nos. 1 to 4, who are the sons of the sister of Rani Barkatunnisa Begam, deceased, are not her heirs according to the Muhammadan Law ; nor did any right of ownership devolve on them in respect of the property left by her (*i.e.*, Rani Barkatunnisa Begam deceased).

Paragraphs 2 to 8 narrate the history of the mutation proceedings in respect of Shahjahanpur and Oudh properties, and also of Suit Nos. 5 to 8.

Paragraph 8 of the plaint sets out the reasons for not including the Shahjahanpur property in Suit No. 8, with a view no doubt to meet objections from the Mahbub brothers. Attention may be drawn to clauses (*c*), (*d*), (*e*), (*f*) of this paragraph as they contain most of the arguments advanced before the Board on behalf of the Appellants.

" (*c*) Abadi Begam and Mirza Mushtaq Ahmad were in exclusive possession of the property in the districts of Sitapur and Hardoi. They were the principal defendants and reliefs for possession were actually sought against them in Suits Nos. 5 of 1928 and 8 of 1928. As the parties were different and different reliefs were sought against them, the property in district Shahjahanpur could not be included in Suit No. 8 of 1928, according to law.

(*d*) Separate causes of action accrued in respect of the property in districts Sitapur and Hardoi on the 28th of March, 1928, and separate causes of action accrued in respect of the property in district Shahjahanpur on the 29th of October, 1928. As the parties were also different, both the properties could not be included in one suit, otherwise, the suit would have become bad for ' multifariousness.'

(*e*) At the time of the institution of Suit No. 8 of 1928, the second appeal, preferred by the plaintiffs against the Collector's order dated the 20th of June, 1928, was pending in the Commissioner's Court and had not been decided. It was struck off after the institution of Suit No. 8 of 1928. The cause of action for this suit accrued subsequently when the defendants took possession of the property in question.

(*f*) The right to sue in respect of the property in districts Sitapur and Hardoi was based on other facts while the right to sue in respect of the property in question situate in district Shahjahanpur is based on different facts."

Paragraph 12 stated the cause of action for the suit as follows :—

12. " The cause of action for this suit accrued on the 29th of October, 1928, when the appeal was struck off by the Commissioner's Court, and on or about the 1st of January, 1938, when the defendants finally refused (to do the needful), at Shajahanpur within the local limits of the jurisdiction of this Court. The suit is cognizable by this Court."

Paragraph 13 stated the reliefs claimed by the plaintiffs. Relief (*a*) ran as follows :—

" on declaration of the proprietary title of the plaintiffs to the property specified as given below, and dispossession and removal of interference on the part of the defendants, the plaintiffs may be awarded proprietary possession over the same."

The other reliefs (*b*) and (*c*) related to mesne profits and costs.

Before proceeding further, it may be mentioned that the facts stated in paragraph 1 of the present plaint, *i.e.*, plaint in Suit No. 2, which explain how the plaintiffs became entitled to the property in suit, had been mentioned by them succinctly in paragraphs 13 and 17 of the plaint in their earlier Suit No. 8. Paragraph 22 of the plaint in that suit stated the reasons why the Mahbub brothers had been added as parties to that suit. It stated :

" 22. That the defendant No. 2 has been impleaded as he was also a claimant in the mutation Court and defendants 3 to 7 are the plaintiffs in Original Suit No. 5 of 1928 claiming the property in suit and hence have been parties to this suit also."

Defendant No. 3 was Abdul Latif, and Defendants Nos. 4 to 7 were Mahbub brothers.—

Paragraph 23 stated the dates when the cause of action for the suit arose as follows :—

"23. That the cause of action for the present suit arose within the jurisdiction of this Honourable Court on 13th April, 1927, the date of Rani Barkatunnisa's death and on 28th March, 1928, the date of the order of the Commissioner, Lucknow Division, in the mutation case."

It may be observed that one of the dates mentioned in the above statement is 13th April, 1927, when Rani Barkatunnissa died.

Amongst the reliefs claimed in paragraph 25 of the plaint in Suit No. 8 were included reliefs against the Mahbub brothers also. Clauses (*a*), (*d*) and (*e*) of the paragraph ran as follows :—

"(*a*) It be declared that the plaintiffs Nos. 1 to 3 are the owners of the property detailed in Schedules "A" to "D" attached to the plaint. (This relief was obviously claimed against all the defendants including Mahbub brothers).

(*d*) A decree for the recovery of the moveables detailed in Schedule "C" attached to the plaint be passed against the defendants Nos. 1, 2 and 4 to 7 (defendants 4 to 7 are Mahbub brothers).

(*e*) A decree for the recovery of cash and corn detailed in Schedule "D" attached to the plaint be passed against defendants Nos. 1, 2 and 4 to 7 in favour of plaintiffs Nos. 1 and 2 (defendants 4 to 7 are Mahbub brothers)."

A comparison of the reliefs claimed in Suits Nos. 8 and 2 shows that reliefs in the form of declaration and possession were claimed against Mahbub brothers in both suits.

It will be observed that the plaintiffs in the two suits claimed the properties, the Oudh property in Suit No. 8, and the Shahjahanpur property in the present suit as heirs to Rani Barkatunnissa, who belonged to the Sunni sect, and died on 13th April, 1927, though they described the cause of action, the nature of which their Lordships have to decide, as having arisen on different dates, *viz.*, on 29th October, 1928, and 1st January, 1938, in Suit No. 2, and on 28th March, 1928, in Suit No. 8 adding to it 13th April, 1927, also. It will also be observed that the relief was claimed against the Mahbub brothers who were also Defendants in the Oudh suit in respect of several items of property covered by that suit.

To resume the narrative, the present suit was contested on many grounds only one of which is now relevant as already stated, that being that the suit is barred by Order 2, rule 2, Civil Procedure Code, as the property in the suit, *viz.*, the Shahjahanpur property was not included by the plaintiffs in their previous Suit No. 8 of 1928. Attention has already been drawn to the terms of Order 2, Rule 2, Civil Procedure Code.

The question to be decided is covered by issue No. 1 :—

Is the suit barred by Order, 2 rule 2, as this property was not included in Suit No. 8 of 1928 in the Oudh Chief Court ?

The Courts in India answered the question against the present Appellants, who will sometimes be referred to as the plaintiffs on the ground that their right, *i.e.*, cause of action to recover both Oudh and Shahjahanpur properties came into existence as soon as Rani Barkatunnissa died on 13th April, 1927, that they were entitled to claim the Shahjahanpur property also in Suit No. 8 to which the Mahbub brothers were parties ; and as they omitted to do so, confining their claim solely to Oudh property, they were precluded by Order 2, rule 2, from bringing the present suit to recover the Shahjahanpur property. The Courts also held that the Respondents were not precluded from taking advantage of Order 2, Rule 2, because they had opposed the application of the plaintiffs for including the Shahjahanpur property in Suit No. 8.

The learned Judges of the High Court first pointed out that on 14th September, 1928, when suit No. 8 was instituted, all the parties concerned were aware that a definite dispute existed as regards the right to succeed to properties left by Rani Barkatunnissa, implying thereby that the plaintiffs should have included the Shahjahanpur property in the earlier suit, and then they proceeded to deal with the

question what is the cause of action in the present suit. That there was a definite dispute between the parties as regards the Shahjahanpur property when suit No. 8 was instituted is not now disputed by Counsel for the appellants his argument being that though there was a dispute no infringment of the plaintiffs' right to the property had occurred earlier than 29th October, 1928, and that the cause of action to recover the property commences only from that date.

After discussing the meaning of the expression " cause of action " as explained in various leading cases the learned Judges expressed their opinion as regards the cause of action in the two suits as follows :—

" The cause of action in the Oudh suit and in the present suit consisted of the facts that Rani Barkatunnisa was the owner of the disputed properties, that she died on the 13th of April, 1927, that she was a Sunni by faith (the defendants alleging in both cases that she was a Shia by faith), that the plaintiffs were the heirs of Rani Barkatunnisa and entitled to inherit, that in the Oudh case the defendants had denied the title of the plaintiffs and in the other case the defendants in pursuance of the denial of title had obtained possession of the property. Mutation of names had already been obtained by the defendants over the Shahajahanpur property by reason of the order of the Collector, dated the 20th June, 1928, when the Oudh suit was filed on the 14th September, 1928, and the plaintiffs were entitled to make a claim in respect of the Shajahanpur property when they filed Suit No. 8 of 1928 in the Oudh Chief Court.

The plaintiffs themselves realised this and attempted to get an amendment of the plaint from the Chief Court, but they were opposed by the defendants and their application was dismissed. This also shows that the cause of action for the Oudh properties and the Shahjahanpur properties was the same."

After holding that the cause of action to recover the Oudh property and the Shahjahanpur property was the same and that the plaintiffs' suit would be barred by Order 2, rule 2, Civil Procedure Code, the learned Judges dealt with the question whether the Respondents should not be permitted to raise the plea based on Order 2, rule 2, Civil Procedure Code, because of the plaintiffs' application under Order 6, rule 17. They held that they could raise the plea.

The arguments ably urged by Mr. Jopling, the learned Counsel for the Appellants, ranged over a wide ground, but the main arguments may be arranged under the following heads :—

It was urged :—

(1) that the plaintiffs could not commence an action in respect of the Shahjahanpur property while the right to mutation in the Revenue register was the subject of appeal to the Commissioner, which was only decided on 29th October 1928, *i.e.*, after the Suit No. 8 had been instituted by them.

(2) that the right and its infringement, and not the ground or origin of the right and its infringement, constitute the cause of action, that the cause of action for the Oudh suit (No. 8 of 1928) so far as the Mahbub brothers are concerned was only a denial of title by them as that suit was mainly against Abadi Begam for possession of the Oudh property ; whilst in the present suit the cause of action was wrongful possession by the Mahbub brothers of the Shajahanpur property, and that the two causes of action were thus different.

(3) that having opposed the application of the plaintiffs for the inclusion of the Shahjahanpur property in Suit No. 8, the Respondents should not now be allowed to say that the present claim of the plaintiffs is barred. In other words, as stated by Counsel, the Respondents should not be allowed to " approbate or reprobate " in connection with the same transaction by raising their present plea.

Controverting the above points, Mr. Dingle Foot, the learned Counsel for the Respondents, argued that the cause of action in Suit No. 8 and in Suit No. 2 was the same, that it was the plaintiffs' title to recover the properties which was the same in respect of both properties, that it consisted of facts which proved that the plaintiffs were the heirs of Rani Barkatunnissa under the Hanafi Law she being a Sunni by faith and that it originated on her death on 13th February, 1927. He also contended that the Respondents were not precluded from raising the plea that the suit was barred under Order 2, rule 2, Civil Procedure Code.

Their Lordships are satisfied that there is no force in the contention that the plaintiffs in the present suit could not reasonably commence an action in respect of the Shahjahanpur property, while their right to mutation in the Revenue registers was the subject of an appeal to the Commissioner which had not been decided, or in other words, that it was not open to them to sue the defendants in respect of the Shahjahanpur property at a date earlier than the 29th October, 1928, and to include the Shahjahanpur property in the earlier suit No. 8 instituted on 14th September, 1928. This contention is not supported either by fact or law. Though the plaintiffs had secured an order as to mutation in their favour from the Assistant Collector of Shahjahanpur that order was set aside on 20th June. All the parties who are claimants to the properties left by Rani Barkatunnissa were well aware in the course of the mutation proceedings of the controversy that prevailed amongst them about their respective titles to the properties and the question regarding titles had been raised in the earlier suit. Prior to the institution of that suit, on 20th June, 1928, the adverse order regarding Shahjahanpur property had been passed against the present plaintiffs. They could well have included the Shahjahanpur property also in that suit unless as they allege the cause of action respecting it is different from the one in the other suit. It is idle to contend that there was a possibility of securing success before the Commissioner, and that they, therefore, waited to know the result of the appeal before instituting the present suit. In this connection it is relevant to point out that a party to mutation proceedings is not prohibited from instituting a suit in a Civil Court to establish his right to the property. After stating in clause 1 that :—

" all disputes regarding entries in the annual registers shall be decided on the basis of possession.'

Section 40, clause (3) of the United Provinces Land Revenue Act (Act III of 1901) which applies to the Shahjahanpur property states that :—

"No order as to possession based on this section shall debar any person from establishing his right to the property in any Civil or Revenue Court having jurisdiction."

Sections 41 and 42 of the said Act deal with the settlement of boundary disputes and the determination of class of tenants.

Section 44 so far as is material to the point under consideration runs as follows :—

" . . . subject to the provision of sub-section 3 of section 40 all decisions under sections 40, 41 and 42 shall be binding on all Revenue Courts in respect of the subject matter of the suit, but no such entry or decision shall affect the right of any person to claim and establish in the Civil Court any interest in land which requires to be recorded in the registers prescribed by (*a*) to (*d*) of section 32 . . . . . ."

It is thus clear that though mutation proceedings in respect of Shahjahanpur property had not ended in the Revenue Court, inasmuch as their claim to mutation was rejected by the Collector's order of 20th June, the plaintiffs were entitled to make a claim with respect to Shahjahanpur property when the suit for the Oudh property was filed by them on 14th September, 1928, unless the causes of action respecting the two properties were different. Their Lordships are of opinion, as will presently appear, that they were the same.

Shortly stated Order 2 Rule 2, Civil Procedure Code, enacts that if a plaintiff fails to sue for the whole of the claim which he is entitled to make in respect of a cause of action in the first suit, then he is precluded from suing in a second suit in respect of the portion so omitted. To apply the rule to the facts of the case their Lordships will have to consider what was the cause of action in Suit No. 8 on which the plaintiffs founded their claim, and whether they included all the claims which they were entitled to make in respect of that cause of action in that suit. For, if they failed to include all the claims, then by force of Order 2, rule 2, they are precluded from including the claim omitted in the present Suit No. 2. As pointed out in *Moonshee Bazloor Ruheem* v. *Shumsunnissa Begam*[1].

" The correct test in all cases of this kind is, whether the claim in the new suit is, in fact, founded on a cause of action distinct from that which was the foundation of the former suit . . . . ."

1. (1867) 11 M.I.A. 531 at 605.

The object of the rule is clearly to avoid splitting up of claims and to prevent multiplicity of suits.

The phrase " cause of action " has not been defined in any enactment but the meaning of it has been judicially considered in various decisions. In *Read* v. *Brown*[1], Lord Esher, M.R., accepted the definition given in *Cook* v. *Gill*[2], that it means

" every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."

Fry, L.J., agreed and said,

" Everything which, if not proved, gives the Defendant an immediate right to judgment must be part of the cause of action."

Lopes, L.J., said,

" I agree with the definition given by the Master of Rolls of a cause of action, and that it includes every fact which it would be necessary to prove, if traversed, in order to enable a plaintiff to maintain his action."

This decision has been followed in India. The term has been considered also by the Board. In *Mussammat Chand Kour* v. *Partab Singh*[3], Lord Watson delivering the judgment of the Board observed as follows—

" Now the cause of action has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set out in the plaint as the cause of action, or in other words, to the *media*, upon which the plaintiff asks the Court to arrive at a conclusion in his favour."

Before considering the nature of the cause of action in Suit No. 8 and in the present suit—Suit No. 2—and whether the causes of action in the two suits are different or the same, it will be convenient to deal preliminarily with certain points which are closely connected with that main quesion.

Their Lordships think that the two suits should be considered as suits between the same persons for the purpose of the present appeal. Admittedly, the plaintiffs are the same in both suits. It is true that all the Defendants in Suit No. 8 are not defendants in Suit No. 2 but Mahbub brothers who are the principal defendants in Suit No. 2, were also defendants in the earlier suit and reliefs as already pointed out were also claimed against them.

In their Lordships' view the plaintiffs' title to recover the properties cannot be affected by the different defences set up by the different sets of Defendants. If the plaintiffs' title to recover the properties depends on their heirship to Rani Barkatunnissa as contended for by the Respondents, then that right cannot be affected by the consideration whether Abadi Begam was defending the plaintiffs' suit on the basis of the Taluqdari Law, while Mahbub brothers were resisting it on the strength of Shiah Law ; the plaintiffs are bound to succeed irrespective of the defences set up by the different sets of Defendants. Whether the cause of action is one or the same in a suit for ejectment does not depend on the different answers to the claim which may be set up by different defendants. The different titles set up by them cannot split up the cause of action of the plaintiffs into distinct causes of action. It was urged by Mr. Jopling that Rani Barkatunnissa's title to Shahjahanpur property was different from her title to the Oudh property, and this would make the cause of action in Suit No. 2 different from the cause of action in Suit No. 8. By whatever title Rani Barktaunnissa happened to obtain the properties, their Lordships think that the plaintiffs' title to recover them being based on their heirship to Rani Barkatunnissa, that title cannot be affected by the fact that Rani Barkatunnissia got the two properties by different titles.

As stated before, the real question to be considered is what is the true nature of the plaintiffs' cause of action ? If it is the same the present suit is barred by Order 2, rule 2, Civil Procedure Code.

The main argument which Mr. Jopling pressed with great force was that the cause of action is the plaintiff's right in law and the facts by which he must

1. (1889) L.R. 22 Q.B.D. 128.
2. (1873) L.R. 8 C.P. 107.
3. (1888) L.R. 15 I.A. 156.

prove that right, plus the infringement of that right. According to the learned Counsel, the right and its infringement, and not the ground or origin of the right and its infringement constitute the cause of action. In support of the main proposition, much reliance was placed on the decision in *Brunsden* v. *Humphrey*[1]. In that case the plaintiff brought an action in a County Court for damage to his cab occasioned by the negligence of the defendant's servant, and, having recovered the amount claimed, afterwards brought an action in the High Court of Justice against the defendant, claiming damages for personal injury sustained by the plaintiff through the same negligence :—*Held* by Brett, M.R., and Bowen, L.J., Lord Coleridge, C.J., dissenting, that damages to goods and injury to person, although they have been occasioned by one and the same wrongful act, are infringements of different rights, and give rise to distinct causes of action ; and, therefore, the recovery in an action of compensation for the damage to the goods is no bar to an action subsequently commenced for the injury to the person. In their Lordships' view, this decision does not lay down any new principle. What would constitute the cause of action in a suit must always depend on the particular facts of the case. It was laid down in *Brunsden* v. *Humphrey*[1], that where the question is whether the cause of action in two suits is the same or not, one of the tests that is applied is whether the same evidence would support the claims in both suits ; if the evidence required to support the claims is different, then the causes of action are also different. This appears to be clear from the judgments of both Brett, M.R. and Bowen, L.J. Brett, M. R., observed as follows :—

"· · · · Different tests have been applied for the purpose of ascertaining whether the judgment recovered in one action is a bar to subsequent action. I do not decide this case on the ground of any test which may be considered applicable to it ; but I may mention one of them ; it is whether the same sort of evidence would prove the plaintiff's case in the two actions. Apply that test to the present case . . . . . ."

Bowen, L.J. quoted the following words of De-Grey, L.J., in *Kitchen* v. *Campbell*[2] :—

"· · · · The principal consideration . . . . . is whether it be precisely the same cause of action in both, appearing by proper averments in a plea, or by proper facts stated in a special verdict, or a special case. And one great criterion of this identity is that the same evidence will maintain both actions.. . . . ."

And applying the test mentioned above the learned L.JJ., came to the conclusion in the case before the Court that the causes of action as to damage done to the plaintiff's cab, and to the injury occasioned to the plaintiff's person are distinct ; in other words, the cause of action on which the first suit was founded was distinct from the cause of action in the second suit which was founded on different facts.

It is important to note that in the course of his judgment, Bowen, L.J., also pointed out that in considering whether the causes of action in the two suits are the same, it would be enough if the causes of action in the two suits are in substance proved to be identical. After stating that it is a well settled rule of law that damages resulting from one and the same cause of action must be assessed and recovered once for all, the learned L.J., observed as follows :—

"The difficulty in each instance arises upon the application of this rule, how far is the cause which is being litigated afresh the same cause in substance with that which has been the subject of the previous suit." (See page 147).

At the end of the paragraph, at page 148, occurs the following observation :—

"It is evident therefore that the application of the rule depends, not upon any technical consideration of the identity of forms of action, but upon matter of substance."

Further on, the learned Lord Justice observed,

"· · · · · the point I now have to determine, whether the cause of action arising from damage to the plaintiff's cab is in substance identical with that which accrues in consequence of the damage caused to his person. . . . . ."

These observtions show that in considering whether the cause of action in the subsequent suit is the same or not as the cause of action in the previous suit, the

1. (1884) 14 Q.B.D. 141.   2. (1771) 2 Bl.W. 827 : 96 E.R. 487.

test to be applied is, are the causes of action in the two suits in substance—not technically—identical ? Applying this test the learned Judges came to the conclusion that the causes of action in the two suits in *Brunsden* v. *Humphrey*[1], were distinct.

Observations to the same effect appear in certain decisions of this Board. In *Soorjomonee Dayee* v. *Suddanund*[2], their Lordships stated as follows :—

" . . . . . their Lordships are of opinion that the term 'cause of action' is to be construed with reference rather to the substance than to the form of action."

In *Krishna Behari Roy* v. *Brojeswari Chowdranee*[3], Sir Montague Smith in delivering the judgment of the Board observed :—

" . . . their Lordships are of opinion that the expression "cause of action" cannot be taken in its literal and most restricted sense. But however that may be . . . . ."

The decision in the *Rajah of Pittapur* v. *Sri Rajah Venkata Mahapathi Surya*[4], does not advance the case of the Appellants. In that case the Plaintiff sued to recover immoveable property in consequence of having been improperly turned out of possession and afterwards sued to recover from the same defendant moveable property in consequence of its wrongful detention. Their title to the said estate as well as to the half share of the personalty now sued for was under a will of one Bharayamma. On the facts, their Lordships held that the causes of action in the two suits were distinct. They held that :—

" The claim in respect of the personalty was not a claim arising out of the cause of action which existed in consequence of the defendants having improperly turned the plaintiffs out of possession of *Viravaram* (Zemindari property). It was a distinct cause of action altogether and did not arise at all out of the other."

Referring to the above case, Lord Buckmaster stated the true principle concisely as follows in *Muhammad Hafiz* v. *Muhammad Zakariya*[5] :—

" . . . . the cause of action is the cause of action which gives occasion for and forms the foundation of the suit, and if that cause enables a man to ask for larger and wider relief than that to which he limits his claim he cannot afterwards seek to recover the balance by independent proceedings."

In similar language what was decided in *Brunsden* v. *Humphrey*[1], may be stated as follows, namely, that the cause of action which gave occasion for and formed the foundation for the first suit in that case was different from the cause of action which gave occasion for and formed the foundation for the second suit.

The principles laid down in the cases thus far discussed may be thus summarised :—

(1) The correct test in cases falling under Order 2, Rule, 2, is " whethr the claim in the new suit is in fact founded upon a cause of action distinct from that which was the foundation for the former suit." [*Moonshee Buzloor Ruheem* v. *Shumsunnissa Begam*[6].]

(2) The cause of action means every fact which will be necessary for the plaintiff to prove if traversed in order to support his right to the judgment. [*Read* v. *Brown*[7].]

(3) If the evidence to support the two claims is different, then the causes of action are also different. [*Brunsden* v. *Humphrey*[1].]

(4) The causes of action in the two suits may be considered to be the same if in substance they are identical. [*Brunsden* v. *Humphrey*[1].]

(5) The cause of action has no relation whatever to the defence that may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff. It refers. . . . . . to the *media* upon which the plaintiff asks the Court to arrive at a conclusion in his favour. [*Musst. Chand Kour* v. *Partab Singh*[8]].

1. (1884) 14 Q.B.D. 141.
2. (1873) 12 Beng.L.R. 304 at 315.
3. (1875) L.R. 2 I.A. 283 at 285 : 1 Cal. 144 (P.C.).
4. (1884-1885) L.R. 12 I.A. 116 : I.L.R. 8 Mad. 520 (P.C.).
5. (1921) 42 M.L.J. 248 : L.R. 49 I.A. 9 : I.L.R. 44 All. 121 (P.C.).
6. (1867) 11 M.I.A. 551 at 605.
7. (1888) L.R. 22 Q.B.D. 128.
8. (1888) L.R. 15 I.A. 156 : I.L.R. 16 Cal. 98 (P.C.).

This observation was made by Lord Watson in a case under section 43 of the Act of 1882 (corresponding to Order 2, Rule 2), where plaintiff made various claims in the same suit.

Applying the above principles their Lordships have to decide what is the plaintiffs' cause of action to recover the Shahjahanpur and Oudh properties ; is it the same or distinct ?

The plaintiffs' cause of action to recover the properties consists of those facts which would entitle them to establish their title to the properties. These facts are the same with respect to both properties, these being, that Rani Barkatunnissa was the owner of the properties ; that she died on 13th February, 1927, that she was a Sunni by faith and that they are her heirs under the Muhammadan Law. It is undisputed that if they prove these facts they will have established their right to both properties. A comparison of paragraph 1 of the plaint in Suit No. 2 (Shahjahanpur suit) with paragraphs 13 and 17 of the plaint in Suit No. 8 (Oudh suit) will show that substantially the same set of facts is alleged in those paragraphs as constituting their title to the properties. The other paragraphs of the plaint give information about the history of the case and connected matters, but the essence of the claim to the properties is what is contained in the paragraphs already mentioned, and it is the same in both suits. In this connection it is necessary to notice the argument that so far as Mahbub brothers are concerned the cause of action in the Oudh suit which is said to be their denial of the plaintiffs' title, is distinct from the one in the present suit (Shahjahanpur suit) which is said to be their wrongful possession of the Shahjahanpur property. It is true that Mahbub brothers had not obtained possession of the Oudh property but had obtained possession of the Shahjahanpur property. In considering this question it must be remembered that on the death of Rani Barkatunnissa disputes had arisen regarding succession to both the properties at the same time ; and each claimant was denying the title of the other on various grounds. Their Lordships have given a summary of their contentions in a previous paragraph ; the details of their contentions are fully set out in the judgment of Nanavutty, J., in Suits Nos. 5 and 8. Having regard to the conduct of the parties their Lordships take the view that the course of dealing by the parties in respect of both properties, was the same and the denial of the plaintiffs' title to the Oudh property and the possession of the Shahjahanpur property by the Defendants obtained as a result of that denial formed part of the same transaction. On this question, the learned Judges of the High Court have expressed their opinion in two places in their judgment as follows :—

"In the case before us the trespass on title or slander of title in the case so far as the Oudh suit was concerned was not distinct and different either in point of time or in point of character from the trespass on possession in the case of the Shahajahanpur property . . . . ." (See page 72).

Again they state as follows :—

"Here in the present case we find that the two trespasses, one on the Shahjahanpur property and the other on the Oudh property were similar in character and formed part of the same transaction and the evidence to prove the facts which it was necessary for the plaintiffs to prove . . . . was the same and the bundle of essential facts was also the same." (page 73).

Their Lordships are prepared to accept the above view.

The Appellants' argument may be met by another reply also. In an earlier portion of the judgment their Lordships have shown that reliefs by way of declaration and possession were asked against Mahbub brothers in the Oudh suit, and the same reliefs have been asked against them in the present suit also aginst Shahjahanpur properties. Both suits have been treated substantially alike by the plaintiffs and claims in respect of both properties could well have been included in the earlier suit.

It was next argued that having regard to the fact that the plaintiffs made an attempt—though unsuccessful it proved to be—to get the Shahjahanpur property included in Suit No. 8 by their application for amendment of the plaint made on 18th February, 1929, already referred to, it cannot be said that they "omitted to sue" in respect of any portion of their claim within the meaning of Order 2,

Rule 2, Civil Procedure Code. It is impossible to accept this argument. The fact cannot be denied that Shahjahanpur property was not included in the plaint in suit No. 8, and it was because it was omitted to be included, that the application for amendment was made to include it in the plaint. Their Lordships are unable to hold that, because the plaintiffs attempted to get it included in the plaint, but were not allowed to do so by Court's order, they did not " omit to sue " in respect of it. No authority was cited in support of the contention.

For the above reasons, their Lordships hold that the plaintiffs are barred by reason of Order 2, Rule 2, Civil Procedure Code, from maintaining the present suit having regard to Suit No. 8, in which they omitted to claim the Shahjahanpur property. It is to be regretted that as a result of this omission, they would lose this property, but as observed by Lord Buckmaster in connection with the application of the rule in *Kishan Narain* v. *Pala Mal*[1].

> " . . . . . It is the duty of the Courts to interpret and carry into effect those rules uninfluenced by the consideration of the individual loss that may be occasioned by disobedience of the provisions."

The last argument advanced was that the Respondents, inasmuch as they opposed the application for inclusion of the Shahjahanpur property in Suit No. 8, should not now be allowed to say that the plaintiff's claim is barred. It was urged that they should not be allowed to approbate and reprobate with reference to the same transaction ; but their Lordships cannot see how the maxim can be applied to the facts of the present case. Nanavutty, J., dismissed the application for amendment on various grounds. He held that it was a " belated " application, that it would be convenient for the rival claimants to this property to have their claims tried in the Court of the Subordinate Judge of Shahjahanpur to avoid multifariousness, and that the causes of action to recover the two properties were different. In the course of his order, the learned Judge also said,

> " If and when the suit in respect of the Shahjahanpur property is filed by Khalil Khan and Fida Ali Khan, as threatened by them, it will no doubt be time enough for Mahbub Ali and his three brothers to take any plea under Order 2, rule 2 of the Code of Civil Procedure such as they may be advised to take by their eminent Counsel who is now appearing for them."

The correctness or otherwise of the reasoning of the learned Judge's order has no bearing on the question which their Lordships have to decide. What is relevant is to find out what was the precise nature of the objection that the Respondents urged for disallowing the plaintiffs' application, or did they in any manner suggest that the peitition should be dismissed as it would be open to the plaintiffs to file a separate suit in respect of the Shahjahanpur property? A perusal of the learned Judge's order does not show the nature of the objections raised by the Respondents. It does not appear that they filed any written objections. It is no doubt true that a party should not be allowed to approbate and reprobate, but before deciding that the Respondents' conduct falls within the rule the Court should have sufficient materials to arrive at a definite conclusion as regards what they did, which their Lordships have not in this case.

Before parting with the case their Lordships desire to express their indebtedness to the able and lucid arguments advanced by the learned Counsel on both sides.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

V.S. *Appeal dismissed.*

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1. (1922) 44 M.L.J. 123 : L.R. 50 I.A. 115 at p. 120 : I.L.R. 4 Lah. 32 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. RAJAMANNAR, *Officiating Chief Justice* AND MR. JUSTICE SATYANARAYANA RAO.

Kurapati Radhakrishna and another .. *Appellants**

v.

Kurapati Satyanarayana and others .. *Respondents.*

Hindu Law—Partition—Disruption of status of family as a result of the unilateral act of a member—Withdrawal of the unilateral act if can nullify its effect—Filing of a plaint for partition—Summons served—Revocation of intention by withdrawal of suit—Effect—Sale by manager of family property described as self-acquired property—Effect.

When once there is a division in a joint Hindu family whether of status or property there is no means of avoiding the result except by a reunion for which an agreement express or implied is always required. A unilateral declaration of intention to divide by a member which is unequivocal and which is communicated to the other coparceners brings about a disruption or division of the status of a family. When once the communication of intention is made which has resulted in the severance of status it is not open to the member concerned to nullify its effect so as to restore the family to its original joint status. The withdrawal of the unilateral act or declaration of intention to separate which had already resulted in a division in status cannot amount to an agreement to reunite, and if there are minors even this agreement is impossible.

In a suit for declaration that the sales in respect of certain family properties did not bind the plaintiff and for partition of his share and possession thereof, the plaint referred to an earlier suit for partition instituted by the present 2nd defendant. It was alleged in that suit that "the plaintiff, being unwilling to remain with the defendants has decided to become divided and he has filed this suit for separation of his one-fifth share in the assets remaining after discharging the family debts separated and for recovery of possession of the same." All the defendants in that suit were served with the summonses and on the death of the 1st defendant therein after the settlement of issues, the plaintiff in that action made the following endorsement on the plaint: "As the 1st defendant had died and as the plaintiff had to manage the family, the plaintiff hereby revokes the intention to divide expressed in the plaint and agreeing to remain as a joint family member, he withdraws the suit."

Held that a division in status had been brought about by the plaint in the suit and it was not open to the plaintiff therein, to revoke or withdraw the unambiguous intention to separate contained in plaint, so as to restore the joint status and as such the members should be treated as divided members for the purpose of working out their respective rights.

The manager along with one of his brothers sold certain property described in the sale deed as separate property but which was found to be really joint family property and the consideration was utilised for the discharge of the binding debts of the family. On a question whether the interests of the other members were affected,

Held, that as the vendors purported to convey the whole of the property—and as managers of the family they possessed the authority to convey it for purposes binding on the family—and as there was nothing in the sale deed to negative an intention to convey an absolute title, it must be treated as having been executed by the vendors as managers of the family and the transaction must be upheld and would be binding on the other members.

Appeal against the decree of the District Court of East Godavari at Rajahmundry dated 22nd February, 1945, in A. S. No. 35 and 196 of 1941 preferred against the decree of the Subordinate Judge's Court, Rajahmundry, in O. S. No. 34 of 1938, dated 9th December, 1940.

M. S. Ramachandra Rao for Appellants.

D. Narasaraju, G. Chandrasekhara Sastri and *K. B. Krishnamurthi* for Respondents.

The Judgment of the Court was delivered by

Satyanarayana Rao, J.—This is an appeal against the judgment and decree of the learned District Judge of Rajahmundry modifying the decree of the learned Subordinate Judge of Rajahmundry in O. S. No. 34 of 1938 on his file.

The plaintiff and the first defendant are the appellants. They are the sons of one Kurapati Venkataratnam by his second wife. Jaggarao, the father of the fourth defendant, the second defendant and the third defendant are the sons of the said Venkataratnam by his first wife. Venkataratnam died in 1922. Thereafter Jaggarao and the second defendant managed the properties of the family

*S.A. No. 1566 of 1945. 23rd April, 1948.

and also continued the trade. During the course of their management the properties of the family were alienated to various defendants in the present suit. The immovable properties of the family are described in schedules A to F attached to the plaint in the present suit. The A schedule property was sold under Ex. III on the 27th May, 1930, to defendants 5 to 7. The B schedule property was sold on the 13th of August, 1930, under Ex. CC to the eighth defendant. The C schedule lands were sold under Ex. VIII dated the 18th of February, 1930, to the ninth defendant. Item 1 of D schedule was sold on the 23rd of March, 1933, to the tenth defendant under Ex. V. Item 2 of the said schedule was sold on the 30th of January, 1935, under Ex. O to the eleventh defendant. The E schedule property was sold to the 12th defendant on the 26th of February, 1935, under Ex. O-1 and from the 12th defendant the 13th defendant purchased it, and he was in possession of the said property. In pursuance of the decree in O. S. No. 57 of 1935 on the file of the Court of the District Munsiff of Rajahmundry items 2 and 3 of the F schedule were sold in Court auction and were purchased in 1938 during the pendency of the present suit by the 14th defendant. G schedule comprises moveables alleged to belong to the family.

The plaintiff instituted the present suit on the 1st of April, 1936, for a declaration that the sales in respect of the properties described in schedules A to F attached to the plaint did not bind him and that the properties comprised in schedules A to G should be divided into five equal shares and possession delivered to him of one share. There are also other reliefs in the plaint which are not very material for the purpose of this appeal. The main contention of the plaintiff raised in the plaint was that the alienations in question were made by Jaggarao and the second defendant for discharge of their private debts and therefore were not binding on the family. He also contended that by reason of the proceedings in O. S. No. 63 of 1933, a suit filed by the second defendant as plaintiff in the Court of the District Munsiff of Rajahmundry for partition of the joint family property, there was a disruption of the joint status of the family and such of the alienations as were made after such division did not bind the plaintiff, in any event, as the brothers had no right or authority to alienate the properties purporting to do so as managers of the family. There is also a further allegation that as regards items 2 and 3 of F schedule the decree in O. S. No. 57 of 1935 in pursuance of which they were sold do not bind him or his interest in the said item, as the decree was obtained against defendants 2 and 3 in their individual capacity and was personal to them and that the sale was also affected by the doctrine of *lis pendens*.

The first defendant, the brother of the plaintiff, filed a written statement supporting the case of the plaintiff. The second defendant was at first *ex parte*, and though he appeared during the trial of the suit by pleader he did not file any written statement. Defendants 3, 4, 8 and 13 were *ex parte*. Defendants 5 to 7 who are in possession of the properties described in the plaint A schedule and whose purchase was before the institution of the suit, O. S. No. 63 of 1933, contended that the properties alienated to them were the self-acquired properties of Jaggarao and the second defendant and that in any event as the alienation was binding on the family as it was made for purposes binding on the family and that therefore the sale ought to be upheld. The ninth defendant who was interested in the C schedule properties raised similar contentions. The tenth defendant who purchased item 1 of D schedule under Ex. V contended that the suit O. S. No. 63 of 1933, which was ultimately withdrawn did not effect a severance in status, and that in any event as the agreement to sell in his favour was long before the filing of the suit his transaction was not affected by the division in status, if any. He also alleged that the sale was for purposes binding on the family and that therefore the sale in his favour should be upheld. The 11th defendant who purchased item 2 of the D schedule under Ex. O, and the 12th defendant who purchased the E schedule property under Ex. O-1, also raised similar contentions. The 14th defendant who purchased items 2 and 3 of the F schedule raised a further contention that the sale in execution of the decree in O. S. No. 57 of 1935 was binding on the shares of the plaintiff and the first defendant,

The learned Subordinate Judge held that Jaggarao and the second defendant continued the rice business which had been started by their father Venkataratnam and that it was an ancestral business of the family and not their separate business. Though in the sale deed in favour of defendants 5 to 7 the A schedule property was described as the self-acquired property of the second defendant and Jaggarao the learned Judge found that it was really joint family property as it was purchased under two documents, Exs. III-a and III-b on 3rd October, 1924, from one Venkatakrishnamaraju out of funds belonging to the family and in discharge of a prior mortgage debt of 1915 due to the family. He also found that the consideration for the sale under Ex. III in favour of defendants 5 to 7 was, in fact, credited in the trade accounts and was utilised for discharging binding debts of the family. He therefore came to the conclusion that the sale of the A schedule property was binding on the plaintiff.

As regards B schedule property purchased by the 8th defendant there was no contest by him ; and there was no evidence let in to support the transaction. The learned Subordinate Judge therefore found that the sale of that property under Ex. CC did not bind the plaintiff. The sale of C schedule property was held to be valid and binding on the plaintiff. According to the learned Subordinate Judge, the proceedings in the suit O. S. No. 63 of 1933 did not bring about a disruption of the status of the family and therefore the sales effected, after the institution of that suit, by Jaggarao and the second defendant were not void on the ground that they had no power or authority to alienate the properties. He found that the consideration for the alienations of the two items comprised in schedule D went in discharge of debts binding on the family and therefore the alienations in question were valid. As regards F schedule property his conclusion was that the sale was binding only to the extent of a sum of Rs. 350-4-6 out of the total consideration of Rs. 600 and that the rest of the consideration was not proved to be binding on the family. In the result, so far as this item of property is concerned, he directed that the plaintiff and the first defendant should each be entitled to recover one-fifth share on condition of each of them paying to the 13th defendant Rs. 70-1-0.

A further contention raised in the suit by way of amendment to the plaint that there was a division of status even before 1922 during the lifetime of Venkataratnam was negatived by the learned Subordinate Judge, and that contention was not persisted either before the lower appellate Court or before us. If that case was established, no doubt the plaintiff would have been entitled to one-fourth share and not one-fifth.

As regards F schedule items 2 and 3, the learned trial Judge held that the sale did not bind the interests of the plaintiff and the first defendant, as after the institution of the present suit defendants 2 and 3 could not continue to represent in the execution proceedings, the plaintiff and the first defendant as there was a division in status. The claim as regards item 1 of F schedule and moveables in G schedule was rejected as the plaintiff failed to adduce any evidence in respect of those properties. The result was that a decree declaring that the plaintiff and the first defendant were each entitled to one-fifth share in the property in B schedule and in items 2 and 3 in F schedule and in E schedule subject to the payment of Rs. 70-1-0 to the 13th defendant and partition and separate possession of a one-fifth share in these items was granted to plaintiff. In other respects the suit was dismissed.

Against this judgment and decree there were appeals to the lower Appellate Court, A.S. No. 196 of 1941 by the plaintiff in respect of the claim disallowed by the trial Court, and A.S. No. 35 of 1941 by the 14th defendant claiming the entirety of items 2 and 3 of the F schedule. In both the appeals the first defendant filed cross-objections claiming the same relief as the plaintiff. The learned District Judge agreed with the first Court on all the points except with reference to items 2 and 3 of the F schedule. In coming to the conclusion regarding F schedule the learned District Judge relied upon the decision of the Full Bench in. *Venkata-*

narayana v. *Somaraju*[1], which laid down that if a suit was filed against the manager of a family in a representative capacity, the mere fact that subsequent to the institution of the suit there was a division of the status of the family would not put an end to the representative capacity of the manager and that a decree obtained in such a suit would be binding on all the members notwithstanding that the status was divided during the pendency of the suit. In the result, the learned Judge allowed the appeal of the 14th defendant and dismissed the appeal of the plaintiff and the cross-objections of the first defendant.

Against this decision the present second appeal was filed by the plaintiff and the first defendant. The second appeal came on for hearing in the first instance before Chandrasekhara Aiyar, J., who referred the case to a Bench on the ground that the properties involved in second appeal were more than Rs. 10,000 in value and that it also raised the question of the correctness of the decision in *Venkatanarayana* v. *Somaraju*[1], after the decision of the Full Bench of five Judges in *Nagireddi* v. *Somappa*[2].

In this appeal we are only concerned with the alienations relating to schedules A, D and F and the court sale relating to items 2 and 3 of F schedule. If, as the appellants contend, there was a division in status of the family brought about by the proceedings in O.S. No. 63 of 1933, that would not affect the validity and binding nature of the sale under Ex. III of the A schedule property and of the sale of item 1 of D schedule under Ex. V. The sale of A schedule property was on 27th May 1930 long before the institution of the suit, O.S. No. 63 of 1933, which was on the 15th March 1933. The sale under Ex. V of item 1 of D schedule was no doubt on the 23rd March 1933 about 8 days after the institution of the suit, O. S. No. 63 of 1933, but the agreement to sell relating to that property was on 23rd December 1932 (Ex. II-c), and it was not seriously contended before us that there was a communication of an intention to separate by that date which resulted in a division of the status of the family. These two alienations therefore will be binding on the plaintiff if they were for necessity or for the benefit of the family. On this question the concurrent findings of the courts below were against the appellants and we find no reasons to differ from them.

It was further argued on behalf of the appellants that as under Ex. III the vendors Jaggarao and the second defendant claimed the property to be their self-acquisition it cannot be held that they acted in a representative capacity as managers of the family and that therefore the alienation was ineffective to convey the interests of the appellants in the A schedule property. It was also faintly argued on behalf of the appellants that the debts alleged to have been discharged from and out of the consideration did not bind the appellants as they were not family debts but the private debts of Jaggarao and the second defendant as the trade they carried on was their individual business and not ancestral trade, and that in any event the specific debts alleged to have been discharged have not been proved. The father, Venkataratnam, who according to the allegations in paragraph 4 of the plaint, carried on the business to supply rice and other articles under contracts to the Rajahmundry Central Jail and other jails, had a commission shop at Rajahmundry and also had a rice mill for converting paddy into rice. This allegation, it is contended, was not seriously denied in the written statements of the defendants. On the other hand, even according to the evidence of D.W. 1, the fifth defendant, one of the alienees, Jaggarao himself introduced a change in the business as instead of using the rice mill merely for husking paddy which was hired for the purpose he himself purchased paddy, got it converted into rice and sold it in his shop. This it is urged is a total change in the nature of the business which Venkataratnam started and carried on during his life-time and that therefore the business carried on by Jaggarao and the second defendant was not ancestral business. We are unable to agree with this

1. (1937) 2 M.L.J. 251 : I.L.R. 1937 Mad. 880 (F.B.).
2. (1942) 2 M.L.J. 691 : I.L.R. 1943 Mad. 248 (F.B.).

contention. The change even if true, was not a material change and the nature of the business was not radically altered. Even for contracts entered into by Venkataratnam for supply of rice to jails he had necessarily to buy rice and then supply it under the contracts. In our view, therefore, the business carried on by Jaggarao and the second defendant after the death of their father was really a continuation of the old business and was not a new business.

As regards the proof of the debts discharged out of the consideration, it is in evidence, that a sum of Rs. 2600 was credited in the accounts of the trade, i.e., not only the consideration of Rs. 2500 for the sale but a further sum of Rs. 100 was credited in the trade accounts. Out of this the accounts themselves show that a sum of Rs. 1900 was utilised for the discharge of the debts of the creditors. The details of these payments to the creditors are to be found in Ex. XV-b. When once the amount as found by the courts below was credited in the trade accounts and most of it was utilised for discharge of pre-existing debts, it is difficult to hold that the consideration was not utilised for purposes binding on the family. The balance over and above Rs. 1900 must have been utilised for the purpose of trade, and this is borne out by the accounts. The consideration therefore of this sale is proved to have been applied for the purposes binding on the family.

The only contention that requires serious consideration with reference to this transaction is the argument that Jaggarao and the second defendant did not act in the matter of this transaction in a representative capacity, as they described the property as their self-acquisition in the sale deed Ex. III, and that therefore the interest of the appellants in the A schedule property were not affected. In support of this contention several decisions were referred to by the learned advocate for the appellants. It has been found by the Courts below that the property was in fact joint family property on the date of sale. The document itself gives as the reason for the sale that the land was not useful and that the amount was required for carrying on the business of the family. There is nothing to indicate in the document that the vendors were setting up a title in themselves inconsistent with and hostile to the interests of the other members of the family. On the other hand, they purported to convey under the document not merely their interests in the property but an absolute right to the vendee. In these circumstances, it must be deemed, that they conveyed not only their interests but the intersts of all the members of the family. The correct principle applicable to such cases has been stated by Venkatasubba Rao, J., in *Sankaranarayana Pillai* v. *Rajamani*[1], with which Phillips, J., concurred. The learned Judge observes,

"The true principle deducible from these cases seems to be this. The first question that arises is, did the executant purport to pass the whole property? The next question is, was he in a position to validly convey it? If the two questions are answered in the affirmative, the third question arises, is there anything in the deed to repel the presumption that he intended to convey the title he possessed in every capacity?"

Under Ex. III the vendors purport to convey the whole of the property and as managers of the family they possessed the authority to convey it for purposes binding on the family, and there is nothing in the deed to negative an intention to convey an absolute title. In the case *Sankaranarayana Pillai* v. *Rajamani*[1], the question was whether the Official Receiver who represented the estate of the father who was adjudicated an insolvent conveyed under a sale by him not only the estate of the insolvent but also the shares of the sons. The answer was that he did so convey as under the law as then understood, the father's power to alienate the sons' shares for the discharge of his antecedent debts also became vested in the Official Receiver on the adjudication of the father as an insolvent. Varadachariar and Mockett, JJ., had also to consider a similar question in *Ramakrishna Mudaliar* v. *Manicka Mudaliar*[2]. At page 592 the test applicable to such casses is stated thus :

"The second head of argument advanced by the learned counsel for the respondents on the strength of the decision in *Balwant Singh* v. *R. Clancy*[3], is answered by more than one decision

1. (1923) 46 M.L.J. 314 : I.L.R. 47 Mad. 462 at page 472.
2. (1937) 1 M.L.J. 587.
3. (1912) 23 M.L.J. 18 : L.R. 39 I.A. 109 : I.L.R. 34 All. 296 (P.C.).

of this court. . . . . to the effect that the mere fact that properties are described by a member of a family as properties acquired out of his earnings is not the assertion of such a hostile claim as against the interests of the family or an indication that it was his own personal transaction as to preclude the application of the principle that if the purpose was one binding on the family the transferor might still be regarded as having entered into the transaction in the capacity in which he could bind the family."

This view was followed by another Bench in *Muthiah Chettiar* v. *Rayalu Iyer, Nagaswami Iyer and Co.*[1].

Of the decisions relied on by the learned advocate for the appellants *Balwant Singh* v. *R. Clancy*[2], is a case where one of the brothers assumed without authority the title of Raja and asserted that the family estate was impartible and that his younger brother was only entitled to maintenance. The properties in question were granted by Government after the Indian Mutiny to one Dilsukh Rai, and after his death they devolved on his son, one Shankar Singh. Sheoraj Singh and Maharaj Singh were the sons of Shankar Singh. Sheoraj Singh executed a mortgage in respect of the properties on the 28th October, 1892, for discharge of debts contracted by Shankar Singh, the father. According to the recitals contained in the mortgage deed, Maharaj Singh, the brother, was included in the deed to evidence his consent to the transaction. It was however found that Maharaj Singh was a minor on that date and was incapable of giving any consent. In a suit to enforce that mortgage by an assignee from the mortgagee the question was whether the mortgage was effective to convey the interest also of Maharaj Singh, it having been found that the estate was not impartible. As Maharaj Singh was a minor it was held that the mortgage was void and of no effect and did not in any way affect the interest of Maharaj Singh in the estate. As Sheoraj Singh, though a *de jure* manager of the family estate, assumed the position that he was the absolute owner of the estate which he claimed to be impartible, asserting a title hostile to Maharaj Singh, it was impossible to hold that Sheoraj Singh represented Maharaj Singh in executing the mortgage, though it was for discharge of binding debts. That decision therefore has no application to the facts of the present case.

The decisions in *Nandan Prasad* v. *Abdul Aziz*[3], and *Ammani Ammal* v. *Ramaswami Naidu*[4], also did not help the appellants as in both the cases there was a hostile assertion of title in the documents themselves which negatived any presumption of the respective vendors acting in their representative capacity. For these reasons we have no doubt, that Ex. III was executed by Jaggarao and the second defendant as managers of the family, and as the consideration was applied for discharge of binding debts the transaction must be upheld.

The sale of item I of D schedule under Ex. V has also been found to be binding on the appellants by both the Courts. The consideration for the document was Rs. 2000, and at the time of the agreement to sell an advance of Rs. 400 was paid, and the balance of Rs. 1600 was paid to the mortgagee under Ex. II which it is not disputed was a binding debt. The payment was endorsed on the document, and the endorsement is marked as Ex. II-a. The sale under Ex. V therefore is binding on the appellants.

Before considering the binding nature of the alienations of item 2 of D schedule under Ex. O and of E schedule under Ex. O-1, and the Court sale relating to F schedule items 2 and 3, it is necessary to deal with the contention of the appellants that the proceedings in the suit, O.S. No. 63 of 1933, effected a severance in the status of the family as the decision on the question has a material bearing on the validity and binding nature of those transactions. Both the Courts have held on the authority of certain decisions which will be considered later that a unilateral declaration by one member of a joint family which is clear and unambiguous and has been communicated to the other members and brought about an immediate severance of status is revocable and that the joint status may be restored by such revocation. The question is whether this view is correct.

1. (1943) 2 M.L.J. 548.
2. (1912) 23 M.L.J. 18 : L.R. 39 I.A. 109 : I.L.R. 34 All. 296 (P.C.).
3. (1923) I.L.R. 45 All. 497.
4. (1918) 37 M.L.J. 113.

It has been pointed out very early in the well known decision in *Appovier* v. *Ramasubba Aiyan*[1], that the word "division" or "vibhaga" is used in a two-fold sense. It denotes both a division of title and also division of the subject to which the title relates. In other words there may be a division of right and there may be also a division of the property. The division of the right or title means that the joint title or joint tenancy is converted into a tenancy in common. After such conversion the shares of the cooparceners become defined and fixed. As a corollary, survivorship which is an incident of coparcenary is put and end to. In the division of the property to which the title or the right relates there is always a separation of the property by metes and bounds, in other words a physical division. Such a division puts an and to the tenancy in common and makes the property the separate property of the vendors. The division of the right or title may be effected either by an agreement between the members or by a unilateral declaration of the member who wishes to become separate, that is, a clear and unambiguous intention to become separate and hold the property in severalty which is communicated to the other members. It is an individual decision and exercise of his volition and is not dependent upon the consent or the concurrence of the other members. The result of such declaration is to divide the title and to bring about a division of status of the family so far as the declarant-member is concerned. Thereafter such member is entitled to alienate his own share which of course is not physically divided and if he dies thereafter the other members do not have any right of survivorship in respect of his share. He is at liberty to dispose of by will his undivided share which is held by him as a tenant in common. These are the results that flow from such division of the status. This method of division of the family was not countenanced by our Court till the decision of the Privy Council in *Suraj Narain* v. *Iqbal Narain*[2]. The view that prevailed in Madras till then was that even for such a division there should be an agreement between the members or there should be a decree. A mere unilateral declaration had not that effect, and an individual member did not possess the liberty of getting himself separated in status by the exercise of his own volition. That it has such an effect has however now been firmly established as part of Mitakshara Hindu Law by the subsequent decisions of the Privy Council and also by the decisions of our and other High Courts. It is also equally well settled that when once there is a division whether of status or of property there is no means of avoiding that result except by a reunion for which an agreement, express or implied, is always required. From the necessity of an agreement it follows that if there are minors, such a reunion is not possible, as a minor can never give an effective consent in law. A coparcenary is a creature of law and cannot be brought into existence by agreement of parties. It therefore follows that except in cases where there is a subsequent reunion it is impossible to restore the joint status when once it has been put an end to. The question therefore that falls to be considered is whether when once a unilateral declaration in unambiguous terms is intimated to the other members, is it open to such a member to withdraw such intention? It is said that certain decisions of the Privy Council and of the Courts in India lend support to the contention that such an intention is revocable. It is necessary therefore to examine the decisions to see whether this argument is well-founded.

The decision of the Privy Council in *Suraj Narain* v. *Iqbal Narain*[2], affords a convenient starting point for the discussion of the principle. In that case their Lordships of the Judicial Committee enunciated the doctrine in these terms at page 87:

"The principle applicable to cases of separation from the joint undivided family has been clearly enuncitaed by this Board in *Rewun Prasad* v. *Radha Beeby*[3], and the well known case of *Appovier* v. *Ramasubba Aiyan*[1], What may amount to a separation or what conduct on the part of some of the members may lead to disruption of the joint undivided family and convert a joint tenancy into a tenancy in common must depend on the facts of each case. A definite and unambiguous indication by one member of intention to separate himself and to enjoy his share in severalty may amount to separation. But to have that effect the intention must be unequivocal and clearly expressed."

1. (1866) 11 M.I.A. 75.
2. (1912) 24 M.L.J. 345 : I.L.R. 35 All. 80 : L.R. 40 I.A. 40 (P.C.).
3. (1846) 4 M.I.A. 137.

After this pronouncement of Privy Council, a Full Bench of this Court considered the question in *Soundararajan* v. *Arunachalam Chetti*[1], where it was held that a member of a joint Hindu family became separated from the other members by the fact of suing them for partition. In the judgments of Sadasiva Aiyar and Seshagiri Aiyar, JJ., the law as understood in this presidency till the decision of the Judicial Committee referred to above was considered. Till the said decision of the Privy Council it was assumed in Madras both by the Bench and the Bar that no separation in status affecting the right of survivorship resulted by a mere institution of a suit for partition and that it was only the decree of the Court passed in such a suit that affected the status. In that decision Sadasiva Aiyar, J., found as a fact that the plaint in that case contained a definite and unambiguous expression by the plaintiff of an intention to separate and to enjoy his share in severalty which was also communicated to the other members by the service of suit summonses. With reference to the question as to when and to what extent the filing of a plaint may be considered to effect a severance in status the learned Judge's observations at page 173 are of considerable assistance. It is necessary to bear in mind those observations in order to understand some of the cases of this and other High Courts whch hold that a plaint which was filed and was subsequently withdrawn did not bring about a disruption of the status of the family. The learned Judge says, at page 173,

" It seems to me that if the plaint is filed, not merely for a declaration of the plaintiff's right as a coparcener in an undivided family (as in the old Calcutta case *Debee Pershad* v. *Phool Koeree alias Gheena Koeree*[2]), but is brought for a partition of the joint family property on the basis that the plaintiff wishes to be treated as a divided coparcener from the date of the plaint (if not from an earlier date) and if he seeks for mesne profits at least from the date of the plaint, if not from an earlier date, and asks for the division of the properties as they stood at the date of the plaint, if not at an earlier date, it seems to me difficult to conceive of a stronger, more unequivocal and more unambiguous declaration of an intention to separate himself and if that intention is communicated through the court by summonses issued to the defendants (the remaining coparceners) in that case, such clear expression of intention becomes fully effectual to create division in status. I take it that the phrase ' clearly expressed ' means ' clearly expressed to the definite knowledge of the other coparceners '."

From this it follows that it is not every plaint or every suit for partition that brings about a division in status from the moment the suit was instituted and the summonses in the suit were served on the other coparceners. It must contain a clear and unambiguous intention on the part of the coparcener suing that he wishes to treat himself as a divided coparcener from the moment the plaint was filed. This view of the learned Judge was accepted by Sir John Wallis, C. J. and Seshagiri Aiyar J.

The next decision of the Judicial Committee in which the question was considered more elaborately after an examination of the Hindu law texts bearing upon the point is the well-known decision of *Girja Bai* v. *Sadashiv Dhundiraj*[3]. In that case, a coparcener issued a registered notice to the other coparcener whereby he communicated his desire to have a partition of the whole of the joint family properties and to hold his one-third share in severalty. As the demand was not complied with, he instituted a suit for partition immediately impleading the other coparceners as parties to it. During the pendency of the suit he died leaving his widow as his sole heiress. The widow thereafter applied for bringing herself on record as the legal representative of her deceased husband, and that application was opposed by the defendants on the ground that after the death of the husband the entire properties of the family passed to them by survivorship, and that therefore the widow had no right to come on record as the deceased plaintiff's legal representative. The question that had to be considered, therefore, was whether the earlier notice in the suit put an end to the joint status of the family or not. The view taken by the Judicial Commissioner against whose decision an appeal to the Judicial Committee was preferred was that a severance in status could not be brought about by a mere unilateral declaration and that it required the consent of the others or an effective decree of the Court to bring about that result. In dealing with this contention, their Lordships pointed out the two-fold meaning attached to the word " partition "

1. (1915) 29 M.L.J. 793 : I.L.R. 39 Mad. 159 (F.B.).
2. (1869) 12 W.R. 510.
3. (1916) 31 M.L.J. 455 : L.R. 43 I.A. 151 : I.L.R. 43 Cal. 1031 (P.C.).

or "vibhaga" under Hindu law as pointed out by their Lordships in the earlier case of *Appovier* v. *Ramasubba Aiyan*[1], and reviewed the texts of Hindu Law and the conclusion was stated at page 1047. As that passage is the foundation for the discussion of the question in later cases, it is necessary to quote it *in extenso*,

"Their Lordships do not think it necessary to examine further the law as laid down in the texts. They propose to refer shortly to the cases which establish clearly that separation from the joint family involving the severance of the joint status so far as the separating member is concerned, with all the legal consequences resulting therefrom, is quite distinct from the *de facto* division into specific shares of the property held until then jointly. One is a matter of individual decision, the desire on the part of any one member to sever himself from the joint family and to enjoy his hitherto undefined or unspecified share separately from the others without being subject to the obligations which arise from the joint status; whilst the other is the natural resultant from his decision, the division and separation of his share which may be arrived at either by private agreement among the parties, or on failure of that by the intervention of the Court. *Once the decision has been unequivocally expressed and clearly intimated to his co-sharers, his right to obtain and possess the share to which he admittedly has a title is unimpeachable* (the italics are ours); neither the co-sharers can question it nor can the court examine his conscience to find out whether his reasons for separation were well-founded or sufficient; the Court has simply to give effect to his right to have his share allocated separately from the others."

At page 1050 it is again pointed out that,

"The intention to separate may be evinced in different ways, either by explicit declaration or by conduct. If it is an inference derivable from conduct it will be for the court to determine whether it was unequivocal and explicit."

In the result their Lordships held that there was a severance in status in view of the notice and of the institution of the suit for partition and that the widow was entitled to succeed. Whether there was such an intention and whether it was communicated to all the members has to be decided from the facts of each case. If there was an explicit declaration which was communicated, the problem may be easily solved; but if there was none such, and the Court has to infer it from the conduct, the entire conduct, has of course, to be taken into consideraion in order to reach a conclusion one way or the other. In considering the later decisions it is necessary to bear this distinction in mind and to see whether it is a case where, on the facts, there was an explicit declaration or whether it was merely a case of inferring an intention to separate from the course of conduct.

In *Kawal Nain* v. *Budh Singh*[2], a suit for partition instituted by one of the members was dismissed on the ground that the plaint did not disclose a cause of action. After the dismissal of the suit the plaintiff in the suit mortgaged his share of the property in favour of the predecessor-in-title of the appellants before the Privy Council. In a suit to enforce that mortgage to which the other members of the family were impleaded as parties they raised the objection that as the mortgagor was a member of joint Hindu family governed by the Mitakshara law at the time of the mortgage, the mortgage did not bind the family. According to the law obtaining in that province a coparcener had no right to alienate his undivided share of the properties. The mortgagee met the objection of the other coparceners by the plea that the earlier suit for partition which no doubt was dismissed brought about a division of the status of the family and that therefore the mortgage by a co-sharer thereafter was valid. Their Lordships had therefore to consider the effect of the prior suit on the status of the family. There was a definite finding of their Lordships that the plaint in the prior suit amounted to an intimation to the defendants (coparceners) of an unequivocal desire of the mortgagor to separate from the joint family and that therefore on the principle of the decision in *Girija Bai* v. *Sadashiv Dhundiraj*[3], the commencement of the suit for partition effectively separated the mortgagor from the joint family even prior to the date of the mortgage. It is again pointed out in that case that for a division in status brought about by such unilateral declaration the consent of the other co-sharers was unnecessary and that a decree may be necessary for working out the result of the severance and for allotting definite shares; but the status of the mortgagor as separate in estate was brought about by the assertion of such right irrespective of the result of the suit.

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1. (1866) 11 M.I.A. 75.
2. (1917) 33 M.L.J. 42: L.R. 44 I.A. 159: I.L.R. 39 All. 496 (P.C.).
3. (1916) 31 M.L.J. 455: L.R. 43 I.A. 151: I.L.R. 43 Cal. 1031 (P.C.).

In *Ramalinga Annavi* v. *Narayana Annavi*[1], a coparcener issued a notice intimating his intention to become separate to the other coparceners and thereafter instituted a suit for partition. He claimed in the suit besides partition of the properties that a provision should be made in the decree for partition, for the marriage expenses of two of his sons one of whom was however married before the date of the decree. Of course if the family were joint the marriage expenses should have been met out of the family funds ; but if there was a division there was no liability on the family property to meet the marriage expenses of the divided members. The High Court held that until the decree for partition the joint family status was not affected and that therefore the liability of the family continued until then. The Privy Council reversed this decision and applying the principle of *Girja Bai* v. *Sadashiv Dhundiraj*[2], held that the notice issued by the plaintiff before the institution of the suit effected a separation and that therefore no provision could be made for the marriage expenses of his sons. At page 495 it is stated :

> " This view (the view of the High Court) is opposed to the law laid down in *Girja Bai* v. *Sadashiv Dhundiraj*[2], where it was held expressly, that under the law of the Mitakshara, to which the parties in the present case are subject, an unambiguous and definite intimation of intention on the part of one member of the family to separate himself and to enjoy his share in severalty has the effect of creating a division of the interest which, until then, he had held in jointness. This intention was clearly intimated to the coparceners when the plaintiff Narayana served on them the notice on 30th July, 1909. That notice effected a separation so far as his branch of the family was concerned, and no obligation rested on the joint family in respect of his sons' marriages."

Syed Kasam v. *Jorawar Singh*[3], was a case in which an intention to become separate was inferred from the conduct of the parties. In that case all the members of the family by an agreement appointed an arbitrator to partition the property. The arbitrator divided the property into lots and lists were drawn up. After one of the coparceners to whom a lot was given by the arbitrator died, the parties notwithstanding his death acted upon the division made by the arbitrator. These transactions, particularly the claim for partition and the agreement appointing an arbitrator, were held to be sufficient to effect a severance in interest and to prevent right of survivorship. Their Lordships stated,

> " It is settled law that in the case of a joint Hindu family subject to the law of the Mitakshara a severance of estate is effected by an unequivocal declaration on the part of one of the joint holders of his intention to hold his share separately, even though no actual division takes place ; and the commencement of a suit for partition has been held to be sufficient to effect a severance in interest even before decree."

The same view was reiterated by the Privy Council in *Balkrishna* v. *Ramkrishna*[4]. It was also a case where from the conduct of a coparcener an intention on his part to become separate in estate was inferred, and the decisions in *Suraj Narain* v. *Iqbal Narain*[5], *Girija Bai* v. *Sadashiv Dhundiraj*[2], and *Kawal Nain* v. *Budh Singh*[6], were referred to. In that case it may be noted that there were also some acts which pointed to the conclusion that they were joint, but the entire conduct had to be considered and an inference drawn from it. The inference of course is one of fact. As the Courts in India found concurrently a clear intention on the part of the coparcener to become separate, their Lordships saw no reason to differ from that conclusion.

Babu Ramasray Prasad Chowdhary v. *Radhikadevi*[7], is also an instance where from conduct an inference to become separate was drawn. The corparceners in that case made an application for registration of their separate shares in property jointly purchased and the shares were registered separately. There was also collection of rent in definite shares. These were treated as indications of an intention to become separate. The principle is stated thus at page 174 :

1. (1922) 43 M.L.J. 428 : L.R. 49 I.A. 168 ; I.L.R. 45 Mad.. 489 (P.C.).
2. (1916) 31 M.L.J. 455 : L.R. 43 I.A. 151 : I.L.R. 43 Cal. 1031 (P.C.).
3. (1922) 43 M.L.J. 676 : L.R. 49 I.A. 358 : I.L.R. 50 Cal. 84 (P.C.)
4. (1931) 61 M.L.J. 362 : I.L.R. 53 All. 300 (P.C.).
5. (1912) 24 M.L.J. 345 : L.R. 40 I.A. 40 : I.L.R. 35 All. 80 (P.C.).
6. (1917) 33 M.L.J. 42 : L.R. 44 I.A. 159 : I.L.R. 39 All. 496 (P.C.).
7. (1935) 43 L.W. 172 (P.C.).

"It is, however, well settled that a member of a joint family may effect a separation in status by giving a clear and unmistakable intimation by his acts or declarations of a fixed intention to become separate even though he goes on living jointly with the other members of the family and there is no division of property: *Balkrishna* v. *Ramakrishna*[1], and that is the sort of separation which the High Court has found to have taken place in the present case."

Here again, the fact that an unmistakable intimation to separate may be deduced from evidence of conduct besides declarations was emphasised.

The last of the Privy Council cases, apart from two other decisions which will be dealt with presently is reported in *Ram Narain Sahu* v. *Mst. Makhna*[2]. The facts of that case are somewhat peculiar. Under a preliminary decree in a partition suit a joint share was allotted to two brothers who were defendants in the suit. One of them was a lunatic and was represented in the suit by his wife as his guardian-ad-litem. Before the actual division in pursuance of the preliminary decree, the wife as guardian of her husband applied to the trial Judge for a separation of the shares *inter se* between the two brothers. The Subordinate Judge granted the prayer and partition of the properties was effected even between the two brothers *inter se*. There was an appeal against the final decree in the partition suit, and during the pendency of that appeal the lunatic died and his widow became the heir-at-law. The final decree, however, in so far as it contained a division of the properties between the brothers *inter se* was reversed by the High Court on the ground that the Subordinate Judge had no power to vary the preliminary decree on the application of the lunatic's guardian. The decree of the High Court however contained a direction that by the decree and judgment of the High Court the learned Judges did not intend to decide the effect of the application of the wife on behalf of her husband to separate the property *inter se* between the two brothers on the joint status between the brothers which should be fought out in a separate suit. The surviving brother thereafter instituted a suit against the widow for a declaration that the property of the lunatic brother survived to him and that he was entitled to recover his share of the property which came into the possession of the widow under the partition made by the trial Court in the earlier suit. On behalf of the widow it was contended that the petition in the earlier suit filed by her brought about a division in status notwithstanding the decree of the High Court which negatived such a right. Dealing with the contention that the decree of the High Court in the partition suit negativing the claim made on behalf of the lunatic for separation of his share had the effect of continuing the family as joint, their Lordships observed at page 687:

"It is difficult for more than one reason, to accept this contention. The decision of the High Court proceeded upon the general consideration that the preliminary decree not having provided for the separation of a one quarter share the final decree could not make a separate allotment in respect of it. This was not a matter in any way having special reference to the disability of Deo Narain (the lunatic). If it was right it would have been equally right had Deo Narain been *sui juris*, and had he declared in the most solemn and explicit manner after the preliminary and before the final decree his intention to become separate in estate and interest. Yet it could hardly be right in that case to hold that because he did not get an allotment in severalty by the final decree he remained joint in status. The gap between preliminary and final decree is not seldom of considerable duration and the ordinary right of a coparcener to effect a separation of his estate, interest or title—as distinct from a partition by metes and bounds—by a proper declaration of his desire to sever, is not abrogated by the mere fact that he has not claimed to exercise it prior to the preliminary decree."

All these decisions of the Judicial Committee have clearly and distinctly stated the principle that a unilateral declaration which was unequivocal and which was communicated to the coparceners brings about a disruption or division of the status of a family. There is nothing in any of these cases to indicate that when once the communication of the intention is made which has resulted in the severance of the status, it is open to him to withdraw such intention and nullify its effect so as to restore the family to its original joint status. It is however contended that two decisions of the Privy Council to which we have not so far referred have laid down that such an intention, even after communication resulting in a division in status,

1. (1931) I.L.R. 35 All. 300.
2. (1939) 2 M.L.J. 569 : I.L.R. 1939 All. 680 (P.C.).

could be revoked and that there was *locus penitentiae*. The two cases are *Kedarnath* v. *Ratan Singh*[1], and *Palaniammal* v. *Muthuvenkatachala Moniagar*[2]. The judgment of the High Court which went on appeal to the Privy Council in *Palaniammal* v. *Muthuvenkatachala Moniagar*[2], is reported in *Palaniammal* v. *Muthuvenkatachala Maniagarar*[3]. It is necessary to examine the facts of these two decisions closely with a view to decide whether there is any foundation for such a contention and whether the Privy Council intended to lay down that a division in status once brought about by a unilateral act could be undone so as to restore the coparcenary status of the family, which is not permissible under the Hindu law. Of course it is possible to bring about a re-union, but that can only be by an agreement between the parties. The withdrawal of the unilateral act which had already resulted in a division in status cannot amount to an agreement to reunite, and if there are minors even this agreement is impossible.

The facts in *Kedarnath* v. *Ratan Singh*[1], so far as they are material for the purpose of this discussion were : Gaya Din, Umrao Singh and Ratan Singh were three brothers. In or about 1859, the Government, who had confiscated their estate granted part of it, *viz*., Sherpur to Gaya Din by way of grace and not in recognition of any proprietary rights in him. Gaya Din however made statements before competent authorities to the effect that though the grant was in his sole name the three brothers had equal shares and that he was the manager on behalf of all of them. Umrao Singh instituted a suit before the death of Gaya Din in 1869 for a partition and separation of his one-third share. Ratan Singh also seems to have instituted a suit for partition at or about the same time but even during the lifetime of Gaya Din he withdrew that suit and compromised with Gaya Din and continued to live with him jointly. Umrao Singh however continued his suit even after the death of Gaya Din after impleading Gaya Din's widow as his legal representative and ultimately compromised it with her. Under an arrangement between the widow of Gaya Din, Lochan Kuar, and Ratan Singh the widow was allowed to continue in possession and enjoyment of the two-third share for her life and under the said arrangement the two-thirds share had to pass to Ratan, after her death. The widow died, and Ratan Singh came into possession of the property. Umrao Singh then instituted the suit, out of which the appeal before the Privy Council arose, along with another who supplied funds for the suit, claiming a half share in the estate and in the alternative one-sixth. His case was that Ratan Singh and Gaya Din became divided and that the estate was the self-acquired proprty of Gaya Din. It was found that under the family arrangement which was admitted by Gaya Din the three brothers became jointly entitled to the estate as members of an undivided Hindu family and that it was not the self-acquired property of Gaya Din. It was also found both by the Judicial Commissioner and by the Privy Council that Ratan Singh remained joint with Gaya Din till the latter's death and that on Gaya Din's death he was entitled to two-thirds of the property. The fact that Ratan Singh instituted a prior suit for partition claiming a one-third share, and that he remained with Gaya Din and withdrew his claim was adverted to at page 426 of the report. On a perusal of the arguments before the Judicial Committee, more fully reported in Law Reports 37 Indian Appeals, 161, it would be seen that the effect of withdrawal of a unilateral declaration after it was communicated did not arise for consideration at all in that case.

Mr. De Gruyther's contention was that Umrao's separation operated as a complete partition not only between himself on the one hand and Gaya Din and Ratan Singh on the other but also between Gaya Din and Ratan Singh *inter se*, and that in any event it had the effect of throwing the burden on Ratan Singh of establishing that he and Gaya Din agreed to re-unite or to remain united. In reply to this contention Sir R. Finlay urged that there was no presumption that Umrao's separation effected a partition of title between Gaya Din and Ratan Singh and that

1. (1910) 20 M.L.J. 900 : LR 37 I.A. 161 I.L.R. 48 Mad. 254 (P.C.). P.C. : 32 All. 415 (P.C.).
2. (1924) 48 M.L.J. 83 : L.R. 52 I.A. 83 ;
3. (1917) 33 M.L.J. 759.

there was no proof of separation between the two brothers Gaya Din and Ratan Singh or of any wish or intention to separate. He also argued that there should be some act or binding declaration of intention before a division of title between the brothers Gaya Din and Ratan Singh could be held to be established so as to put an end to the right of survivorship claimed by Ratan Singh. In reply to this argument Mr. De Gruyther, however, did not contend, as he would possibly have contended if there was any substance therein, that the institution of the suit for partition by Ratan Singh and its withdrawal during the lifetime of Gaya Din had that effect. The question therefore of the effect of withdrawal of an intention to separate communicated to the other members was not before the Privy Council and it is difficult to see how this case can be treated as an authority in support of the contention that such an intention is revocable. The mere claim for a partition need not necessarily imply a fixed determination and communication of an intention to divide the title and hold the property in severalty. It is merely a piece of conduct from which an inference for or against the expression of such an intention may be deduced according to the facts and circumstances of each case.

This leads us to a consideration of the next decision of the Privy Council which it is urged establishes that after communication of an intention there is *locus penitentiæ* and that it can be revoked. That decision is *Palaniammal* v. *Muthuvenkatachala Moniagar*[1]. The suit in that case related to the partition of an estate known as the Vadimitta estate. The estate was purchased sometime in 1834 by one Periyar Muthukumaraswami. He died in 1834 leaving a will in and by which he partitioned the property between his six sons by his first wife and the one son by the second. In 1842 a suit was filed in the Zilla Court of Tinnevelly by an ancestor of the plaintiffs in the action which was the subject-matter of the appeal before the Privy Council. In that suit a partition of the estate was claimed on the basis of the will left by Muthukumaraswami. The suit was resisted by the eldest son on the ground that the estate was not partible and that the will executed by the father was invalid under Hindu law. The Zilla Judge found that the estate was partible property and that the will was invalid. He however divided the property giving one half of the estate to the six sons of Muthukumaraswami by his first wife and the other half to the son by his second wife according to what is called *Pathnibhagam*. There was an appeal against that decision to the Sudder Court, and in the appeal it was held that the estate was partible, that the will was invalid and that the division effected under the decree of the Zilla Court was wrong and the estate was divisible between the several sons equally. The Sudder Court declined to grant a decree dividing the estate in accordance with Hindu law on the ground that the suit was instituted only for a division according to the will and not in accordance with the law of inheritance. During the pendency of the appeal in the Sudder Court the great grandfather of the plaintiffs in the subsequent suit who was the first plaintiff in the Zilla Court filed a razinama whereby he expressed his wish not to press for partition of the estate and to leave it in the hands of the eldest son. The effect of the proceedings in the suit and of the razinama on the status of the family particularly in relation to the plaintiffs' branch was considered by the High Court in its judgment. The High Court was of opinion that the proceedings in that suit and the razinama did not evidence an intention on the part of the great grandfather of the plaintiffs to separate himself from the elder branch. The suit for partition itself was not on the footing that it was joint family property but was merely to enforce a share in the estate in pursuance of the directions contained in the will of the father. It is an instance of inferring from conduct an intention to separate, and taking the entire proceedings into consideration the High Court came to the conclusion that no such intention was ever manifested in the course of those proceedings. Kumaraswami Sastri, J., observes at page 775 of the report (*Palaniammal* v. *Muthuvenkatachala Maniagarar*[2]).

1. (1924) 48 M.L.J. 83 : L.R. 52 I.A. 83 : I.L.R. 48 Mad. 254 (P.C.).
2. (1917) 33 M.L.J. 759.

"Assuming the mere filing of a plaint is sufficient to sever the status of the coparcener it seems to me that till a decree is passed in that suit it is open to the plaintiff to change his mind and to withdraw the suit so as to leave him in the same position as if no suit had been filed. I can find nothing either in Hindu law or in the decided cases to countenance the view that a mere expression of an intention to separate is irrevocable."

There being no express declaration of an intention to separate, and it being a case where such an intention had to be inferred from the conduct of the parties in the suit, it is difficult to see how the statement by the learned Judge is an authority for the position contended before us. No one could suggest that a mere filing of a plaint will be sufficient to sever status, if, as pointed out by Sadasiva Aiyar, J., in *Soundararajam* v. *Arunachalam Chetty*[1], the plaint does not proceed on the footing of an intention or exercise of the volition by the coparcener instituting the suit to hold the property in severalty from the moment of the institution of the suit. Further, a mere expression of intention is not sufficient in law to bring about a division in status. The intention must be unequivocal and definite in the sense that from that very moment the person manifesting such intention desires to become separate in status and to hold the property in severalty. It must be communicated also. It is open to a person merely to hold an intention, but he may not carry out that intention to effect with the consequence that no division of the right or the status results therefrom. The learned Judge was not at all considering and was not called upon to consider the question whether, if by reason of the communication of the intention a division of the status has resulted, it was open to that person by his unilateral act to undo it, consistent with the principle of Hindu law that when once there is a division the coparcenary cannot be again brought into existence except to the limited extent of bringing about a re-union by agreement between the parties.

When the matter went up to the Privy Council, their Lordships confirmed the decision of this Court. At page 258 the following passage occurs:

"The fact that any member of a joint family has separated himself from his coparceners may be proved by his suing for partition of the joint family property, and if the suit is decreed the date of his severance from the joint family will, if nothing else is proved, be treated as the date when the suit was instituted. In *Kedarnath* v. *Ratnan Singh*[2], a member of a joint Hindu family had filed a plaint claiming a partition but afterwards had withdrawn it, and the Board held that no severance of the joint status resulted. Their Lordships see no reason to depart from that view, although such a plaint, even if withdrawn, would, unless explained, afford evidence that an intention to separate had been entertained, see *Girja Bai* v. *Sadashiv Dhundiraj*[3] and *Kawal Nain* v. *Budh Singh*[4]. In a suit for partition which proceeds to a decree which was made, the decree for a partition is the evidence to show whether the separation was only a separation of the plaintiff from his coparceners or was a separation of all the members of the joint family from each other. It appears to be obvious to their Lordships that in a suit for partition no effective decree can be made for a partition unless all the coparceners whose addresses are known, are parties to the suit, and that it is the decree alone which can be evidence of what was decreed."

From this it is argued that the Privy Council really recognised that an intention was revocable even after it was communicated. It seems to us that in this passage their Lordships are merely considering the effect of conduct evidenced by the institution of the suit for partition and the decree in such a suit. If there was no declaration of intention in the plaint and the matter had to be judged by the conduct in the suit, the fact that the claim for partition was withdrawn is a material element to be considered in inferring whether an intention to sever did or did not exist. The reference to the decision in *Kedarnath* v. *Ratan Singh*[2] can be justified only on that footing, as we have already shown that the question did not at all arise for consideration in that case. All that the plaint in such a suit would establish is that the coparcener entertained an intention to separate; but whether he had expressed such an intention in the plaint to become severed in status immediately and intended to convey that intention by that plaint to the other members is a different matter and has to be judged from the language of the plaint in each case. The reference to the two decisions in *Girja Bai* v. *Sadashiv Dhundiraj*[3] and *Kawal Nain* v. *Budh Singh*[4]

1. (1915) 29 M.L.J. 793 : I.L.R. 39 Mad. 159.
2. (1910) 20 M.L.J. 900 : L.R. 37 I.A. 161 : I.L.R. 32 All. 415 (P.C.).
3. (1916) 31 M.L.J. 455 : L.R. 43 I.A. 151 : I.L.R. 43 Cal. 1031 (P.C.).
4. (1917) 33 M.L.J. 42 : L.R. 44 I.A. 159 : I.L.R. 39 All. 496 (P.C.).

makes it clear that their Lordships were fully alive to the principle that when once an intention is expressed and communicated, the status of the person is thereby affected which it is not possible to nullify or undo. Their Lordships also state at page 258 that when once a joint Hindu family separates, the family or any of its members may agree to re-unite as a joint Hindu family, but that is of rare occurrence and it requires strict proof to establish the same. This is the only mode by which to a limited extent the effect of a division can be got rid of. It is impossible to hold that their Lordships are laying down in the succeeding paragraph a principle which is opposed to Hindu law. On the facts of the particular case the conclusion of their Lordships was as follows :

> " Their Lordships think that so far from the members of that joint family intending to separate their object probably was to establish themselves, if possible, as a joint family with an impartible estate descending according to the rule of lineal primogeniture with rights of maintenance and other privileges for the junior members. Such a joint family could not be established in modern times."

This passage, in our opinion, gives the real basis of the judgment of their Lordships. Their Lordships were only trying to ascertain the intention of the members of the family, which was according to their Lordships' finding to create a joint family with an impartible estate. Their Lordships finally held that such creation was unknown to Hindu law.

An examination of the decision of the Judicial Committee leads us to the conclusion that there is no foundation for the contention urged before us on behalf of the respondents. It only remains for us to refer to the decisions of our and other High Courts cited before us. In *Vemi Reddi* v. *Nallappa Reddi*[1] decided by Sadasiva Aiyar and Spencer, JJ., the plaintiff instituted a suit against his father for a declaration that the mortgage executed by the father was not binding on him on the ground that the mortgaged property had fallen to his share in an earlier partition. After the institution of the suit he filed a petition to amend the plaint so as to include a prayer for partition in case the Court were to hold that the earlier partition was not established. He subsequently withdrew that petition stating that he did not intend to press the question of division and also withdrew the suit with liberty to file a fresh suit for a partition. He subsequently instituted a suit for partition on an alternative basis to get the earlier partition established or if that was not found to be true, for a division of the family properties. One of the questions in that case was the effect of the amendment petition filed in the earlier suit which was subsequently withdrawn. This contention however was not raised in the Courts below but was raised for the first time in the High Court. The conclusion of Sadasiva Aiyar, J., was that the petition did not contain an unequivocal and final expression of an intention to become divided in status. Spencer, J., treated it as a piece of conduct along with others from which an inference of an unequivocal intention had to be drawn. Both the learned Judges thought that the conduct of the plaintiff in instituting the former suit and in applying to get the plaint amended and thereafter withdrawing this petition and withdrawing the suit did not constitute an unambiguous expression of intention resulting in a separation of status. *Palaniammal* v. *Muthuvenkatachala Maniagarar*[2] was also referred to.

Krishnaswami Naidu v. *Nammayya Naidu*[3] is a case similar to *Vemi Reddi* v. *Nallappa Reddi*[1]. The plaintiff instituted an earlier suit for partition and withdrew it with liberty to bring another suit on condition of paying the costs. He failed to pay the costs but continued to live jointly with the other coparceners. He thereafter instituted a fresh suit for partition. The learned Judge was of opinion that their Lordships of the Privy Council did not intend to lay down a general principle that the filing of a suit for partition was sufficient in all cases to constitute a severance in status, and that there was no authority for holding that every such declaration was irrevocable. This again, in our view, is a case where from conduct evidenced by the institution of the partition suit and its withdrawal an intention to sever

1. (1920) 11 L.W. 611.
2. (1917) 33 M.L.J. 759.
3. (1924) 20 L.W. 540.

could not be inferred. Phillips, J., follows this opinion in *Ganapathi* v. *Subramaniam Chetti*[1] sitting with Madhavan Nair, J. There a Hindu father instituted a suit for partition for himself and on behalf of his minor sons against his father, his brother and his sons. Before a decree was passed, the grandfather died and subsequently the father, *i.e.*, the plaintiff. One of the sons who became a major elected to continue the suit for himself and also on behalf of his minor brother. The mother of the minor plaintiff however was opposed to that course and did not want a partition for the minor. The minor was therefore transposed as a defendant. The other coparceners had no objection for a division. The trial Court passed a decree awarding a one-third share to the major brother for himself and also on behalf of his minor brother. There was then an appeal to the High Court on behalf of the minor. It was contended on behalf of the minor that it was not advantageous to the minor to become divided from the defendants as his share would be increased by the death of the grandfather. It was argued that the institution of the suit by the father had not the effect of bringing about a severance between his branch and the other branches. The learned Judges accepted this contention, and in our view their decision on this point is wrong as it is opposed to the Privy Council decisions in *Mst. Jatti* v. *Banwari Lal*[2] and *Ramalinga Annavi* v. *Narayana Annavi*[3]. The learned Judges thought that their view was supported by the decision in *Palaniammal* v. *Muthuvenkatachala Moniagar*[4], but in that case the question was not between the father and his descendants but between persons standing in the same degree. In such a case no doubt the separation of one member does not necessarily create a division between all the members, but it is a totally different thing where the father as the head of the family of his branch severs himself from the others. Not only himself but his descendants as well would become separated from the other branches. The learned Judges in view of this conclusion thought that the minor stood to gain by not separating himself from the rest. This again is a decision in which there was no express declaration but one had to be inferred from the conduct. The observation at page 851 in *Ganapathi* v. *Subramania Chetti*[1] that :

> "In this view it would be difficult to hold that a declaration of intention by the father, which is subject to revocation, must necessarily effect a separation of his sons from that date."

cannot refer to a case where the separation had already been brought about by communication of the intention.

Thavasimuthu v. *Thavasimuthu*[5] is a decision of Ramesam, Officiating Chief Justice and Cornish, J., in which the effect of the institution of a suit for partition again came up for consideration. The learned Judges were of opinion that the institution of a suit for partition effects a severance in status conditionally, the condition being that the suit is proceeded with and not withdrawn. This must be understood to mean that a mere suit for partition, the plaint in which does not amount to or does not contain an intention to separate, has not the effect of bringing about a division in status from the moment of the institution of the suit. The observations of Venkataramana Rao, J., in *Rama Rao* v. *Venkatasubbayya*[6] and Krishnan Pandalai, J., in *Annamalai Chettiar* v. *Koothappudayar*[7] have also to be understood in the same light.

There is nothing in the decisions in *Chockalingam* v. *Muthukaruppan*[8] and *Diravyam* v. *Veeranan*[9] to support the contention on behalf of the respondents. In the latter case, even the papers relating to the withdrawal of the suit for partition were not on record. As the fact of withdrawal was admitted it was argued that the onus of proving that the institution of the suit did not effect a severance in status was shifted

1. (1929) 57 M.L.J. 374 : I.L.R. 52 Mad. 845.
2. (1923) 45 M.L.J. 355 : L.R. 50 I.A. 192 : I.L.R. 4 Lah. 350 (P.C.).
3. (1921) 43 M.L.J. 428 : L.R. 49 I.A. 168 : I.L.R. 45 Mad. 489 (P.C.).
4. (1924) 48 M.L.J. 83 : L.R. 52 I.A. 83 : I.L.R. 48 Mad. 254 (P.C.).
5. A.I.R. 1931 Mad. 824.
6. (1937) 46 L.W. 309 at 313.
7. (1932) 38 L.W. 280 at 293.
8. (1938) 2 M.L.J. 756 : I.L.R. 1938 Mad. 1019.
9. (1939) 2 M.L.J. 822 : I.L.R. 1939 Mad. 853.

to the other side, and reliance was placed in support of the contention upon the decision in *Palaniammal* v. *Muthuvenkatachala Moniagar*[1]. At page 869 the learned Judges said :

> " This seems to us to read too much into their Lordships' observations. Referring to *Kedarnath* v. *Ratan Singh*[2], their Lordships said that they saw no reason to depart from the view there laid down and only added that the plaint so presented, even if withdrawn, would, unless explained, afford evidence that an intention to separate *had been* entertained. This can hardly be read as laying down any rule of law or even a presumption. It only seems to suggest a possible inference of fact. It is not unlikely, as observed by the learned Subordinate Judge, that in this case the ninth defendant instituted the suit at a time when he thought that he would get some benefit out of it but that when he found that there would be nothing left after payment of the debt due by the family he did not think it worthwhile to proceed with the suit. These circumstances do not seem to us to warrant the conclusion that he became divided merely by the presentation of the plaint."

We respectfully agree with this view of the decision in *Palaniammal* v. *Muthuvenkatachala Moniagar*[1].

Of the decisions of the other High Courts referred to in the course of the arguments before us it is only necessary to refer to some of them. In *Banke Bihari* v. *Brij Bihari*[3] a member of a joint Hindu family sent a registered notice to the other members demanding a partition, but he abandoned that intention to separate a day or two later as a result of an agreement between the members of the family. The question was whether in the circumstances there was a severance in status. The actual decision in the case was that as the other members also agreed to the abandonment of the intention, there was no separation in law. Of course the decision can be justified on the ground that with the consent of the members there was a re-union. If it is to be treated as an authority for holding that the intention is revocable, we must respectfully dissent from it. The decision in *Joala Prasad Singh* v. *Mst. Chanderjot Kuer*[4] is only an authority to the extent of indicating the modes by which an intention may be established or proved, and following the decision of the Privy Council in *Girja Bai* v. *Sadashiv Dhundiraj*[5], it was pointed out that as intention has to be proved in a Court of Justice it can be established by evidence. The evidence may consist of the filing of a plaint claiming partition or it may take some other form, but it is no more than evidence of the intention to separate. In that case the filing of a plaint was not considered as evidencing a clear communication of an intention to separate, and the learned Judges declined in second appeal to interfere with that finding of fact which was reached by the Courts below.

The question was examined at length by the Nagpur High Court in *Shankar Singh* v. *Gulabchand*[6]. The learned Judges held that the severance effected by an unequivocal intention to become separate which was communicated could be nullified provided all interested consented to a re-union. The facts of the case are somewhat analogous to the present case. There were two brothers Kesharsingh and Kallusingh. The plaintiff in the suit was an illegitimate son of Kesharsingh by a permanently kept concubine. The plaintiff claimed in the suit that an award made by the Debt Conciliation Board did not bind him and that he was entitled to an injunction restraining the defendants from enforcing it. His case was that Kesharsingh became divided in status from Kallusingh which was denied by the defendants. Kesharsingh and Kallusingh were admittedly joint at one time, but as Kesharsingh was wasting away his property Kallusingh instituted a suit for partition in 1933. Though the plaint in that case was not exhibited it was common ground between the parties that in the plaint Kallusingh did express an intention to separate from the family. During the pendency of the suit Kesharsingh died. Kallusingh thereafter applied for permission to withdraw the suit. In the application for withdrawal Kallusingh stated that by Kesharsingh's death the very reason for instituting the suit for partition had disappeared and that he was therefore

1. (1924) 48 M.L.J. 83 : L.R. 52 I.A. 83 : I.L.R. 48 Mad. 254 (P.C.).
2. (1910) 20 M.L.J. 900 : L.R. 37 I.A. 161 : I.L.R. 32 All. 415 (P.C.).
3. (1928) I.L.R. 51 All. 519.
4. (1938) I.L.R. 17 Pat. 430.
5. (1916) 31 M.L.J. 455 : L.R. 43 I.A. 151 : I.L.R. 43 Cal. 1031 (P.C.).
6. I.L.R. (1945) Nag. 444.

induced not to cause a separation in the family and thus to abandon his original intention to separate himself from the family. The question that had to be considered was the effect of this withdrawal. The learned Judges after an examination of the authorities held that the severance took effect as a result of the suit instituted by Kallusingh and that there were only two possible alternative modes of bringing about the former position of jointness, *i.e.*, either by invoking the principle of re-union, or by holding that a *locus penitentiæ* to resile was permissible, the severance in interest being only provisional. Of these alterntives, the learned Judges preferred the former. The reasons for this view are contained in the following paragraph :

> "We feel there are objections in principle to the latter view. Every member of a joint family has a right to bring about a severance of interest. That is an incident of joint ownership. But the moment severance is effected the member separating ceases to be a member of a joint family and we find it difficult to see how a person who is not a member of the family can join it or rejoin it, by unilateral action. Equally it seems wrong in principle to permit a person who has severed his interests to do something which will affect the status and rights of the other members by unilateral action."

The two Privy Council decisions in *Kedarnath* v. *Ratan Singh*[1] and *Palaniammal* v. *Muthuvenkatachala Moniagar*[2] are explained by the learned Judges on the footing of re-union, if really there was a severance in those two cases. *Palaniammal* v. *Muthuvenkatachala Moniagar*[2] was explained also on the basis that it was really a case in which on a consideration of the evidence the Judicial Committee came to the conclusion that there was never any intention to separate and that the object of the suit was not to effect a partition but only to establish that they were joint as indicated in the last paragraph of the judgment of their Lordships which has already been quoted. We respectfully agree with this decision of the learned Judges which is correct both on principle and on authority.

The Bombay High Court in *Gangadhar Rao* v. *Ramchandra*[3] expressed the opinion that by an agreement the parties might continue to be joint as before. Nobody can quarrel with this, as from such an agreement it is possible to infer a re-union so long as there were no minors, but the statement at page 147 (column 2) to the effect that an unequivocal demand for partition should not only be communicated but also should be persisted in in order to bring about a division in status is not supported by any authority. Of course, if with the consent of the other members it was abandoned or withdrawn so as to constitute an agreement to re-unite, that is a different matter altogether. We are therefore of opinion that save in the case of a re-union it is not open to a member of a coparcenary governed by Mitakshara law to revoke or withdraw an unambiguous intention to separate communicated to the other members, after such communication.

This leads us on to a consideration of the effect of the proceedings in the suit, O. S. No. 63 of 1933. It is not contended before us that the plaint in that case, Ex. C, does not contain an unambiguous declaration of an intention to separate. After setting forth the facts which influenced his determination to become separate the second defendant who was the plaintiff in that suit alleged in paragraph 5 :

> "Therefore, the plaintiff being unwilling to remain joint with the defendants has decided to become divided and he has filed this suit for separation of his one-fifth share in the assets remaining after discharging the family debts separated and for recovery of possession of the same."

It is also common ground that this was communicated as the suit summonses were served on all the defendants and in fact the third defendant by Ex. C-2 his written statement, expressed also a similar intention. The mother of the plaintiff and the first defendant also filed a written statement, Ex. C-1, on behalf of the minors claiming a partition. After the issues in the suit were settled and the suit was ready for trial Jaggarao, the first defendant, in that suit died, and on 21st November, 1934, the second defendant made the following endorsement on the plaint :

> "As the first defendant had died and as the plaintiff himself had to manage the family, the plaintiff hereby revokes the intention to divide expressed in the plaint and agreeing to remain as a joint family member, he withdraws this suit."

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1. (1910) 20 M.L.J. 900 : L.R. 37 I.A. 161 : I.L.R. 32 All. 415 (P.C.).
2. (1924) 48 M.L.J. 83 : L.R. 52 I.A. 83 : I.L.R. 48 Mad. 254 (P.C.).
3. A.I.R. 1946 Bom. 146.

Till the death of Jaggarao, therefore, the second defendant persisted in his claim for a partition, and all the members presumably agreed that there should be a partition. This communication of intention undoubtedly brought about a division in status. The third defendant was a major, and he also communicated his intention and he never withdrew it. No doubt, as the suit did not end in a decree for partition the intention expressed by the guardian on behalf of the minor plaintiff and the present first defendant may not be of avail, but during the pendency of the suit till the death of Jaggarao undoubtedly all the members agreed that there should be a division of the property. An agreement to abandon or to unite is not possible in this case as at that time the plaintiff and the first defendant were minors. In the light of the principles already discussed we are clearly of opinion that there was a division in status of defendants 2 and 3 as a result of the proceedings in the suit, O. S. No. 63 of 1933.

The effect of this conclusion is that the alienation of item 2 of D schedule in 1935 under Ex. O, and of E schedule under Ex. O-1, also in 1935 and the sale of items 2 and 3 of F schedule in execution of the decree in O. S. No. 57 of 1935 did not bind the plaintiff and the first defendant as defendants 2 and 3 had no right to affect the interests of the plaintiff and the first defendant as they were no longer managers. The sale however of item 2 of D schedule was for discharge of a binding family debt under Ex. II. The sum of Rs. 6,400, the consideration for Ex. O was paid to the mortgagee under Ex. II and with this payment the mortgage debt was fully discharged. Under the sale deed the purchaser was directed to pay the amount in full discharge of the mortgage debt and was also directed to obtain the return of the mortgage deed and retain the same with him as a voucher. The endorsement Ex. II-d on the mortgage, the recital in the sale deed and the evidence of D. W. 9 the brother of the 11th defendant, and of D. W. 11, the 11th defendant himself, fully support the contention that the payment fully discharged the mortgage debt. Apart from any other consideration, as the mortgage debt was completely discharged by this payment, the 11th defendant would be entitled under law to subrogation, and as the plaintiff and the 1st defendant derived the advantage of getting the property freed from the mortgage, they are bound to pay their share of the debt before they are permitted to recover their share in the property covered by Ex. O. The plaintiff and the first defendant therefore should each pay 1/5th share of the consideration of the sale under Ex. O. The interest on the amount payable by the plaintiff and the mesne profits attributable to their shares of the property may be set off and therefore there should be a direction to pay the money only from the date of suit with interest and that the 11th defendant should be made accountable for mesne profits of the share of the property of the plaintiff and the first defendant also from that date.

As regards E schedule, the sale of course is not binding on the plaintiff and the first defendant, and there was also a direction by the lower Court that out of the consideration for the sale, as only a portion of it was binding, the plaintiff and the first defendant should each pay a sum of Rs. 70-1-0 as condition for recovery of possession of their respective shares from the 13th defendant. No doubt in respect of this document, the alienee and the 13th defendant may not be entitled to subrogation, though a part of the amount was paid for discharge of the mortgage debt under Ex. II. As the plaintiff and the first defendant however have derived advantage of this payment which went in discharge of the mortgage debt barring a small sum and as the sale is void so far as they are concerned, they are bound to pay Rs. 70-1-0 as a condition for recovery of their share of the property, and the direction of the Courts below will stand.

As regards F schedule, in the view we have taken of the effect of the proceedings in the earlier partition suit, it is really unnecessary to deal with the reasoning of the learned District Judge based on the Full Bench decision in *Venkatanarayana* v. *Somaraju*[1]; but, in our opinion, the learned District Judge was wrong in his conclusion

1. (1937) 2 M.L.J. 251 : I.L.R. 1937 Mad. 880 (F.B.).

that the present case falls within the principle of the Full Bench decision. These items were the subject-matter of an agreement of sale dated 15th December, 1934 (Ex. VI) by which defendants 2 and 3 both for themselves and on behalf of the minor members of the family including the plaintiff and the first defendant purported to sell to Sitharatnam for a sum of Rs. 6,400 the property, item 2 of D schedule, which was subsequently sold to the 11th defendant. They received an advance of Rs. 450 under the agreement and the balance was agreed to be paid towards the discharge of the mortgage under Ex. II. Under this agreement defendants 2 and 3 covenanted to get the sale deed executed also by the mother of the plaintiff and the first defendant and also by the mother of Jaggarao's son who was also a minor. The sum of Rs. 450 was utilised for discharge of some binding debt. For some reason or other the sale could not be completed. Seetharatnamma filed the suit, O. S. No. 57 of 1935, for recovery of the advance paid under the agreement and also Rs. 500 as damages. The suit was decreed on the 29th of September, 1936. To that suit the only parties were the present second and third defendants. The decree was a personal decree against the two defendants for the sum claimed in the plaint. The plaint in that suit is filed as Ex. IV-c, and from a perusal of the allegations in the plaint and from the fact that the relief was claimed only against defendants 2 and 3 personally and no claim was made against the family properties, we are clearly of opinion that they were sued in their personal capacity and not as managers of the family. The claim was to enforce payment of the amount of advance received by them personally and also for damages for the breach committed by them. There is no indication either in the plaint, the judgment or the decree that they were sued in a representative capacity and that the decree was obtained on that footing. In pursuance of this decree items 2 and 3 of F schedule were brought to sale and were purchased by the 14th defendant who obtained a sale certificate, Ex. VI-e, on the 23rd of February, 1939.

The argument of the learned advocate for the respondents is that as, in fact, defendants 2 and 3 were managing the family property and business, and as the amount of advance was applied for discharge of a binding debt the decree must be treated to be a decree against defendants 2 and 3 in a representative capacity as managers of the joint family, but we are unable to accept this contention. As pointed out in the later Full Bench of five Judges in *Nagireddi* v. *Somappa*[1], if a manager who is not the father was sued on a contract entered into by him and the decree contains no direction that it should be executed against the family property the decree is only a personal decree and not against the manager. The undertaking in the contract to secure the concurrence of the mother and to get a conveyance also from her on behalf of the minors is an indication that the contract was not entered into in a representative capacity. We are therefore unable to agree with the learned District Judge that the decree was obtained against defendants 2 and 3 as managers of the family. In this view, it becomes unnecessary to consider the correctness of the decision of the Full Bench of three Judges in *Venkatanarayana Somaraju*[2], in view of the later Full Bench decision of five Judges in *Nagireddi* v. *Somappa*[1]. In any view, therefore, the plaintiff and the first defendant would be entitled to a decree for partition of items 2 and 3 of F schedule.

The result is that the second appeal in so far as it relates to A schedule and item 1 of D schedule should be dismissed with the costs of defendants 5 to 7 and the 10th defendant. The appeal relating to item 2 of D schedule and items 2 and 3 of F schedule should be allowed. The plaintiff and the first defendant would be entitled to recover their share in item 2 of D schedule on condition of their paying one-fifth of the consideration under Ex. O with interest from the date of suit till payment at six per cent. per annum. The decree in respect of E schedule will be confirmed. The plaintiff and the first defendant are entitled to their costs throughout from the respective defendants in respect of item 2 of D schedule and

1. (1942) 2 M.L.J. 691 : I.L.R. 1943 Mad. 248.

2. (1937) 2 M.L.J. 251 : I.L.R. 1937 Mad. 880 (F.B.).

of F schedule. There will be no order as to costs in respect of E schedule. Though the first defendant in his written statement claimed also a decree for partition and separate possession of his share, no decree was, in fact, granted to him either by the trial Court or by the appellate Court. We think that this defect should now be remedied by granting a decree also to the first defendant but subject to payment of the court-fee by him. A decree therefore will be drafted in the light of this judgment in modification of the decrees of the Courts below. In other resepcts the decree of the trial Court will stand. The plaintiff and the first defendant pay in the first instance the court-fee payable to Government in all the Courts and recover the same from the respective defendants to the extent of their success. The court-fee payable will be a charge on the suit property.

This second appeal having been posted for orders this day, the Court made the following order :—There will be an enquiry into mesne profits under Order 20, rule 12, Civil Procedure Code, in respect of item 2 of D schedule from the date of plaint and in respect of 2 and 3 of F schedule from 25th July, 1939.

V.S. *Decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

The Public Prosecutor .. *Appellant**

v.

Bondada Ramalingeswaraswamy .. *Respondent.*

War Risks (Goods) Insurance Ordinance (IX of 1940), section 7—Offence committed before repeal of section—Power of Government to prosecute after the repeal of the section—Not taken away.

The repeal of section 7 of the Wark Risks (Goods) Insurance Ordinance did not take away the right which the Crown has to initiate proceedings for an offence committed when section 7 was in force.

Appeal under section 471, Criminal Procedure Code, 1898 against the acquittal of the aforesaid respondent (accused) by the Sessions Judge, West Godavari at Ellore in C.A. No. 58 of 1947 on his file (C.C. No. 77 of 1946 Sub-Divisional Magistrate's Court, Narasapur).

The appellant in Person.

G. Chandrasekhara Sastri for Respondent.

The Court delivered the following

JUDGMENT.—This is an appeal against acquittal of the respondent who had been convicted by the trial Court of an offence under section 7, sub-section (2) of the War Risks (Goods) Insurance Ordinance, which conviction was set aside by the learned Sessions Judge on the ground that at the time the prosecution was launched section 7 of the Ordinance had been repealed and therefore there was no jurisdiction for the Courts to entertain the case.

The only question argued by the learned Public Prosecutor is one of law, namely, that the repeal of section 7 will not take away the right which the Crown has to initiate prosecutions for an offence committed when section 7 was in force. For this argument reliance is placed on section 6, sub-clause (*e*) of the General Clauses Act, as well as on a decision of this Court in *Chokkalingam In re*[1]. Mr. Chandrasekhara Sastri for the respondent contends that even if section 6 (*e*) is applicable a different intention appears from the repealing enactment that for offences committed when the repealed Act was in force no prosecution should be instituted after the same was repealed. The learned Sessions Judge has agreed with this

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* Crl. Appeal No. 114 of 1948. 27th July, 1948.

1. (1945) 2 M.L.J. 295.

view on the ground that since section 7-A was retained in the statute and section 7 alone had been repealed, the implication is that the Legislature did not want to prosecute the offenders for the offences but that the Legislature intended to retain the right to collect the insurance premia. This argument is countered on the other side by pointing out that sections 12 and 12-A have been retained. If the intention of the Legislature had been that no prosecution ought to be instituted after the repeal of section 7, there was no necessity for retaining sections 12 and 12-A which deal with the grant of sanction for prosecutions and also the compounding of prosecutions. Whatever might be said as regards the retention of the provision empowering the authority to compound the offence, there would have been no necessity whatever for allowing section 12 which is a prohibitory section to continue. Section 12 can contemplate only a state of circumstances which comes into existence after the repeal of the other sections because if prosecutions had been instituted prior to the repeal of section 7 no further sanction is necessary. Therefore what was intended by the retention of section 12 was that for future prosecutions after the repeal of section 7 also sanction was necessary. It is therefore clear that future prosecutions were contemplated and envisaged. If the argument of the respondent that a different intention appears, namely, that no fresh prosecutions are to be instituted, section 12 becomes an absolute dead letter. I am not prepared to accept such an argument which will imply that an unnecessary section was retained in the Statute Book with no purpose whatever. The decision of the House of Lords in *Wicks* v. *Director of Public Prosecutions*[1], though it turns mainly on the construction of the particular enactment, is also helpful in this connection.

I would therefore set aside the order of acquittal passed by the learned Sessions Judge. Since there are other points which should be considered and which the Sessions Judge has not decided, the appeal is remanded to him for fresh hearing and disposal in the light of the observations contained in this judgment.

K.S. *Appeal remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO.

Sabapathi Pillai (died) and others .. *Appellants**

v.

Mohammad Ilais Sait and another .. *Respondents.*

Civil Procedure Code (V of 1908), Order 21, rule 57 (as amended in Madras)—Applicability—Application for sale in execution of property attached before judgment—Dismissal without notice to decree-holder as the property was out of the jurisdiction of that Court—Validity of order—Attachment if extinguished.

On an application for sale in execution of a decree of properties attached before judgment after an orde for sale was made, a note was put up by the office pointing out that it was then discovered that the properties which were sought to be sold were not within the jurisdiction of that Court but outside it and the Court passed an order without any notice to the decree-holder as folows : " Advanced and dismissed. Attachment to subsist for six months." When the decree-holder learnt of the order he had the decree transmitted to the Court having jurisdiction in respect of the attached properties and filed a petition before that Court for sale of the properties which was beyond six months of the order of dismissal. Meantime, the properties had been purchased by a stranger who contended that by the lapse of the period of six months the attachment had ceased and her title became perfected. The claim having been allowed the decree-holder filed a suit to set aside the claim order.

Held : The order dismissing the petition passed behind the back of the decree-holder was a nullity and further the order passed was by a Court which had no jurisdiction to entertain the application itself and the attachment did not cease and continued to be in force notwithstanding the expiry of the period of six months from the date of the order of dismissal. Accordingly the sale in favour of the claimant was of no avail against the attachment effected by the decree-holder.

Appeal against the decree of the Court of the Subordinate Judge, Coimbatore dated 28th June, 1945, in A.S. No. 68 of 1945 preferred against the decree of the Court of the District Munsiff, Tiruppur, in O.S. No. 23 of 1943.

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1. 1947 A.C. 362.

* S. A. No. 2371 of 1945. 16th July, 1948.

P. S. Ramachandran for Appellants.

A. C. Sampath Aiyangar for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff is the appellant. He instituted the suit out of which this second appeal arises to set aside the summary order passed on the 24th June, 1942, in E.A. No. 244 of 1942 in E.P. No. 707 of 1941 on the file of the District Munsiff's Court of Tiruppur.

The claim order was passed under the following circumstances. The first defendant in the present suit executed a promissory note on the 25th April, 1935, for a sum of Rs. 600 in favour of the plaintiff. As the amount due under the promissory note was not paid the plaintiff instituted O.S. No. 322 of 1937 on the file of the District Munsiff's Court of Coimbatore. He also applied in I.A. No. 646 of 1937 for an attachment before judgment of certain immoveable properties of the first defendant and obtained an interim attachment order. On the 28th October, 1937, the suit was decreed ex *parte* and the interim attachment before judgment was made absolute. On the 4th June, 1940, the decree-holder filed E.P. No. 2203 of 1940 in the District Munsiff's Court of Coimbatore for sale of the properties which were attached before judgment in I.A. No. 646 of 1937. In this execution petition presumably the judgment-debtor was served and after several adjournments on the 6th January, 1941, the Court passed an order directing proclamation and sale of the property on the 24th March, 1941. The further hearing of the application was also adjourned on the same day to 31st March, 1941. On the 6th January, 1941, a note was put up by the office pointing out that it was then discovered that the properties which were sought to be sold were not within the jurisdiction of that Court but were outside it, i.e. within the jurisdiction of the District Munsiff's Court of Tiruppur. The suggestion of the clerk who put up the note was that the hearing of the execution application should be advanced and that the same be dismissed and the decree-holder should be left to take other effective steps. No notice of this was given to the decree-holder and the District Munsiff passed an order on the 6th January, 1941, in the following terms :

"Advanced and dismissed. Attachment to subsist for six months."

When the decree-holder went to the Court about the 24th March, he was told that the execution petition was dismissed earlier. He applied for a copy of the order and curiously the copy that was granted to him omitted the limit of six months. It stated "Advanced and dismissed. Attachment to subsist." After this the decree-holder had the decree transmitted for execution to the District Munsiff's Court, Tiruppur and on the 9th July, 1941, filed E.P. No. 707 of 1941 for the sale of the property. The present second defendant then intervened with a claim petition alleging that the property was purchased from the first defendant by one Kasim Sahib on 3rd June, 1940, and that from the said Kasim Sahib she had purchased the same on 24th October, 1940, and that as by the lapse of the period of six months the attachment had ceased, her title became perfected. That claim was allowed by the District Munsiff on the 24th June, 1942. The plaintiff therefore instituted the present suit to set aside the claim order.

The contention of the plaintiff in the Courts below was that notwithstanding the order of 6th January, 1941, of the District Munsiff of Coimbatore, the attachment of the suit property effected before judgment in the suit subsisted and that as the second defendant and her vendor obtained transfer of the property at a time when the attachment was subsisting the sale in their favour could not prevail over the attachment. Both the Courts rejected the contention of the plaintiff and dismissed the suit. Hence this second appeal.

The appellant argues that as the order of 6th January, 1941, was passed without notice to him it is a nullity and that in any event in order to invoke the power of terminating the attachment under Order 21, rule 57 of the Civil Procedure Code, the execution application on which the order was passed must have been

made to a Court having jurisdiction to grant the relief of sale of the property prayed for in the petition and thaat as admittedly the Coimbatore District Munsiff's Court had no jurisdiction to sell the property the order on the execution petition restricting the period of attachment for six months was a nullity. The question is whether these contentions are well founded. It has been found by the appellate Judge in more than one place that the order was passed on the 6th January without notice to the decree-holder. The decree-holder had no knowledge that the hearing of the execution application was advacced to that date. The appellant relies upon the decison of Venkatasubba Rao, J., in *Krishna Iyengar* v. *Mohidin Sahib Rowther*[1], in support of his contention that the order passed without notice to the decree-holder is not valid. In that case an execution petition was taken up for hearing on the 13th December 1924 and on that date it was adjourned to 23rd December, 1924, for filing sale papers. The Court instead of taking up the the petition on the 23rd to which the petition stood posted disposed of it on the 16th January, 1925, without notice to the decree-holder and passed an order dismissing the petition on the ground that sale papers were not filed. The question raised before the learned Judge was that the effect of this dismissal was to terminate the attachment. It was pointed out by the learned Judge that the order dismissing the petition could not have been passed on that date on the ground that the sale papers were not filed without notice to the decree-holder and had notice been given to the decree-holder it would have been open to him to show that the sale papers could not be obtained for reasons beyond his control and that there was no negligence on his part and he could have asked the Court to adjourn the petition to a future date instead of dismissing it. The termination of the attachment as a consequence of the dismissal of the petition as pointed out by the learned Judge, was in the nature of a penalty and a dismissal without giving an opportunity to the decree-holder to represent the facts and behind his back was not a dismissal in the eye of the law and therefore did not put an end to the attachment. That decision was under Order 21, rule 57 of the Civil Procedure Code before the amendment of that rule, was made by this Court. Before the amendment the language of the rule was,

> "When any property has been attached in execution of a decree but by reason of decree-holder's default the Court is unable to proceed further with the application for execution, it shall either dismiss the application or for any sufficient reason adjourn the proceedings to a future date. Upon the dismissal of such application the attachment shall cease."

There were only two courses open under the rule, *viz.*, either to adjourn the application or to dismiss it. If it was dismissed it automatically terminated the attachment. The rule was altered in 1936 by this Court and the amended rule reads as follows :

> "Where any property has been attached in execution of a decree and the Court hearing the execution application either dismisses it or adjourns the proceedings to a future date, it shall state whether the attachment continues or ceases ; Provided that when the Court dismisses such an application by reason of the decree-holder's default the order shall state that the attachment do cease."

Under this rule even in a case where a petition was not adjourned but was dismissed, it is open to the Court to continue the attachment or terminate it. But in either case it is the duty of the Court to state whether the attachment continues or ceases. If the application is dismissed by reason of the default of the decree-holder the order should state that the attachment has ceased. I do not think that the basis of the decision in *Krishna Iyengar v. Mohideen Sahib Rowther*[1] is altered by reason of the amendment. The reasoning equally applies whether we consider the language of the unamended rule or of the rule as amended. In my opinion therefore the contention that the order of the 6th January, 1941, passed behind the back of the decree-holder is a nullity should be accepted.

Even otherwise I am of opinion that the order in this case is invalid on the ground that the Court had no jurisdiction to pass the order. It has been held in *Meyyappa Chettiar* v. *Chidambaram Chetti*[2], that the expression "property

1. (1934) 40 L.W. 263. (F.B.).
2. (1923) 46 M.L.J. 415: I.L.R. 47 Mad. 483

attached in execution of a decree" in Order 21, rule 57 applied also to property attached before judgment, provided that the decree in the suit was followed by an execution application for the purpose of bringing the attached property to sale. When once there is a decree in the suit and an application for bringing the property to sale has been made the procedure prescribed under Order 21, rule 57 of the Civil Procedure Code becomes applicable and the attachment before judgment thereafter is treated as an attachment in execution. In order therefore to have this effect it is necessary that there should be an execution petition for sale of the property to a Court competent to sell the property. The very language of Order 21, rule 57 of the Civil Procedure Code assumes that there was an application for execution of the decree to the Court competent to execute it and that for some reason or other, other than want of jurisdiction, the Court was unable to proceed with the execution application. The reason may be the default of the decree-holder or a reason which is analogous to that but in either case it assumes that there was an application before a Court competent to entertain it but was unable to proceed with the execution of the decree for want of proper steps. If the Court had no jurisdiction at all to entertain the application it cannot be said that it is a case to which Order 21, rule 57 of the Civil Procedure Code applies. In this case therefore when the application was made to the Coimbatore District Munsiff Court on which the order of 6th January was made it was to a Court admittedly unable to proceed with the sale of the property as it had no jurisdiction to sell it. In these circumstances I am of opinion that the order on the execution application filed in the Coimbatore Court which admittedly had no jurisdiction to sell the property would not bring about the consequences contemplated under Order 21, rule 57 of the Civil Procedure Code. The Court ought to have merely disposed of the application on the ground that it had no jurisdiction to entertain it and no question of either continuing or ceasing the attachment or limiting the continuance of the attachment of the property would then arise. The order therefore was one which was passed by a Court which had no jurisdiction to entertain the application. In these circumstances the order of 6th January, 1941, is a nullity with the result that the attachment continued in force notwithstanding the expiry of the period of six months from the 6th January, 1941.

Lastly it was also urged on behalf of the appellant that in any event he should not be made to suffer as the Court granted him a copy which did not disclose the fact that the attachment was continued only for a period of six months. Had he known that the attachment was continued only for a period of six months he would have taken steps early enough to file the execution petition in the Tiruppur District Munsiff's Court. He therefore says that by reason of the act of Court he should not be made to suffer. I think there is considerable force in this contention also urged on behalf of the appellant but it is unnecessary for me to rest my decision in this case on that point.

The result is that the attachment of the properties continued in force and the sale in favour of Kasim Sahib by the first defendant and the subsequent sale by Kasim Sahib to the second defendant are of no avail against the attachment effected by the plaintiff. The second appeal is allowed, the decrees of the Courts below are set aside and the suit is decreed as prayed for with costs throughout.

Leave to appeal is refused.

K.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO.

V. K. Kandasami Chettiar (since deceased) and others .. *Appellants**

v.

Shanmugha Thevar and another .. *Respondents.*

Contract—Construction—Agreement for sale of immoveables—Clause that in case of default in completing sale within due date the defaulter was to pay Rs. 100 *as damages and that the contract was to become void—Default—Effect—Claim for specific performance—If can be resisted by defaulting party.*

In an agreement of sale relating to immoveables it was provided that the balance of price was to be paid within one month from the date of the contract and if the amount was paid the vendor should execute the sale deed and get it registered. There was a clause "in case there is default in completing the sale deed within the aforesaid due date, as aforesaid, the individual who commits the default shall pay the other individual Rs. 100 as damages and in addition this contract shall become void." A suit by the vendee for specific performance was resisted by the vendor who having sold the property to others contended that the contract had become void and unenforceable under the default clause in the agreement.

Held, notwithstanding that a sum is named in the contract as the amount to be paid in case of its breach, and even though the party in default is willing to pay the same, the other party is entitled to enforce specific performance of the contract. The clause making the contract unenforceable is in addition to the payment of damages by the defaulting party.

Even assuming that the clause means that the contract is void and unenforceable at the instance of either of the parties, the purchaser is not precluded from enforcing the contract as the party in default cannot take advantage of his own wrong.

Second Appeal against the decree of the District Court of the East Tanjore in A. S. No. 113 of 1945, preferred against the decree of the Court of the District Munsiff, Tiruthuraipundi in O. S. No. 96 of 1944.

K. S. Desikan for Appellants.

A. V. Viswanatha Sastri and *T. R. Ramachandran* for Respondents.

The Court delivered the following

JUDGMENT.—Defendants 2 and 3 are the appellants, and this second appeal arises out of a suit for specific performance of a contract of sale relating to immovable property entered into on the 11th October, 1943, between the plaintiff and the first defendant. Defendants 2 and 3 are the subsequent purchasers of the property with notice of the prior contract. The Courts below upheld the plaintiff's right to specific performance and decreed the suit in his favour. Hence this second appeal by the subsequent purchasers.

The short point that arises for consideration in this second appeal is whether in view of the terms of Ex. P-2, the agreement of sale, the plaintiff is precluded from claiming specific performance. Under the contract the price fixed was Rs. 2,100. An advance of Rs. 500 was paid on that date, and the balance was agreed to be paid within one month from the date of the contract. It was also agreed that if the amount was paid, the first defendant, the vendor, should execute the sale deed and get it registered. Then follows the clause on the construction of which the decision of this case rests. It is in the following words :

"In case there is default in completing the sale deed within the aforesaid due date, as aforesaid, the individual who commits the default shall pay the other individual Rs. 100 as damages, and in addition this contract shall become void."

The contention urged on behalf of the appellants is that by this clause the parties agreed to treat the contract as void if there was any default of any one of the parties in carrying out the terms of the contract. It is contended that according to the language of the clause the unenforceability of the contract by reason of the default of one of the parties is not confined merely to the defaulting party but applies to both the parties. On the other hand, it was contended on behalf of the plaintiff that the clause merely states the disability of the defaulting party who claims specific performance of the contract as laid down in section 24 (*b*) of the Specific Relief

* S. A. No. 869 of 1946. 9th July, 1948.

Act, and does not extend the disability to enforce the contract to the other party. It is also further urged that even assuming that the construction contended for on behalf of the appellant is correct, and the parties contemplated the contract to become void on a contingency under law, the party who brought about the default cannot take advantage of his own wrong and prevent the other party from claiming specific performance of it. In my opinion the contentions urged on behalf of the plaintiff-respondent ought to prevail. It is established law that notwithstanding that a sum if named in the contract as the amount to be paid in case of its breach, and even though the party in default is willing to pay the same, the other party is entitled to enforce specific performance of the contract. This rule was laid down in England very early by Lord Chancellor Hardwicke in *Howard* v. *Hopkyns.*[1] In that case the articles of the agreement between the plaintiff and the defendant contained a proviso that if either side should break the agreement he would pay £ 100 to the other. The defendant committed the breach, and the plaintiff sued for specific performance. The Lord Chancellor held that the insertion of penalties in an agreement was not to release the parties to the agreement from their duty to perform the obligation under the contract. This rule is enacted in the Specific Relief Act (section 20). It may therefore be taken that under the suit contract the mere existence of a clause to pay Rs. 100 as damages would not prevent the plaintiff from claiming specific performance.

The clause in the suit contract making the contract unenforceable is in addition to the payment of damages by the defaulting party. According to the clause, therefore, the defaulting party is not only to pay to the other party the sum of Rs. 100 as damages but also should be under the disability to enforce the contract. According to my view, on a plain reading of the clause, this is the natural and reasonable interpretation of it. This, as contended on behalf of the respondents, merely lays down the law as enacted in section 24 (*b*) of the Specific Relief Act. It is unreasonable to hold that the parties intended that by reason of the default of one party the other party also shoud be under a disability or disadvantage and become incapable of enforcing the rights under the contract. I do not for a moment suggest that it is not possible for the parties by appropriate words to enter into such contract; but in this case the parties had not entered into such contract.

Even assuming for a moment that the clause means that it is void and unenforceable at the instance of either of the parties, even then, in my opinion, the plaintiff is not precluded from enforcing this contract. As pointed out by Lord Atkinson in his speech in the decision in *Newzealand Shipping Co.* v. *Societe Des Ateliers Et Chantiers De France*[2] :

> " It is undoubtedly competent for the two parties to a contract to stipulate by a clause in it that the contract shall be void upon the happening of an event over which neither of the parties shall have any control, cannot bring about, prevent or retard. For instance, they may stipulate that if rain should fall on the 30th day after the date of the contract, the contract should be void. Then if rain did fall on that day the contract would be put an end to by this event, whether the parties so desire or not. Of course, they might during the currency of the contract rescind it and enter into a new one, or on its avoidance immediately enter into a new contract. But if the stipulation be that the contract shall be void on the happening of an event which one or either of them can by his own act or omission bring about, then the party, who by his own act or omission brings that event about, cannot be permitted either to insist upon the stipulation himself or to compel the other party, who is blameless, to insist upon it, because to permit the blameable party to do either would be to permit him to take advantage of his own wrong, in the one case directly, and in the other case indirectly in a roundabout way, but in either way putting an end to the contract."

This is exactly the situation here. The party in default wants to take advantage of her own wrong and prevent the plaintiff from enforcing the specific performance of the contract. On the principle of that decision I think the first defendant should not be permitted to take advantage of her own wrong and prevent the plaintiff from exercising his undoubted right under law.

My attention has been drawn to two decisions, one in *Radhakissen* v. *Sohanlal*[3] and the other in *Chunnilal Dayabhai and Co.* v. *Ahmedabad Fine Spinning and Weaving*

1. (1742) 2 Atk. 371 : 26 E.R. 624.
2. (1919) A.C. 1 at 9.
3. (1942) 47 C.W.N. 86.

Co., Ltd.[1]. It is unnecessary to consider these decisions as the language of the contracts which were considered in those cases are different from the language of the contract in this case. The decision in *Chunnilal Dayabhai and Co.* v. *The Ahmedabad Fine Spinning and Weaving Co., Ltd.*[1], follows the principle laid down in *Newzealand Shipping Co.* v. *Societe Des Ateliers Et Chantiers De France*[2].

For these reasons I am of opinion that the construction placed by the Courts below on the suit contract is correct. The second appeal fails and is dismissed with costs.

No leave.

K.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

A. Nalliappa Pillai and others .. *Petitioner**

v.

Palaniandi Ambalam .. *Respondent.*

Criminal Procedure Code (V of 1898), section 203—Dismissal of complaint under—Giving opportunity to complainant to show that police report is wrong—If obligatory—Duty of Magistrate.

In dismissing a complaint under section 203 of the Criminal Procedure Code, it is not obligatory upon the Magistrate before whom the complaint is made or to whom it has been transferred, to give an opportunity to the complainant to show that the report of the police enquiry is wrong. All that the Magistrate has to do is to consider the statement on oath if any of the complainant as well as the result of the investigation or enquiry under section 202 of the Criminal Procedure Code before he dismisses the complaint.

Maccarthy v. *Shannon,* (1927) 29 Crl.L.J. 48, not followed.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of Session of Ramnad at Madura dated 2nd April, 1947 in Crl. R. C. No. 5 of 1947, presented against the judgment of the Court of the Sub-Divisional First Class Magistrate, Devakottah in C. C. No. 218 of 1946.

A. V. Narayanaswami Aiyar for Petitioner.

K. Veeraswami and *N. Kasiviswanathan* for Respondent.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—When this revision petition came on for hearing on a previous occasion, I called for a report from the Sub-Divisional Magistrate whether the allegations contained in the affidavit filed in this Court were true or not. The report which has been received from the Sub-Divisional Magistrate to some extent supports the allegations contained in the affidavit.

The petitioners were accused before the Sub-Divisional Magistrate, Devakottah, and they were proceeded against under various sections of the Indian Penal Code for having cut open the bund of a tank and thereby caused loss to the crops of the complainant. The Sub-Divisional Magistrate, after sending the complaint to the police for enquiry and considering the police report, dismissed the complaint under section 203, Criminal Procedure Code. The complainant took the matter in revision and the learned Sessions Judge following a decision in *Maccarthy* v. *Shannon*[3], to the effect that before a complaint was rejected under section 203, Criminal Procedure Code, the complainant should have been given an opportunity to meet the reasons given by the police in their report under section 202 of the

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1. (1921) I.L.R. 46 Bom. 806. 2. (1919) A.C. 1.

* Crl. R. C. No. 584 of 1947. (Crl. R. P. No. 480 of 1947). 10th August, 1948.

3. (1927) 29 Crl.L.J. 48.

Criminal Procedure Code for not proceeding with the complaint, set aside the order of the Sub-Divisional Magistrate and directed the complaint to be disposed of according to law. He was of opinion that there was a duty cast upon the Court of enquiry to give an opportunity to the complainant to explain or meet the evidence recorded by the police during the investigation and that in this case such duty had not been discharged.

It is not obligatory upon the Magistrate before whom the complaint is made or to whom it has been transferred, to give an opportunity to the complainant to show that the report of the police enquiry is wrong. Section 203 does not impose such a duty. All that the Magistrate has to do is to consider the statement on oath if any of the complainant as well as the result of the investigation or enquiry under section 202 of the Criminal Procedure Code before he dismisses the complaint. Nowhere is it stated that a Magistrate who has referred a complaint for enquiry should, after receipt of the police report, give an opportunity to the complainant to adduce evidence to show that the report of the police is wrong or incorrect. If the view of the learned Sessions Judge is to be accepted, then it makes the provisions of section 203, Criminal Procedure Code, much wider than it is expressly stated.

In this case the Magistrate says that he went to the tank bund with a view to have some idea of the supply position in the tank and the condition of the crops in connection with proceedings that were pending before him under section 145 of the Criminal Procedure Code. He reports that his inspection of the tank did not reveal damage to the crops as stated in the complaint. Though the Magistrate did not specifically give an opportunity to the complainant to prove that the police report was wrong—which he is not bound to do—he told the complainant that the police report was against him and that the Magistrate's inspection of the tank did not reveal damage to the crops. The complainant had no satisfactory answer to give and the report also does not state that he did request the Court to give him an opportunity then and there to explain the findings contained in the police report. In view of the fact that the occurrence took place as long ago as the 12th December, 1946, and that the Sub-Divisional Magistrate discharged the accused under section 203, Criminal Procedure Code, I do not think it necessary to re-agitate the whole matter afresh. I therefore set aside the order of the learned Sessions Judge and confirm the order of discharge passed by the Sub-Divisional Magistrate.

K.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA SASTRY.

Thelepurath Madhavakurup .. *Appellant**

v.

K. Muhammad Sukri Sahib .. *Respondent.*

Madras Non-Residential Buildings Rent Control Order (as amended in 1944), section 8 (1)—Suit for ejectment instituted before the Order was amended—Decree passed after amendment—Execution of the decree—A substantive right—Right to execute the decree cannot be affected.

An *ex parte* decree in ejectment was obtained after the amendment of the Madras Non-Residential Buildings Rent Control Order came into force, though the suit itself was instituted long before the amendment came into force. In execution of the decree of the Court the property was delivered to the landlord, but on a subsequent application by the tenant re-delivery was ordered on the ground that under section 8 (1) of the amended Order a tenant could not be evicted. On the question whether the amended section is retrospective in operation,

Held, that the right of the landlord to obtain an executable decree and to take out execution proceedings and obtain delivery of possession from the tenant is not a mere matter of procedure and such a right could not be taken away by the amendment unless there is a clear indication expressly or by necessary intendment that the amended Order should apply so as to take away even existing rights of a substantive character. It is possible to give a meaning to the words " whether in execution

* A. A. A. O. No. 43 of 1946. 12th July, 1948.

of a decree or otherwise" in section 8 (1), without necessarily construing it as taking away the rights of parties in an action instituted before the amendment came into force.

Appeal against the appellate order of the Court of the Subordinate Judge of South Malabar at Calicut dated 3rd August, 1945, and made in A. S. No. 104 of 1945, preferred against the order of the Court of the District Munsiff of Calicut in E. P. No. 2986 of 1944 in O. S. No. 405 of 1943.

S. V. Venkatasubramaniam for Appellant.

S. R. Subramania Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—The appellant herein obtained a decree in ejectment against the respondent in respect of a shop belonging to the appellant which had been leased to the respondent. The suit in ejectment was filed in the District Munsiff's Court of Calicut some time in 1944. The precise date does not appear. During the pendency of the suit the Madras Non-Residential Buildings Rent Control Order was amended and the amended order came into force on the 11th July, 1944. An *ex parte* decree in ejectment was passed by the District Munsiff on the 8th September, 1944, and the property was delivered over to the appellant in execution proceedings on 15th September, 1944, but the execution application was not formally closed. Thereafter on 28th October, 1944, the respondent before me applied to the Court of the District Munsiff for re-delivery of the property and the same was ordered on 30th December, 1944. The District Munsiff held, upholding the contention of the respondent, that under section 8 (1) of the amended Non-Residential Building Rent Control Order, a tenant could not be evicted and accordingly held that the previous order directing delivery was wrong and the Court had jurisdiction to set aside that order and to order re-delivery as the execution petition had not been closed and the proceedings were still pending before the Court. The decree-holder took the matter in appeal to the Subordinate Judge of South Malabar at Calicut. The learned Subordinate Judge agreed with the view of the learned District Munsiff and held that section 8 (2) of the Control Order ousted the jurisdiction of the Civil Court to give delivery of the shop in spite of the fact that a decree for eviction had already been passed in respect of the same. The appeal was dismissed by him and this civil miscellaneous second appeal is against the said order.

It is contended before me for the appellant that, as the suit had been instituted prior to 11th July, 1944, the provisions of section 8, clauses (1) and (2) of the amended Control Order, which came into force on 11th July, 1944, should not be applied but that on the other hand the law to be administered is the law as it was in force when the suit was instituted. He relies on the decision of Mockett, J., in *Moothalandan Chetty* v. *Venkatesan Chetty*[1], where the learned Judge has pointed out that the rights of parties prior to the amended Control Order were altogether different and there have been substantive changes in the new Control Order from the previous law and these changes in favour of the tenant take away pre-existing rights in favour of the landlord. It was held by the learned Judge that there was no indication in the amended Control Order that the terms thereof should be construed to operate retrospectively so as to affect the rights of persons in pending litigation at the time when the amendment came into force. He overruled the contention that the new section 8 (1) and (2) merely affected the procedure of the Court and not any substantive rights of parties. He expressly dissented from the *obiter dictum* of Chandrasekhara Aiyar, J., in an earlier case which took a different view.

The question before me is whether section 8 (1) and (2) of the amended Control Order should be so construed as to have retrospective operation and affect the rights of parties in pending litigation. In the particular case before me the suit was instituted much earlier than 11th July, 1944, and the landlord had apparently a good title to get a decree in ejectment as there was nothing to indicate that the

1. (1945) 1 M.L.J. 441.

tenant had obtained any rights under the provisions of the previous Control Order then in force. No doubt the decree in ejectment was one passed after 11th July, 1944. If there had been no amendment in the interval, the landlord, who had a right to obtain an executable decree in ejectment when the suit was instituted could have taken out execution proceedings and obtained delivery of possession from the tenant in due course of execution of the decree which he had obtained in the suit. Such a right could not be a mere matter of procedure which could be taken away by the amended provisions of the new Order unless there is any clear indication that the amended Order should apply so as to take away even existing rights of a substantive character, rights which had accrued prior to the coming into force of the new amendment, and indeed, rights for the enforcement of which an action had been instituted in the Civil Court. Section 8 (1) no doubt is very wide in its terms and operates to prevent a tenant from being evicted,

> "Whether in execution of a decree or otherwise and whether before or after the termination of the tenancy."

The advocate for the respondent strenuously contends that these words are by themselves sufficient to indicate that the Legislature meant to take away pre-existing rights. He lays particular stress on the words "whether in execution of a decree or otherwise." It is however possible to give a meaning to these words without necessarily construing the section as taking away the rights of parties in an action instituted before the amendment came into force. It is possible to imagine cases where an action itself had been instituted after 11th July, 1944, and a decree obtained in the Civil Court. In such class of cases the decree in ejectment cannot be executed by the Civil Court but the landlord will have to make an application to the authorities under the Rent Control Order. It is not therefore as if the words "in execution of a decree" would become meaningless and inoperative unless the section were construed retrospectively. It must now be taken to be well settled that a decree in ejectment could be passed by a Civil Court and all that the Order provides is that during the subsistence of the Order, the Civil Court cannot execute the said decree but the landlord will have to take appropriate steps under the provisions of the Order. The Order itself is only for a short duration and if and when it is repealed or it expires without being renewed, the previous decree of the Civil Court will have to be executed by the Civil Court as in ordinary cases. If, therefore, it is possible to give a meaning and scope for operation for the words "in execution of a decree or otherwise" in section 8 (1) by confining it to cases where the decree is obtained in a suit instituted after 11th July, 1944, and if there is nothing else in the enactment to indicate that every pending legislation or pre-existing substantive rights of parties were intended to be affected by the amended Order, I must hold in accordance with the well-established rules of construction of statutes that the amended Control Order, section 8, clauses (1) and (2) has no application to the present execution petition and that the order for delivery originally made was right and proper. Reference may usefully be made in the discussion of the question as to how far statutes can be taken to have retrospective operation to the judgment in *The United Provinces* v. *Mst. Atiqa Begum*[1]. Sulaiman, J., points out that unless either expressly or by necessary intendment it is made out in the new legislation that it applies to pending proceedings as well, it ought not to be construed to have retrospective operation so as to affect the rights of parties in pending suits. Varadachariar, J., also refers to the same principle and explains the decision of the Judicial Committee in *K. C. Mukherjee* v. *Mst. Ram Ratan Kuer*[2]. In the result, this appeal is allowed with costs throughout.

Leave granted.

V. P. S. *Appeal allowed.*

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1. (1941) 1 M.L.J. Supp. 65 : (1940) F. C. R. 110 : 3 F.L J. 97.
2. (1935) 70 M.L.J. 195 : L.R. 63 I.A. 47 : I.L.R. 15 Pat. 268 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN.

Chava Lakshmidevamma .. *Petitioner**

v.

Chava Nagayya and others .. *Respondents.*

Civil Procedure Code (V of 1908), *Order* 1, *rule* 10—*Suit by Hindu widow against divided brothers of her husband asking for declaration that she had succeeded to her husband's property and injunction restraining defendants from causing her obstruction—Plea that son of one of the defendants had been adopted by plaintiff's husband and had title and possession—Addition of alleged adopted son as defendant—Legality.*

The plaintiff laid the suit in the first instance against her deceased husband's three brothers who were divided in status from her husband. She claimed that on the death of her husband she succeeded to her husband's properties and asked for a declaration of her title and injunction restraining the defendants from causing obstruction or hindrance to her. The defendants denied the plaintiff's allegations and the second defendant alleged that his son was the adopted son of the plaintiff's husband and that on the latter's death succeeded to and was in possession of his adoptive father's properties. The adopted son also applied to be impleaded as a party defendant to the suit and was added as a proper party. In revision,

Held: The lower Court was right in holding that the adopted son was a proper party whose "presence was necessary for the determination of the real matter in dispute" within the meaning of Order 1, rule 10 of the Civil Procedure Code. On the pleadings of the plaintiff and the original defendants both the issues of title and possession arose for determination and the Court had to decide whether the widow or the adopted son had title and possession. The right of the adopted son to be impleaded in the suit cannot be taken away merely on the ground that the plaintiff was *dominus litus* and did not seek as against such adopted son any relief or any adjudication of his rights.

Case-law discussed.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the District Munsiff of Guntur, dated the 20th December, 1946, and made in I.A. No. 3349 of 1946 in O.S. No. 796 of 1946.

B. V. Ramanarasu for Petitioner.

Konda Kotayya for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff-petitioner seeks to set aside in revision the order of the learned District Munsiff of Guntur directing under Order 1, rule 10 that the fourth defendant, who had applied therefor, be impleaded as a party defendant to the suit.

The plaintiff laid the suit in the first instance against the three defendants, her deceased husband's brothers. It was common ground that defendants 1 to 3 were divided in status from the plaintiff's husband. The plaintiff claimed that on the death of her husband she succeeded to her husband's properties. After averring in paragraph (5) of the plaint that the defendants threatened to interfere with her possession, and that it

"therefore became necessary to institute the suit for a declaration of the rights of the plaintiff in the suit property"

and for a permanent injunction restraining the defendants from interfering with the plaintiff, the plaintiff prayed for a decree

(*a*) "declaring that the plaintiff has got rights of a Hindu widow in the suit property" and (*b*) "for a permanent injunction restraining the defendants and their persons from causing obstruction or hindrance to the plaintiff and her persons."

The defendants denied that the plaintiff was entitled to succeed to her husband's properties, and that she was in possession of those properties. One of the pleas advanced was *jus tertii*. The second defendant alleged that his son, subsequently impleaded as the fourth defendant, was the adopted son of the plaintiff's husband, and that on the latter's death the adopted son succeeded to and was in possession

* C. R. P. No. 117 of 1947. 16th July, 1948.

of his adoptive father's properties. At the same time, that is, even before the stage of settlement of issues was reached, the fourth defendant applied to be impleaded as a party defendant to the suit.

It was not the case of any one that the fourth defendant was a necessary party to the suit as laid by the plaintiff within the meaning of Order 1, rule 10. Though there was no specific finding to that effect in the order of the learned District Munsiff, it should be obvious that it was on the ground that the fourth defendant was a proper party that the learned District Munsiff ordered that the fourth defendant be added as a party defendant. The summary of the pleadings set out above should by itself suffice to uphold that implied finding of the learned District Munsiff. Since, however, the petition was argued at considerable length by both parties I shall deal with the contentions advanced during arguments.

That this Court has jurisdiction to set aside under section 115, Civil Procedure Code, erroneous orders passed by a subordinate Court under Order 1, rule 10 is well settled and needs no authority. The petitioner's advocate referred to *Pandit Rup Chand* v. *Fateh Chand*[1], but that, however, dealt with the addition of a party who, the Court found, was neither a necessary nor a proper party. In *Subramania* v. *Anantakrishnaswami*[2], the suit was one in ejectment filed on the basis of a lease deed. Ananthakrishna Aiyar, J., held that persons claiming adverse rights to the plaintiff's title should not be made parties in the absence of any special circumstances. That has no direct application to the facts in issue in the present case.

Subbaiya Pandaram v. *Mohammad Musthappa Maracayar*[3] has no direct application either. It was held in that case that a person in possession without a title had the right to maintain his possession against all the world except the rightful owner, and that to such a suit proof by the defendant that the real title was outstanding in a third party was no defence. The suit as laid by the plaintiff-petitioner in this case was specifically for a declaration of a title to the suit properties and for the consequential relief of a permanent injunction. That title of the plaintiff to the suit properties was directly and substantially in issue. I am unable to see any real substance in the contention of the learned advocate for the petitioner that the real relief claimed in the suit was the injunction, and that the determination of the question of title was subsidiary to the grant of the main relief of injunction. The question of title was put directly in issue on the pleadings of the plaintiff and the defendants whom she originally impleaded.

It was mainly on the observations of Srinivasa Ayyangar, J., in *Sri Mahant Prayaga Doss* v. *Board of Commissioners for Hindu Religious Endowments, Madras*[4], that the learned advocate for the petitioner relied in support of his contention that the lower Court had no jurisdiction at all to implead the fourth defendant in the suit. The respondents' advocate pointed out that in the *Secretary of State* v. *Murugesa Mudaliar*[5], Venkatasubba Rao, J., doubted the correctness of the principles laid down by Srinivasa Ayyangar, J., in *Sri Mahant Prayaga Doss* v. *Board of Commissioners for Hindu Religious Endowments, Madras*[4]. Whether there was a real conflict between these two decisions can be but of academic interest now in view of the observations of Gwyer, C.J., in *The United Provinces* v. *Mst. Atiqa Begum*[6]. At page 71 Gwyer, C.J., observed :

"It is not clear to me that Srinivasa Ayyangar, J., would have come to a conclusion contrary to that of his brother Judge, if the later case—(*Secretary of State* v. *Murugesa Mudaliar*[5]) had come before him ; for different principles appear to be involved in the two cases. The question of the validity of the Act could certainly have been decided in the absence of the Secretary of State in the first case, though it might have been convenient to have him represented before the Court. In the second case it was in effect the action of the Government itself of which the plaintiff complained. But it is obvious that in the later case a wider view was taken of the powers conferred by Order 1, rule 10, and stress was laid rather upon the words 'effectually and completely to adjudicate upon

1. (1910) 6 I.C. 36.
2. A.I.R. 1932 Mad. 688.
3. (1916) 32 M.L.J. 85.
4. (1926) 51 M.L.J. 148 : I.L.R. 50 Mad. 34.
5. A.I.R. 1929 Mad. 443.
6. (1941) 1 M.L.J. (Supp.) 65 : 3 F.L.J. 97 : (1940) F.C.R. 110.

and settle all the questions involved in the suit' than upon the words 'necessary to enable the Court' which preceded them."

In view of these observations of Gwyer, C.J., I do not think it is necessary to consider in detail the other cases in which the learned Judges of this Court from time to time approved of the principles laid down by Venkatasubba Rao, J., in *Secretary of State* v. *Murugesa Mudaliar*[1]. See *Sivarama Pillai* v. *Ganesaiathnam Pillai*[2], *Anjaneya Sastri* v. *Kothandapani*[3], *Vanjiappa Goundan* v. *Annamalai Chettiar*[4] and *Mangacharyulu* v. *Balarama Krishnamacharyulu*[5]. There is only one observation that I need make at this stage. There was no real question of *jus tertii* as such in *Sri Mahant Prayaga Doss* v. *Board of Commissioners for Hindu Religious Endowments, Madras*[6], no right as such of the Secretary of State was in jeopardy in that litigation. *Krishnaswami Naidu* v. *Municipal Council, Bellary*[7], dealt with the addition of a party considered to be a necessary party within the meaning of Order 1, rule 10.

To reiterate, the very summary of the pleadings in the present suit, wherein the issue of the plaintiff's title to and possession of the suit properties was raised showed that the question of possession was closely linked up with that of title, and that both the issues of title and possession arose for determination. The defendants pleaded that the plaintiff had no title to and was not in possession of the suit properties, and that the fourth defendant was the person who had both title and possession. The Court, even without impleading the fourth defendant, could not possibly avoid a decision of the questions, whether it was the plaintiff or the fourth defendant that had title to the properties, and whether it was the plaintiff or the fourth defendant that was in possession of the properties. No doubt the plaintiff was *dominus litus*. In the plaint as she framed it no question of adoption could arise for determination. It may be that the fourth defendant has secured a cheap remedy in having his status as adopted son litigated in this suit filed by the plaintiff; but if he has a legal right to do it, that right cannot be taken away merely on the ground that the plaintiff was *dominus litus* and did not seek as against the fourth defendant any relief or any adjudication of the rights of the fourth defendant. On the pleadings of the plaintiff and defendants 1 to 3 themselves the Court was right in holding that the fourth defendant was a proper party whose "presence was necessary for the determination of the real matter in dispute" within the meaning of Order 1, rule 10.

Even were the question only whether the learned District Munsiff exercised his discretion rightly in directing the addition of the fourth defendant—and that should be considered quite independent of the question of jurisdiction—there should be no occasion at all in the circumstances of this case to interfere in revision with the discretion exercised by him.

In the circumstances of this case the lower Court was right in ordering that the fourth defendant be impleaded as party defendant. The petition fails and is dismissed with costs.

K.S. *Petition dismissed.*

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1. A.I.R. 1929 Mad. 443.
2. A.I.R. 1935 Mad. 353.
3. A.I.R. 1936 Mad. 449.
4. (1939) 2 M.L.J. 551.
5. (1939) 2 M.L.J. 872.
6. (1926) 51 M.L.J. 148 : I.L.R. 50 Mad. 34.
7. (1937) 1 M.L.J. 597.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO.

Koduri Krishnamma .. *Petitioner**

v.

Koduri Chennayya and another .. *Respondents.*

Arbitration Act (X of 1940), section 17 and Civil Procedure Code (V of 1908), section 115—Passing of decree on award before period allowed for filing objections thereto had expired—Illegal exercise of jurisdiction—Proper remedy of aggrieved party.

Where a decree was passed on an award before the expiry of the period of 30 days from the date of the service of the filing of the award allowed for filing objections thereto, on a question as to the proper remedy of the aggrieved party,

Held: The order passed was one without jurisdiction and in such a case an appeal does not lie and the only remedy of the aggrieved party is an application under section 115, Civil Procedure Code.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the decree of the Court of the District Munsiff of Tanuku, dated 12th July, 1947 and passed in I.A. No. 536 of 1947 in O.S. No. 421 of 1946.

T. Satyanarayana for Petitioner.

K. Umamaheswaram for Respondents.

The Court delivered the following

JUDGMENT.—The defendant has filed this application to revise the decree of the District Munsiff of Tanuku which was passed on the basis of an award. After the issues in the suit were framed the matter in difference between the parties to the suit was referred to arbitration. The arbitrators were directed to file the award by 10th July, 1947. An award was filed into Court on the 10th July, 1947. On that day the District Munsiff passed an order " Award filed ; objections, if any, 12th July, 1947." As no objections were filed on 12th July, 1947, a decree in terms of the award was passed on that day.

In this revision petition, the main point urged on behalf of the petitioner is that the learned District Munsiff acted illegally in the exercise of his jurisdiction in not giving 30 days time for filing objections to the award from the date of service of notice of the award as provided by the amended Article 158 of the Indian Limitation Act. As the question whether the District Munsiff failed to give 30 days time or whether the defendant waived his right to file objections was in controversy between the parties, I called for a report from the learned District Munsiff. His report shows that after the award was filed into Court on 10th July, 1947, only two days time was granted and on 12th July, 1947, as no objections were filed by either party, the suit was decreed in terms of the award. There is no truth in the contention of the respondent that the defendant waived his right to file objections and that therefore the decree in terms of the award was passed. As the learned District Munsiff acted illegally in the exercise of his jurisdiction in not observing the rule regarding the time for filing of objections, it is a case in which the order of the learned District Munsiff should be set aside and the matter remanded for disposal according to law.

On behalf of the respondents, however, an objection was taken that the proper remedy of the defendant was to file an appeal against the decree and not a civil revision petition under section 115 of the Civil Procedure Code. It is not contended by the respondents that this is a matter in which a right of appeal is provided specifically by section 39 of the Arbitration Act, 1940. The contention urged is that against the decree an appeal lies as the decree is an illegal decree and not a decree in accordance with law. Section 17 of the Arbitration Act, 1940, says :

" Where the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration or to set aside the award, the Court shall, after the time for making an application to set aside the award has expired, or such application having been made, after refusing it, proceed

* C.R.P. No. 1506 of 1947. 20th April, 1948.

to pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except on the ground that it is in excess of, or not otherwise in accordance with, the award."

This section, word for word, is a reproduction of paragraph 16 of Schedule II of the Civil Procedure Code, since repealed. Under that section it was held by the Allahabad High Court in *Najmuddin Ahmed* v. *Albert Puech*[1] that an appeal would lie from a decree passed in accordance with an award if such decree was passed without allowing to the parties the time prescribed by law for filing objections to the award. The provision corresponding to paragraph 16 of Schedule II of the Civil Procedure Code of 1908 then in force was section 522 of the old Code which was also similar in language. The learned Judges construed the prohibition that " no appeal shall lie when the decree is passed in accordance with the award " contained in that section as applicable only to a case where the decree was a legal decree and not a decree which was passed ignoring the rule prescribing the time for filing objections to the award. As the decree was not a legal decree, it was held that it was open to the parties aggrieved by the action of the Court to file an appeal. Of course, from the language of the section it seems to me clear that save in two exceptional cases namely, where the decree is in excess of or is not otherwise in accordance with the award; no appeal shall lie from any decree. The word " decree" there may mean a legal or an illegal decree. I see no basis in the language of either section 17 of the Arbitration Act or the corresponding provisions under the previous Codes for any such distinction. The learned Judges of the Allahabad High Court, however, relied on the decision of the Privy Council in *Maharajah Joymungul Singh Bahadoor* v. *Mohun Ram Marwaree*[2], in support of their conclusion. In my opinion, however, that decision does not warrant the conclusion drawn by the learned Judges of the Allahabad High Court. In that case there was a decree passed on the basis of an award, but the award was signed by the arbitrators separately and the ten days time for filing objections was not granted. All the same a decree in terms of the award was passed. The matter was taken in appeal to the High Court and the High Court remanded the matter for further consideration. With reference to the procedure adopted by the High Court, their Lordships of the Judicial Committee observed :

" From that decree there was an appeal to the High Court, and the decree was set aside, and properly set aside, by the High Court, apparently on two grounds : the first was that the Judge had proceeded irregularly, inasmuch as he had passed his decree without allowing the parties the ten days for bringing in objections to an award which the Code of Procedure allows them."[2]

In this passage, there was no consideration of the question whether the appeal was properly entertained in view of the language of section 325 of the Code of 1859, where the language was that " in every case in which judgment shall be given according to the award, the judgment shall be final." As early as *Monji Premji Set* v. *Maliyakel Koyassan Koy Haji*[3], this Court held that where the time for filing objections was given by the Court and a decree in terms of the award was passed, no appeal lay from the decree. It was pointed out in that judgment that except in the cases mentioned in the Act, *i.e.*, where the decree is in excess of or is not otherwise is accordance with the award, there was no appeal from the decree which was passed in terms of the award. The same view was taken by Wallis, J. (as he then was) sitting as a single Judge in the case in *Velu Pillai* v. *Appasami Pandaram*[4]. There also a decree was passed in terms of the award before the time for filing objections had expired. This Court set aside the decree under section 115 of the Civil Procedure Code. In *Sooraparaju* v. *Narayanaraju*[5], a Bench consisting of Benson C.J. and Napier, J., considered *Monji Premji Set* v. *Maliyakel Koyassan Koy, Haji*[3] and *Najmuddin Ahmed* v. *Albert Puech*[1] and held that it was doubtful whether an appeal lies and interfered in revision and set aside a decree passed on the basis of an award before the expiry of the period of ten days allowed by law for filing

1. (1907) I.L.R. 29 All. 584.
2. (1875) 23 W.R. 429 (P.C.).
3. (1880) I.L.R. 3 Mad. 59.
4. (1910) 21 M.L.J. 444.
5. (1912) M.W.N. 1232.

objections. Very recently Horwill, J., also took the same view in *Venkataramayya* v. *Papayya*[1]. It is clear therefore that from *Monji Premji Set* v. *Maliyakel Koyassan Koy Haji*[2] onwards, this Court has consistently taken the view that in such a case as this, an appeal does not lie and the only remedy of the aggrieved party was an application under section 115 and it was also further held that where a decree was passed before the period fixed for filing objections had expired it was an illegal exercise of jurisdiction. I therefore overrule the objection that the civil revision petition is incompetent.

The result is that this civil revision petition is allowed, the decree of the learned District Munsiff is set aside and the matter is remanded to the lower Court for disposal according to law. Costs of this civil revision petition will follow and abide the result.

V.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

Sivagaminatha Pillai .. *Petitioner**

v.

S. A. Venkitaswami Naicker .. *Respondent.*

Civil Procedure Code (V of 1908), Order 23, rule 1 (2) —Appreciable portion of evidence adduced found insufficient to establish the case propounded in plaint—Leave to institute fresh suit on same cause of action—If can be granted.

Where after an appreciable portion of the material evidence has been adduced the plaintiff finds that the evidence is insufficient to establish the case propounded by him in the plaint it will be contrary to the letter as well as the spirit of sub-rule (2) of order 23, rule 1 of the Code of Civil Procedure to permit the plaintiff to institute a fresh suit on the same cause of action.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the District Munsiff of Tuticorin dated 27th June, 1946, in I.A. No. 383 of 1946 in O.S. No. 71 of 1945.

U. Somasundaram for Petitioner,

C. S. Rajappa for Respondent.

The Court delivered the following

JUDGMENT.—I have no doubt that the order of the learned District Munsiff granting leave to the plaintiff to institute a fresh suit for the same subject matter is incorrect. It is not necessary to go into the question whether the expression " other sufficient grounds " in sub-rule (2) (b) of rule 1 of Order 23 is *ejusdem generis* with the expression " some formal defect " in sub-rule (2) (*a*). This is a case where an appreciable portion of the material evidence was adduced and the plaintiff found that the evidence was insufficient to establish the case propounded by him in the plaint. To permit the plaintiff in these circumstances to institute a fresh suit on the same subject matter would be contrary to the letter as well as the spirit of sub-rule (2). The revision petition is allowed with costs and the order of the District Munsiff granting leave is reversed. O.S. No. 71 of 1945 will be restored by the District Munsiff to his file and proceeded with from the stage at which it was discontinued on granting leave. The costs deposited by the respondent-plaintiff in the lower Court as a condition precedent to the order granting leave may be refunded to the plaintiff if it is in Court. If it has been paid over to the defendant, it should be called in and paid to the plaintiff.

K.S, *Petition allowed,*

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1. (1943) 2 M.L.J. 152. 2. (1880) I.L.R. 3 Mad. 59.

*C.R.P. No. 1270 of 1946. 22nd April, 1948.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN.

T. A. Janakumara Nainar .. *Appellant**

v.

Periaswamy Goundan and others . *Respondents.*

Time for complying with orders of Court—Final extension to a particular date—Dismissal on that date for non-compliance with the order of Court—Legality.

In an execution application filed on 24th September, 1945, which was in time allowed by law, time for compliance with the orders of Court was extended periodically and on an application for a further extension of time on 31st October, 1945, the Court passed the following order " Time extended finally 2nd November, 1945." and dismissed it on 2nd November, 1945, when its orders were not complied with. On appeal

Held : The Court had no jurisdiction at all to dismiss the application on 2nd November, 1945 itself for non-compliance with its order.

Appeal against the appellate order of the District Court of North Arcot at Vellore dated 31st July, 1946, in A.S. No. 497 of 1945 preferred against the order of the Court of the District Munsiff, Ranipet, in E.P. No. 40 of 1945 in O.S. No. 192 of 1931, District Munsiff Court, Tiruvettipuram.

D. Ramaswami Aiyangar for Appellant.

A. Narasimhachariar for Respondents.

The Court delivered the following

JUDGMENT.—E.P. No. 40 of 1945, which the appellant decree-holder filed, was the last he could file within the period of 12 years the law allowed him. The application was filed on the 24th September 1945. The appellant was directed to furnish the sale papers. Time was extended periodically, and on the 31st October, 1945, he applied for a further three weeks. The order of the Court ran,

" Time extended finally 2nd November, 1945."

The sale papers were not filed on the 2nd November, 1945, and on that day the learned District Munsiff dismissed the application for execution. That order was confirmed on appeal to the learned District Judge of North Arcot.

The main contention in second appeal was not one that was presented for the consideration of either the trial Court or the lower appellate Court. The learned advocate for the appellant contended, that, as the learned District Munsiff had granted to the decree-holder on his application dated the 31st October, 1945, time till the 2nd November, 1945, to file the sale papers, independently of any question, whether the appellant could comply with the orders of the Court for the production of the sale papers, or even whether he intended to comply with those orders, the order of dismissal passed on the 2nd November, 1945, was one without jurisdiction. He relied on *Perumal Nadan* v. *Swananji Nadachi*[1], *Muthu Chettiar* v. *Narayanan Chettiar*[2], and *Chinniah Chettiar* v. *T. Kumaraswamiah*[3]. In *Muthu Chettiar's case*[2], on the facts it was clear that the application was dismissed in the forenoon when there were still many hours of the usual Court hours left on the day fixed for compliance with the orders of the Court. The facts have not been set out in full in *Chinniah Chettiar's case*[3]. In *Perumal Nadan's case*[1], the earliest of these, Oldfield and Seshagiri Aiyar, JJ., after pointing out that time for performance was granted till the 3rd December, 1912, observed,

" The learned Subordinate Judge therefore had no jurisdiction to pass his order of dismissal before 4th December, 1912."

That was obviously to give effect to the principle, reiterated in these decisions that, when the Court fixes a date for the fulfilment of a certain condition, the person

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*A.A.A.O. No. 320 of 1946. 23rd July, 1948.

1. (1915) I.L.R. 39 Mad. 583.
2. (1927) 55 M.L.J. 274 : I.L.R. 51 Mad. 672.
3. (1933) M.W.N. 88.

on whom that obligation is imposed will have the whole of that day for complying with the orders. Whether the whole of the " day " should be limited to the normal Court hours of the day or to the whole of the calendar day does not appear to have been specifically raised or decided in any of these cases ; but I do not think that question need be discussed now in view of the implied decision in *Perumal Nadan* v. *Swananji Nadachi*[1] Oldfield, J. was definitely of opinion that at no time on the last of the dates fixed for compliance with an order of the Court could that Court have any jurisdiction to dismiss the application for default.

The learned advocate for the respondents pointed out that the order of the learned District Munsiff in this case " Time extended finally 2nd November, 1945 " should be virtually construed to mean that time was extended finally till the 1st November, 1945. No doubt the word " till " was not used before " 2nd November 1945." That on prior occasions when this very execution petition came up for orders before the same learned District Munsiff, applications for further extension of time were made on the last of the dates appointed for the production of the sale papers is certainly not enough to construe the order of the 31st October, 1945, to mean that when the Court fixed the 2nd November, 1945, it meant that time was granted only till the 1st November, 1945, that is, upto and inclusive of the 1st November, 1945. The only reasonable interpretation of the order dated the 31st October, 1945 appears to me to be that time was granted till the 2nd November, 1945. In that case the contention of the learned advocate for the appellant, that the Court had no jurisdiction at all to dismiss the application on the 2nd November, 1945, itself for non-compliance with the orders of the Court, must prevail.

The orders of the lower Court and that of the lower appellate Court are set aside, and the execution petition is remanded for disposal afresh according to law. Costs upto this date of these proceedings will be costs in the cause and will abide the final result of the execution petition.

K.C. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

Mudigonda Veerabhadraiah .. *Appellant**

v.

Lavu Seshiah .. *Respondent.*

Limitation Act (IX of 1908), Article 182 (5)—" Final Order "—Order dismissing unnumbered execution petition which had been returned but re-presented after the time allowed for carrying out certain requirements—If final order.

In an execution petition there was a mistake regarding the amount realised by way of rateables under a prior execution petition. The office returned the execution petition for necessary amendments and also to comply with certain requisitions. On 14th February, 1938, there was a return by the Court fixing seven days' time to comply with the requirements of the office. The petition was re-presented on the 1st March, 1938, beyond the time allowed for re-presenting it. No application to excuse the delay in re-presentation however was filed. The unnumbered execution petition was dismissed on 5th March, 1938, by the order " Not amended. Dismissed." The next execution petition (also unnumbered) was filed on 28th February, 1941, with a prayer similar to the one contained in the prior execution petition. That execution petition was returned from time to time for producing the copy of an order in insolvency. On 17th March, 1941, it was re-presented with the endorsement " I pray that time for ten days may be granted for filing the copy of the insolvency order." It was again returned by the office with the endorsement " Petition for the relief sought for to be filed. Notice three days." Finally it was re-presented on 26th March, 1941, with the endorsement " I applied for a copy of the insolvency petition. Therefore I pray that time for one week may be granted.". The petition was rejected on 29th March, 1941, with the endorsement " Petition called for not filed. Rejected." In a fresh execution petition filed within three years of that order,

Held : That the orders on the prior unnumbered petitions were " final orders " within the meaning of Article 182 (5) of the Limitation Act and an execution petition filed within three years of

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1. (1915) I.L.R. 39 Mad. 583.

*A.A.A.O. No. 299 of 1945. 31st March, 1948.

such order will be in time. Even assuming that the orders of dismissal were made wrongly, (on the ground that the petitions had no legal existence) nevertheless, the orders remained alive and effective unless and until they were set aside by means of a proper procedure. The propriety of such orders cannot be canvassed in a subsequent proceeding.

Khadir Sahib v *Visuanatha Iyer*, (1942) 2 M L J. 768 : I.L.R. 1943 Mad. 357 distinguished.

Muthu Venkatasubba Reddiar v. *Thangavel Chetti*, (1948) 1 M.L.J. 327 applied.

Appeal against the order of the Court of the Subordinate Judge, Bapatla, dated 25th January, 1945, in Appeal No. 66 of 1944 preferred against the order of the Court of the District Munsiff of Bapatla in E.P. No. nil in O.S. No. 583 of 1933.

V. Subramaniam for Appellant.

V. Suryanarayana for Respondent.

The Court delivered the following

JUDGMENT.—This civil miscellaneous second appeal arises out of the execution proceedings of the decree in O.S. No. 583 of 1933 on the file of the District Munsiff's Court, Bapatla. The execution petition No. nil in O.S. No. 583 of 1933 was dismissed on the ground that it was barred by limitation. The point for determination in this civil miscellaneous second appeal is whether the order dismissing the execution petition on the ground of limitation is correct.

The decree in question was passed on 15th February, 1934. On 24th February, 1934, E.P. No. 190 of 1934 was filed and it was struck off on 10th April, 1934. The next execution petition No. 218 of 1935 was filed on 17th January, 1935, for rateables and on 15th November, 1935 rateables were allowed and part satisfaction of the decree was entered. The third execution petition was filed on 26th January, 1938, in which the prayer was that the second defendant should be added as the legal representative of the deceased first defendant in the suit, that notice might be issued under Order 21, rule 22 of the Civil Procedure Code and moveable property attached under Order 21, rule 43. There was a mistake in that execution petition regarding the amount realised by way of rateables under the prior execution petition. The office returned the execution petition for necessary amendments and also to comply with certain requisitions. On the 14th February, 1938, there was a return by the Court fixing seven days' time to comply with the requirements of the office. The petition was re-presented on the 1st March, 1938, that is, beyond the time allowed for re-presenting it. No application to excuse the delay in re-presentation however was filed. That execution petition was dismissed on 5th March, 1938, by the order "Not amended. Dismissed." The fourth execution petition which was also unnumbered was filed on 28th February, 1941, with a prayer similar to the one contained in the prior execution petition. That execution petition was returned from time to time for producing the copy of an order in insolvency. On 13th March, 1941 the endorsement on the petition was

"Copy of insolvency order to be filed. Notice 7 days."

On the 17th March, 1941, it was re-presented within the time with the endorsement,

"I pray that time for ten days may be granted for filing the copy of the insolvency order."

It was again returned by the office with the endorsement

"Petition for the relief sought for to be filed. Notice three days."

Finally it was re-presented on 26th March, 1941, with the endorsement,

"I applied for a copy of the insolvency petition. Therefore I pray that time for one week may be granted."

The petition was rejected on 29th March, 1941, with the endorsement "Petition called for not filed. Rejected." The present execution petition was filed on the 12th March, 1943, *i.e.* within three years from the date of the order on the last execution petition. There is no dispute that the present execution petition would be in time if the orders on the two unnumbered petitions are final orders.

The short question therefore is whether the order dated 5th March, 1938, on the execution petition of 1938, and the order dated the 29th March, 1941, on the unnumbered execution petition of 1941 are "final orders" within the meaning of of Article 182, clause 5 of the Indian Limitation Act. The Courts below following the decision in *Khadir Sahib* v. *Viswanatha Iyer*[1], held that as there were no petitions to excuse the delay and in fact the delay was not excused the two execution petitions had no legal existence and therefore the orders could not be treated as final orders. This decision in *Khadir Sahib* v. *Viswanatha Iyer*[1], was recently considered in a case which is somewhat analogous to the facts of the present case by Gentle, C.J., and myself in A. A. O. No. 651 of 1945, *Muthu Venkatasubba Reddiar* v. *Thangavel Chetti*[2]. In that case we pointed out after examining the facts in *Khadir Sahib* v. *Viswanatha Iyer*[1] :

"In that case there was an order refusing to excuse the delay occasioned in the 1933 petition, but such order was passed in an application made in the 1937 petition and not in the 1933 petition; upon that application being refused it was then that the 1933 petition was rejected. The judgment in *Syed Gulam Khadir Sahib case*[1], was with respect to the particular facts therein arising, which are not the same as in the present instance."

With reference to a contention similar to the one raised in the present case in the Courts below and before me we observed that,

"Mr. Panchapagesa Sastry's argument is a challenge to the correctness and validity of the order of dismissal, his contention being that, while it purports to be a final order, since the execution petition was not re-presented within the period limited, it should follow that thereafter the petition had not legal existence and in respect of it an order of dismissal could not properly be made and therefore the petition could not have been "dismissed." That argument, in effect, is similar to an endeavour to go behind a decree of Court and to contend that the decree is invald although it has never been set aside. Even assuming that the order of dismissal was made wrongly, nevertheless, it was an order and it remains alive and effective unless and until it is set aside by means of a proper procedure which has not taken place in the present instance."

In the present case in the light of this decision it is not seriously challenged before me that the order dated 5th March, 1938, on the first unnumbered execution petition of 1938 is not a final order. The contention, however, strongly urged on behalf of the respondent by Mr. Suryanarayana is that it cannot be said that the order dated 29th March, 1941, on the unnumbered execution petition of 1941 is a final order. There was no petition to excuse delay and the ground for rejecting the execution petition was that the petition called for was not filed. There are two answers to this contention. Firstly, I understand the order to mean that the petition was rejected because the insolvency petition which was called for and was directed to be produced was not filed. Assuming, however, that that order refers to the petition to excuse delay even then I think that whatever may be the ground on which the execution petition was dismissed it does not matter and the order on that petition is a final order as it finally disposes of the proceeding in that execution petition. The reasons given by the Court may be sound or unsound but if the effect of the order on that petition is to terminate the proceedings so far as that Court is concerned that order is a final order unless it is set aside by appropriate proceedings. The propriety of that order cannot be canvassed in a subsequent proceeding. In my opinion, therefore, the principle enunciated in the unreported decision in A. A. O. No. 651 of 1945, *Muthu Venkatasubba Reddiar* v. *Thangavel Chetti*[2] exactly applies to the facts of the present case. The result is that this Civil miscellaneous second appeal is allowed. The orders of the Courts below are vacated and the execution petition is restored and remanded to file of the learned District Munsiff of Bapatla who will proceed with it and dispose it of according to law. The appellant is entitled to costs in all the Courts.

Leave refused.

K.S. *Appeal allowed.*

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1. (1942) 2 M.L.J. 768 : I.L.R. 1943 Mad. 357.
2. (Since reported) (1948) 1 M.L.J. 327.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN.

Pedapudi Nookaratnam .. *Appellant**

v.

Pedapudi Venkata Suryanarayana .. *Respondent.*

Civil Procedure Code (V of 1908), Order 21, rule 32—Decree for restitution of conjugal rights—Refusal of judgment-debtor (wife) to live with the decree-holder (husband) expressed in unequivocal terms—If " wilful "—Right to execute—Discretion of execution Court to refuse execution.

It cannot be said that the expression " wilfully" in Order 21, rule 32 of the Code of Civil Procedure should be construed as " unreasonable." The refusal of the judgment-debtor (wife) to live with the (husband) decree-holder expressed in unequivocal terms is " wilful " within the meaning of Order 21, rule 32 and the right of the decree-holder to execute the decree in the manner provided for by the rule cannot be denied. But the use of the expression " may " in the rule vests the executing Court with a discretion.

Appeal against the order of the Court of Subordinate Judge of Cocanada in A.S. No. 42 of 1946, preferred against the order of the District Munsiff of Cocanada in E.P. No. 546 of 1945 in O.S. No. 347 of 1942.

M.S. Varadacharya for Appellant.

K. Bhimasankaram for Respondent.

The Court delivered the following

JUDGMENT.—Neither the decree under execution nor the application for its execution prior to E.P. No. 546 of 1945 are before me, and I have to gather the contents of these documents from what has been set out in the judgment of the lower appellate Court.

The operative portion of the decree in the suit filed by the plaintiff-respondent-decree-holder against his wife for restitution of conjugal rights was apparently :

" The Court having directed (by an order dated 12th March, 1943), the plaintiff to give an undertaking within tree days that he should reside with his wife, the third defendant, away from his parents for about a month, failing which the suit will stand dismissed with costs and further holding that if the plaintiff gives the undertaking, there will be a decree in favour of the plaintiff for restitution of conjugal rights . . . The plaintiff having given the necessary undertaking on this date, the Court doth order and decree that the third defendant do go to the plaintiff and render conjugal duties, that in case the third defendant, does not go and render such rights, the plaintiff do take the necessary process through Court to get the third defendant to his house for securing conjugal rights and to live with him etc."

The wife was a minor when E.P. No. 255 of 1943 and E.P. No. 92 of 1944 were filed, where the prayer was for the attachmet of the moveables of her father. Those applications were dismissed. After the wife, the judgment-debtor, became *sui juris*. E.P. No. 546 of 1945 was filed with prayers in the alternative (1) for restitution of conjugal rights ; and (2) on the failure of the judgment-debtor to comply with the terms of the decree, to attach her moveables.

The learned District Munsiff to whom the application for execution was made dismissed the application. On appeal the learned Subordinate Judge directed execution to proceed by attachment of the wife's, judgment-debtor's, moveables.

Order 21, rule 32, Civil Procedure Code, lays down :—

" Where the party against whom a decree.. . . for restitution of conjugal rights. . . . has been passed has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced in the case of a decree for restitution of conjugal rights by the attachment of his property. . "

There can certainly be no doubt about the fact, that the only occasion, when, by way of an application for execution of the decree, an opportunity was offered to the judgment-debtor herself to obey the decree, was when E.P. No. 546 of 1945 was filed. To reiterate, the judgment-debtor was a minor before the date of E.P. No. 546 of 1945. Nor can there be any doubt about the fact, that she failed

*A.A.A.O. No. 308 of 1946. 23rd July, 1948.

to obey the decree after E.P. No. 546 of 1945 was filed. Incidentally, at no time after the decree was passed, did the wife live with the husband either in compliance with the decree or independently of it. The refusal of the judgment-debtor now to live with her husband, expressed in unequivocal terms, seems to me to be "wilful" within the meaning of Order 21, rule 32, Civil Procedure Code. Therefore the right of the decree-holder to ask to execute the decree in the manner provided for by Order 21, rule 32, Civil Procedure Code, cannot be denied. I am unable to accept the contention of the learned advocate for the appellant, that the expression "wilfully" should be construed as "unreasonable."

I am, however, of opinion that the trial Court was right in refusing execution. I accept the contention of the learned advocate for the appellant, that the use of the expression "may" in Order 21, rule 32, Civil Procedure Code, vests the executing Court with a discretion. It is unnecessary to point out that the decree under execution is a decree for restitution of conjugal rights. Of course the discretion has to be exercised in a judicial manner. In the present case the judgment-debtor being a woman, after she wilfully refused to obey the decree, the only method of execution the appellant could ask for was by attachment of her moveables. It does not necessarily follow that in every such case of wilful disobedience the Court is bound to levy execution by attachment of the defaulting party's moveables.

The learned District Munsiff in paragraph 4 of his order observed :

"I find that, as the wife refused to live with her husband on the grounds mentioned, this petition need not be ordered. Hence this petition is dismissed."

The learned District Munsiff, it should be remembered, was dealing not merely with an application for restitution of conjugal rights, but also with an application in the alternative for the attachment of the moveables in case the judgment-debtor defaulted compliance with the decree. Earlier in his order the learned District Munsiff obviously accepted as true the contentions of the judgment-debtor set out in her affidavit filed in E.P. No. 546 of 1945. He exercised his discretion—a discretion vested in him by the terms of Order 21, rule 32, Civil Procedure Code—and decided that this was not a fit case where execution should be levied by the attachment of the judgment-debtor's moveables. I am unable to find anything in the judgment of the lower appellate Court to indicate that the learned Subordinate Judge purported to exercise a discretion vested in him. Certainly there was nothing in it to show that he was of opinion that the discretion exercised by the learned District Munsiff was based upon erroneous grounds. The learned Subordinate Judge apparently was of opinion that once there was a wilful failure to obey the decree within the meaning of Order 21, rule 32, Civil Procedure Code, the decree-holder was automatically entitled to the attachment of the judgment-debtor's moveables. In fact the learned Subordinate Judge used the expression "entitled" in paragraph 2 of his judgment.

Sitting in second appeal I should normally be reluctant to interfere with an order based upon the exercise of jurisdiction ; but here we have a case of an order based on the learned District Munsiff's exercise of discretion being reversed on appeal by a learned Judge who did not purport to exercise any discretion at all. This, I think, is a fit case where the order of the trial Court should be restored.

This second appeal is allowed, the order of the lower appellate Court is set aside and that of the trial Court is restored. The appellant will be entitled to her costs both in the lower appellate Court and in this Court.

(Leave to appeal is refused.)

K.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO.

Kuppuswami Nainar .. *Appellant**

v.

Rangaswami Goundan and others .. *Respondents.*

Limitation Act (IX of 1908), *Article* 182 (5)—*Unnumbered execution petition returned for complying with certain requisitions—Re-presentation with application to excuse delay after a long lapse of time along with fresh execution petition—Rejection—If saves limitation for the fresh execution petition.*

An unnumbered execution application filed on 10th October, 1941, was returned on 13th October, 1941, for filing sale papers, filling up blanks and payment of batta. Two weeks time was granted for complying with these requisitions and the petition was re-presented on 28th October, 1941, a day after the expiry of the two weeks. The petition was again returned on 31st October, and was not re-presented to Court till 23rd January, 1943, when that unnumbered execution petition was also filed with an application to excuse the delay in re-presentation along with a fresh execution petition. The Court held that the delay should not be excused and dismissed the fresh execution petition and also rejected the unnumbered petition. On appeal,

Held, as the unnumbered petition was not re-presented for a long time it did not exist in the eye of the law and therefore the order rejecting the petition on refusing to excuse the delay was of no legal consequence. There was no " final order " on the unnumbered petition to save limitation for the fresh execution petition of 23rd January, 1943.

Khadir Sahib v. *Viswanatha Iyer*, (1942) 2 M.L.J. 768 : I.L.R. (1943) Mad. 357, followed.

Gopalaswami Mudaliar v. *Executive Officer, Tiruvarur Devasthanam*, (1945) 1 M.L.J. 428 ; *Venkatarathnam* v. *Ramakot'ayya*, (1945) 2 M.L.J. 152 ; *Ramachandra Naidu* v. *Muthu Chettiar*, (1943) 1 M.L.J. 236 and *Natarajan Pillai* v. *Narayanaswami Iyer*, (1947) 1 M.L.J. 393, distinguished.

Appeal against the order of the Court of the Subordinate Judge of Vellore, dated 29th September, 1945, in A. S. No. 76 of 1945, preferred against the order of the Court of the District Munsiff of Tiruvannamalai in R. E. P. No. 398 of 1943 in O. S. No. 638 of 1930.

V. Ramaswami Aiyar for Appellant.

A. V. Viswanatha Sastri for Respondents.

The Court delivered the following

JUDGMENT.—The point raised in this appeal is governed by the decision of a Bench of this Court reported in *Khadir Sahib* v. *Viswanatha Iyer*[1], which was approved by the Full Bench in *Seshagiri Rao* v. *Subbarami Reddi*[2]. The decree-holder is the appellant. He obtained a final decree in a mortgage suit on 28th August, 1935. The first execution petition was filed on 29th August, 1938, which was rejected on 14th October, 1938. The present execution application was filed on 23rd January, 1943, more than three years from the date of the final order on the prior execution petition. In order to save limitation for this execution petition he relies upon an unnumbered execution application filed by him on 10th October, 1941, and returned on 13th October, 1941, for filing sale papers, filling up blanks and paying batta. Two weeks time was granted for complying with these requisitions and the petition was re-presented a day after the expiry of the two weeks on 28th October, 1941. The petition was again returned on 31st October, 1941, and was not re-presented to Court till 23rd January, 1943, when that unnumbered execution petition was also filed along with the present execution petition with an application to excuse the delay in re-presenting the execution petition. It is this unnumbered execution petition that the decree-holder relies upon as helping in saving limitation. The Courts below have held that the delay should not be excused and dismissed the present execution petition and also rejected the unnumbered execution petition. This is exactly what happened in *Khadir Sahib* v. *Viswanatha Iyer*[1]. It is as if the unnumbered petition was not in existence in the eye of the law and therefore the order refusing to excuse the delay is of no legal consequence. There is no final order between the 14th October, 1938, and

* A. A. A. O. No. 82 of 1946. 20th November, 1947.

1. (1942) 2 M.L.J. 768 : I.L.R. (1943) Mad. 357.
2. (1945) 1 M.L.J. 270 : I.L.R. (1945) Mad. 684 (F.B.).

the filing of the present execution petition on 23rd January, 1943. There is no doubt that on the principle of the decision in *Natesa* v. *Ganapathia*[1] and the decision of the Privy Council in *Govind Prasad* v. *Pavankumar*[2], an unnumbered execution application is an application presented in accordance with law as the requirements insisted upon are not any statutory obligations imposed by the Code but by the Civil Rules of Practice. There is therefore no doubt that the application was one in accordance with law but unfortunately as it is not re-presented for a long time it did not exist in the eye of law and the subsequent order rejecting it is of no consequence. The decisions of Somayya, J., in *Gopalaswami Mudaliar* v. *Executive Officer, Tiruvarur Devasthanam*[3] and *Venkatarathnam* v. *Romakottayya*[4] are distinguishable because in those cases there is not much delay in re-presenting the unnumbered application. In the decision of King, J., in *Ramachandra Naidu* v. *Muthu Chettiar*[5] and the decision of Wadsworth, J., in *Natarajan Pillai* v. *Narayanaswami Iyer*[6], the application was not taken return of but was within the precincts of the Court and was finally dismissed by the Court. In those cases there was clearly a final order on the unnumbered execution petitions which gave fresh start to limitation. The Civil Miscellaneous Second Appeal therefore fails and is dismissed with costs. No leave.

K.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

Parasa Mangadu and others .. *Appellants.**

Penal Code (XLV of 1860), *sections* 201, 149 *and* 511—*Act with an intention to commit an offence under section* 201—*No disappearance of any evidence of the commission of an offence—Offence made out.*

Where the accused were seen by the P. Ws. carrying the body of a deceased man along a footpath and on being confronted and questioned by the P.Ws. gave certain versions found to be untrue and left the body in the footpath and disappeared from the place, on a question whether they could be convicted of an offence under section 201, Indian Penal Code, read with section 149, Indian Penal Code,

Held, all the circumstances put together left one with no doubt whatever that the accused knew that the deceased man had been murdered and their conduct showed that that their intention was to hide either the scene of murder or the murderer or to cause disappearance of other evidence of the crime. They did an act in furtherance of the intention of committing the crime though an offence under section 201, Indian Penal Code, had not been completed by the act. As a matter of fact there had not been any disappearance of any evidence of the commission of the offence, since the dead body had been left and not taken away and secreted, or burnt or buried. Hence the offence committed is only an attempt to cause the disappearance of the evidence of the offence and the accused could not be convicted of an offence under section 201, Indian Penal Code, read with section 149, Indian Penal Code, but only under section 201, Indian Penal Code, read with section 511, Indian Penal Code.

Appeal against the order of the Court of Session of the Kistna Division at Masulipatam, dated 3rd January, 1948, in Case No. 25 of the Calendar for 1947.

M. Appa Rao for Appellants.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court delivered the following

JUDGMENT —Appellants 1 to 5 have been convicted by the learned Sessions Judge of Kistna of an offence under section 201, Indian Penal Code, read with section 149, Indian Penal Code and each of them sentenced to rigorous imprisonment for five years. The sixth appellant has been convicted of an offence under section 323, Indian Penal Code, and sentenced to a term of one year's rigorous imprisonment. I shall first of all deal with the case of the sixth appellant. The evidence against him is that of a solitary witness P. W. 11, who says that she saw the sixth appellant hit the deceased above the left eye-brow with a stick. She has not been corroborated by any other evidence or by any other witness in the case.

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1. I.L.R. (1940) Mad. 949.
2. (1943) 2 M.L.J. 121 : L.R. 70 I.A. 83 : I.L.R. (1943) Nag. 669 (P.C.).
3. (1945) 1 M.L.J. 428.
4. (1945) 2 M.L.J. 152.
5. (1943) 1 M.L.J. 236.
6. (1947) 1 M.L.J. 393.

* Crl. Appeal No. 50 of 1948. 23rd July, 1948.

Her statement that the fifth accused (fifth appellant) was then going ahead of the sixth appellant has not been accepted by the learned Sessions Judge. The learned Sessions Judge has also declined to rely on other circumstances against the sixth appellant. Such being the case I feel that it is unsafe to convict the sixth appellant on the solitary testimony of P. W. 11 of the offence under section 323, Indian Penal Code. I therefore give him the benefit of the doubt and acquit him.

So far as appellants 1 to 5 are concerned, the question is whether, accepting the evidence of P. Ws. 2, 3, 4, 5 and 8 the act attributed to them would amount to an offence under section 201, Indian Penal Code. Shortly stated the evidence of these witnesses is that on the morning of 7th March, 1947, each one of them saw the five appellants carrying the body of the deceased man and coming in the direction southwards from the No. 8 channel along the footpath marked in the plan. Each one of them deposes that on being questioned either one or the other of the appellants had given them certain versions all of which have now been found to be untrue by the learned Sessions Judge. It is also found that on being confronted and questioned by these witnesses the appellants left the body of the deceased near that footpath and went away from that place. It is difficult to say that these witnesses are not speaking the truth. Their evidence has been accepted by the learned Judge and I see no reason to reject the same.

Mr. Appa Rao contends that the circumstances in this case do not point to any irresistible conclusion that the appellants were doing the act of intentionally concealing the evidence of crime. The direction in which the appellants were proceeding was towards the village munsiff's house which according to the evidence is only about 50 yards from the place where the body was found. That being so, it is contended, it is unnatural for the appellants to have carried the dead body to the vicinity of the village munsiff's house if they wanted to cause disappearance of the evidence of crime rather than to take it away from the village munsiff's house and hide it. This no doubt is a circumstance in their favour, but I am inclined to think that all the other circumstances put together leave one with no doubt whatever that the appellants knew that the man had been murdered. If that supposition is taken as the basis, then, the subsequent conduct of the appellants would necessarily show that their intention was to hide either the scene of murder or the murderer or to cause disappearance of other evidence of crime. It may be as is laid down by the Calcutta High Court in *Nagendra Bhakta* v. *Emperor*[1] that if persons are found carrying the dead body of a murdered man from a particular house to a pial of a mosque and leaving it there, that by itself cannot lead to an inference that they had an intention to screen the offender or to hide the scene of crime. But in the present case I am inclined to think that the fact that the appellants on seeing the witnesses left the dead body at that place and disappeared and most of them were arrested only the next day necessarily shows that their intention was to commit an offence under section 201, Indian Penal Code. They did an act in furtherance of the intention of committing the crime though I am not satisfied that an offence under section 201, Indian Penal Code, has been completed by the act. As a matter of fact there has not been any disappearance of any evidence of the commission of the offence. If the body had been taken away and secreted, or burnt, or buried, that might be something. But since the body was left in or near about the footpath in public view, one cannot say that any evidence of murder has been caused to disappear. I would therefore hold that the offence which the appellants 1 to 5 have committed is only an attempt to cause the disappearance of the evidence of the offence and that being so I modify the conviction from one under section 201, Indian Penal Code, read with section 149, Indian Penal Code, to one under section 201, Indian Penal Code, read with section 511, Indian Penal Code. The maximum sentence for an offence under section 201, Indian Penal Code, read with section 511, Indian Penal Code, is only half of seven years and in the circumstances of the case I impose a sentence of rigorous imprisonment for one year on each appellant.

V.S. ——— *Conviction modified and sentence reduced.*

1. A.I.R. 1934 Cal. 144.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PATANJALI SASTRI AND MR. JUSTICE BELL.

S. A. R. Chinnan Chettiar .. *Appellant**

v.

The Estate Manager, Sivaganga Estate .. *Respondent.*

Limitation Act (IX of 1908), *Article* 182 (5) *and Civil Procedure Code (V of* 1908), *section* 48—*Execution application against deceased judgment-debtor by mistake due to negligence but honestly made—Step-in-aid of execution —Application for execution against deceased judgment-debtor filed within twelve years of the decree—Application to add legal representatives made and ordered after the twelve years—Execution, if barred.*

An application for execution presented against a deceased judgment-debtor by mistake due to negligence but honestly made, is a *bona fide* mistake and the application though it could not be acted upon by the executing creditor would be an effective step-in-aid for the purpose of saving limitation.

Where such an application was filed within twelve years of the decree sought to be executed, but the application to add the legal representatives of the deceased judgment-debtor was filed and ordered beyond the twelve years allowed by section 48, Civil Procedure Code, on a question whether the application was not barred,

Held, the naming of a deceased judgment-debtor as the person against whom execution is sought is no more than a mistake in giving the particulars required under Order 21, rule 11 (2), Civil Procedure Code and it could be remedied under Order 21, rule 17 (1) and when so remedied by amendment it has to be deemed, under Order 21, rule 17 (2), to have been an application in accordance with law and presented on the date when it was first presented. Hence, as the legal representatives of the deceased judgment-debtor, were brought on record only by way of amendment in the execution application which was filed within the twelve years allowed by section 48, execution was not barred under the section.

Samia Pillai v. *Chockalinga Chettiar,* (1893) 4 M.L.J. 8 : I.L.R. 17 Mad. 76, followed.

Appeal against the order of the District Court, Ramnad at Madura, dated 16th November, 1945, in A.S. No. 353 of 1945 preferred against the order of the Court of the Special Deputy Collector of Manamadura dated 5th May, 1945, in E.P. No. 5784 of 1944 in S.S. No. 2156 of 1929.

V. Ramaswami Aiyar for Appellant.

K. Kuttikrishna Menon for Respondent.

The Judgment of the Court was delivered by

Patanjali Sastri, J.—This appeal arises out of an application to execute a decree for arrears of rent obtained by the Zamindar of Sivaganga represented by the Estate Manager, the respondent herein, against one Kannappa Chettiar deceased. The decree was passed on 31st July, 1929, and though Kannappa died on 28th November of the same year successive applications, each within 3 years of the preceding one, were filed subsequently in the Revenue Court for execution of the decree against the said judgment-debtor as if he were alive on those dates but were allowed to be dismissed for non-prosecution. The present application (E.P. No. 5784 of 1944) which has given rise to this appeal was filed on 10th July, 1941, against the same person but it was returned by the Special Deputy Collector with the remark that as the judgment-debtor was dead his legal representatives should be added. The respondent decree-holder accordingly applied on 24th April, 1943, to bring on record the appellant and another as the legal representatives of Kannappa and that application was ordered on 27th October, 1943. The appellant then objected to the execution of the decree on the ground that it was barred by limitation but the Courts below overruled the objection and ordered execution to proceed. From that order the present appeal has been preferred to this Court.

Mr. Ramaswami Iyer for the appellant conceded, in view of the decision of this Court in *Samia Pillai* v. *Chockalinga Chettiar*[1] and other cases, that an application for execution presented against a deceased judgment-debtor owing to a *bona fide* mistake, though it could not be acted upon by the executing creditor, was an effective step-in-aid for the purpose of saving limitation. But he urged that the previous applications for execution were not made *bona fide* inasmuch as

* A. A. A. O. No. 112 of 1946. 21st November, 1947.

1. (1893) 4 M.L.J. 8 : I.L.R. 17 Mad. 76.

the respondent knew, or must be taken to have known, that Kannappa was dead, the officers of the respondent's estate having taken various proceedings in the Revenue Courts for collection of rent wherein Kannappa's death was referred to. This fact was not disputed but it was explained that the execution petitions were filed by a different department of the Estate establishment and that the judgment-debtor's death was lost sight of in the routine of its business. The Courts below accepted this explanation and found that the Estate officials were acting only negligently but not dishonestly in filing the earlier execution applications without impleading the legal representatives of the deceased judgment-debtor. This finding was not challenged before us but it was contended that the principle of *Samia Pillai* v. *Chockalinga Chettiar*[1], could not be extended to cases of mistake due to negligence as "*bona fide*" implies due care and attention. We are unable to accede to this contention. Though there is not room here for the application of the definition of "good faith" in section 3 (20), General Clauses Act (X of 1897) under which,

> "a thing shall be deemed to be done in 'good faith' where it is in fact done honestly whether it is done negligently or not,"

it shows that ordinarily the expression does not import due care and attention. The decision in *Samia Pillai* v. *Chockalinga Chettiar*[1] itself shows that a mistake due to negligence but honestly made is a *bona fide* mistake within the meaning of the rule laid down by it, for the mistake of entering in the execution application the name of the deceased judgment-debtor as the party against whom execution was sought in that case was made by the vakil's gumastah who could have readily ascertained from the decree-holder the true state of facts before filing the application in Court. Yet the learned Judges held that "it was no doubt a *bona fide* mistake."

It was next urged that the present execution application was barred by section 48 of the Civil Procedure Code. The argument was put thus: the application having been filed against a deceased judgment-debtor, was a nullity even as a plaint filed against a deceased person is a nullity (see *Veerappa Chetti* v. *Tindal Ponnan*[2]). It became an effective application only when the legal representatives of Kannappa including the appellant were brought on record, and as this was done on the 27th October, 1943, more than twelve years after the date of the decree, no order for execution should be passed on the application. This point, again, is concluded against the appellant by the decision in *Samia Pillai* v. *Chockalinga Chettiar*[1]. In that case the naming of a deceased judgment-debtor as the person against whom execution is sought was regarded as no more than a mistake in giving the particulars required under section 235 of the Old Code corresponding to Order 21, rule 11 (2) of the present Code. The learned Judges observed:

> "Where there has been in fact an application for execution made by the party entitled to mak it the mere fact of a mistake having been made in giving the particulars required by section 235 of the Code of Civil Procedure cannot, we think, have the effect of rendering the application, a nullity."

If so, the defect could be remedied under Order 21, rule 17 (1) and when so remedied by amendment,

> "it shall be deemed to have been an application in accordance with law and presented on the date when it was first presented" (Sub-rule 2).

It was suggested that *Samia Pillai* v. *Chockalinga Chettiar*[1] was wrongly decided and should not be followed and our attention was drawn to *Gulab Singh* v. *Nathu*[3], decided by a single Judge as laying down the correct principle. If the matter were *res integra* in this Court, it would be a question for serious consideration whether the view expressed in the above case is not the sounder one. But *Samia Pillai* v. *Chockalinga Chettiar*[1] has never been departed from in this Court but has been followed in subsequent cases (e.g., *Subramania Desika* v. *Rangaswami Chettiar*[4] and *Jagannath Rao* v. *Narayanamurthi*[5]) and also in other High Courts (see *Bepin Behari Mitter* v. *Bibi Zohra*[6] and *Sheogobind Ram* v. *Mst. Kishunbasi Kuar*[7]). In this state of the autho-

1. (1893) 4 M.L.J. 8 : I.L.R. 17 Mad. 76.
2. (1907) 17 M.L.J. 551 : I.L.R. 31 Mad. 86.
3. I.L.R. (1944) Nag. 419.
4. (1934) 68 M.L.J. 261.
5. (1933) 65 M.L.J. 374.
6. (1908) I.L.R. 35 Cal. 1047.
7. (1932) I.L.R. 11 Pat. 546.

rities we are inclined to follow the decision in *Samia Pillai* v. *Chockalinga Chettiar*[1], where, as already observed, the mention of the name of the deceased judgment-debtor as the person against whom relief in execution is sought was regarded as a matter for amendment under Order 21, rule 17. In this view the representatives of Kannappa having been brought on record by way of amendment in E.P. No. 5784 of 1944 in the place of the deceased judgment-debtor, that application which was admittedly filed within twelve years from the date of the decree is not barred under section 48 of the Code of Civil Procedure.

The appeal is dismissed with costs.

V.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO.

T. V. Varada Pillai .. *Appellant**

v.

The Corporation of Madras, represented by the Commissioner, Corporation of Madras .. *Respondent.*

Madras City Municipal Act (XIV of 1919), *section* 397—*Requirements of—Mention in the statutory notice of section* 80, *Civil Procedure Code, by mistake, instead of section* 397, *Madras City Municipal Act—If a fundamental error vitiating the notice.*

All that section 397 of the Madras City Municipal Act requires is that there should be a statutory notice informing the Corporation or its officers of the nature and particulars of the claim. The section does not say that the notice should also mention the section under which the notice was issued. Hence, in a notice satisfying all the requirements of section 397, a reference to section 80, Civil Procedure Code, instead of section 397, Madras City Municipal Act, is of no consequence and it would not in any manner or to any extent vitiate the notice from being a statutory notice fulfilling the requirements of section 397.

Appeal against the decree of the Court of the City Civil Judge (Principal), dated 16th December, 1946, in O.S. No. 452 of 1945.

R. Deenadayalu for Appellant.

John and Row for Respondent.

The Court delivered the following

JUDGMENT.—The plaintiff is the appellant. His suit was dismissed by the learned City Civil Judge, Madras, on a preliminary point that statutory notice as contemplated by the Madras City Municipal Act had not been issued to the defendant.

The plaintiff is the Zamindar of Mambakkam; and, according to the case as set out in the plaint, the defendant, the Corporation of Madras, issued a distress warrant against him for recovery of property tax, in respect of a house owned by him in Madras without even sending a previous demand as required by the City Municipal Act. He claimed as damages a sum of Rs. 500 for the illegal act of the Corporation in issuing a distress warrant. The defendant has raised various pleas which are covered by the issues in the suit and the sixth issue in the suit was tried as a preliminary issue. This raised the question whether the suit was maintainable in the absence of a statutory notice required under the City Municipal Act.

Before the institution of the suit, the plaintiff issued Ex. P-3 dated 22nd June, 1945, to the Commissioner, Corporation of Madras, through a lawyer. The notice was as follows :

" Sir,

On behalf of my client, Mr. T. V. Varada Pillai, Zamindar of Mambakkam residing at No. 79, Govindappa Naicken Street, George Town, Madras, I issued a notice to you on 9th March, 1945, and further addressed communications thereon, seeking redress of a grave wrong and damages inflicted on my client by the issue of an illegal distress warrant for the recovery of the tax for 2/1944-45 due on premises Nos. 192-194, Poonamallee High Road, Madras, without previously issuing a demand

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1. (1893) 4 M.L.J. 8 : I.L.R. 17 Mad. 76.

* C. C. C. A. No 23 of 1947. 11th August, 1948.

bill. As no satisfaction was given to my client, my client, as already intimated to you through your Revenue Officer, has decided to file a suit against the Corporation for the recovery of damages. The suit will be filed either in the City Court or in the Small Causes Court, Madras. A copy of the proposed plaint which contains the causes of action, the name, description, place of residence of the plaintiff and the relief which he claims is forwarded to you for your information and in compliance with section 80 of the Civil Procedure Code as statutory notice prior to institution of suit my client gives you the two months notice as contemplated by that section.

The suit will be filed either in the City Court or in the Small Causes Court, Madras."

As stated in the notice, the notice was accompanied by a copy of the proposed plaint which gave full particulars of the claim of the plaintiff against the defendant. The notice was received by the Corporation ; and in reply to that, Ex. D-1 was sent by the Revenue Officer to the plaintiff's advocate. The suit was instituted on 25th August, 1945. In the plaint as originally framed, reference was made in paragraph 10 to the statutory notice in the following words :

" The statutory notice to the defendant required under section 80 of the Civil Procedure Code has been served on the defendant."

This was later amended by substituting in paragraph 10,

" the statutory notice as contemplated by the City Municipal Act has been served on the defendant."

In paragraph 12 of the written statement filed by the defendant, the objection taken by the defendant was that the suit was not maintainable as the statutory notice required under the City Municipal Act has not been given before the filing of the suit. The only basis for this contention was that instead of mentioning in the notice and in the plaint section 397 of the Madras City Municipal Act, section 80 of the Civil Procedure Code was mentioned. The learned City Civil Judge thought that there was a fundamental error in the notice, Ex. P-3, as the correct section was not mentioned by it and therefore dismissed the plaintiff's suit.

In this appeal, the only question for consideration is whether Ex. P-3 and the plaint which accompanied it constitute a sufficient notice within the meaning of section 397 of the City Municipal Act. All that the section requires is, like section 80 of the Civil Procedure Code, that a month's notice should be given, mentioning the place of abode of the officer, servant or person against whom the claim was made, stating the cause of action, the relief sought, and the name and the place of abode of the intending plaintiff, and that the plaint should also contain a statement that such a notice has been so delivered or left. The section does not say that the notice should also mention the section under which the notice was issued. All that it requires is that there should be a statutory notice informing the Corporation or its officers of the nature and the particulars of the claim. The section need not be mentioned in the notice. In fact, in the argument before me it was conceded by the learned advocate for the respondent that if the notice had not mentioned any section, it would have been a perfectly valid notice. The principle on which the decision of the case should rest has been, if I may say so with respect, correctly laid down by Rajamannar, J., as he then was, in *Meenakshi Ammal* v. *The Province of Madras*[1], where the learned Judge observed that the error should not be a fundamental error. In that case, the error was with reference to the description of the subject-matter of the suit. A wrong survey number was given of the land in dispute and this was certainly a fundamental error. In fact, by reading the notice in that case one would have thought that the subject-matter related not to R. S. No. 722/4-A which was the correct survey number, but related to a land comprised in R.S. No. 722/4-B. All that the law requires is that there should be a clear intimation of the nature of the dispute and the nature of the claim. This requirement of the section is satisfied by the notice, Ex. P-3, and the plaint which accompanied it. In my opinion, the reference to section 80 of the Civil Procedure Code instead of section 397 of the Madras City Municipal Act in Ex. P-3 is of no consequence and it does not in any manner or to any extent vitiate the notice from being a statutory notice fulfilling the requirements of section 397 of the City Municipal Act.

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1. (1945) 2 M.L.J. 387.

It is, as submitted by the learned Advocate for the appellant, a mistake on his part to have quoted the wrong section instead of referring to the section in the City Municipal Act. I think that explanation of the learned advocate is satisfactory and should be accepted.

For these reasons, I am of opinion that the decision of the Court below is wrong and should be set aside. The appeal is allowed and the suit remanded to the City Civil Judge for disposal according to law. The appellant is entitled to costs in this Court. The court-fee paid on the memorandum of appeal will be refunded.

V.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Verkattil Unnyethamma's son Raman Nambiar and another .. *Petitioners**

v.

K. K. Govindan Nayar .. *Respondent.*

Madras Tenants and Ryots Protection Act (XVII of 1946), *section* 4 (1) (a) *and Malabar Tenancy Act (XIV of* 1930), *section* 3 (v) *and* (j)—Othidar *and sub*-kanomdar *from him—"If tenants" entitled to apply under section* 4 (1) (a) *of Madras Act XVII of* 1946—*"Intermediary"—When a tenant.*

An *othidar* is not a "tenant" within the meaning of that definition in section 3 (*v*) of the Malabar Tenancy Act.

From the fact that an *othidar* is said to have been granted possession and enjoyment in *oth kuzhikanom* or the use of the word "*Kaividugai othi*" in the *othi*, it cannot be said that the *othi* is more of the nature of one of the tenures referred to in the definition of "tenant" in the Malabar Tenancy Act and not an *othi* in the ordinary sense of a usufructuary mortgage.

Though a usufructuary mortgagee is a person who satisfies the definition of "intermediary" in section 3 (*j*) of the Malabar Tenancy Act, it cannot be said that all intermediaries are "tenants" within the meaning of section 3 (*v*) of the Act. The word "intermediary" has to be read with the other parts of the definition ; the intermediary referred to must be an intermediary who pays rent or other consideration for his being allowed by another to enjoy the land of the latter. Hence, an *othidar* though he may be an intermediary, is not a "tenant" within the meaning of section 3 (*v*) of the Act.

An *othidar* not being a "tenant" is not entitled to apply under section 4 (1) (*a*) of Madras Act XVII of 1946 for stay of a suit by the mortgagor to redeem the *othi*. The sub-*kanomdars* of the *othidar* cannot claim to be tenants because the *othidar* himself is not a tenant and the so-called sub-tenant of a person who is not a tenant cannot apply under section 4 (1) (*a*) of the Madras Act XVII of 1946.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the District Munsiff, Calicut, dated 31st March, 1947, in I.A. No. 1325 of 1947 in O.S. No. 1226 of 1946.

D. R. Nambudripad for Petitioners.

K. P. Raman Menon for Respondent.

The Court delivered the following

JUDGMENT.—The first defendant was one in whose favour an *othi* demise had been executed. The plaintiff was the mortgagor. Defendants 2 and 3 were described as sub-*kanomdars* of the first defendant. The plaintiff filed a suit to redeem the mortgage, whereupon defendants 2 and 3, supported by the first defendant, filed an application for stay of the suit under section 4 (1) (*a*) of the Madras Act XVII of 1946, stating that they were tenants of the land within the definition of "tenant" in section 3 (*v*) of the Malabar Tenancy Act, and that the suit was one in which their eviction was involved. The Court below held that the first defendant was an *othidar* and was not therefore a tenant. Defendants 2 and 3, it thought had no higher rights then the first defendant.

The word "tenant" in the Malabar Tenancy Act includes certain persons who have agreed to pay rent or other consideration, for being allowed to enjoy the land

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* C. R. P. No. 1037 of 1947. 26th February, 1948.

of another. If, however, they are in enjoyment of the land as security for the sum advanced by them, they would not be covered by this definition. Moreover, *othis* are well-known in Malabar law, and the omission of *othidar* from the category of persons included within the definition of " tenant " is significant and almost conclusive that the Legislature did not intend to include *othidars* within the definition of " tenant."

The learned advocate for defendants 2 and 3 has, however, drawn my attention to certain clauses in the *othi* deed which suggest that it was more of the nature of one of the tenures referred to in section 3 (*v*) of the Malabar Tenancy Act than of a usufructuary mortgage as generally understood. For example, the *othidar* was said to have been granted possession and enjoyment in *othi kuzhikanom*, and it is therefore suggested that the deed in question participated of the nature of *kuzhikanom*. *Kuzhikanom* is however primarily a grant of land rent free, in order that the land might be improved by growing trees. That this deed does not resemble a *kuzhikanom* is indicated by the fact that 1100 fanams were borrowed, and that although it was contemplated that more trees might be grown, the grant was in no way dependent upon the further development of the land, because the mortgagor covenanted to pay to the mortgagee the value of any new trees grown, *if any be so planted there*.

An expression relied on as indicating that the deed in question was something more than an *othi* is the use of the word " *Kaividugai otti* " which in the glossary in Sundara Aiyar's Malabar and Alayasanthana Law is defined as "*othi* irredeemable except when the *othidar* refuses to make further advance " ; but in Appendix III to Moore's Malabar Law and Custom it is said :

" In the first edition of this work Mr. Wigram defined a '*Kaividugai othi*' as ' a tenure higher than *othi* which leaves to the Janmi merely nominal rights.' In 1884, however, the High Court in *Kundu* v. *Impichi*[1] held that a " *Kaividugai othi* " was redeemable. It cannot be said that there is at the present time any real difference between " *Kaividuga othi* and an ordinary *othi*."

I therefore find no reason for thinking that the suit *othi* was more of the nature of one of the tenures referred to in the definition of " tenant " in the Malabar Tenancy Act and not an *othi* in the ordinary sense of a usufructuary mortgage. Although it has been said that *othi* and *kanom* are very similar, the only difference being that in the case of an *othi* a much larger amount is paid ; yet a *kanom* has always been considered to be partly of the nature of usufructuary mortgage and partly of the nature of a lease, whereas it has never been said of an *othi* that it in any way participates of the nature of a lease.

It is however argued that even though the first defendant is not a tenant by virtue of his being an *othidar*, yet he is a tenant because he is an " intermediary " within the meaning of section 3 (*j*) of the Malabar Tenancy Act and therefore a tenant, because intermediaries are tenants within the meaning of section 3 (*v*) of the Act. A usufructuary mortgagee is certainly a person who satisfies the definition of " intermediary " in section 3 (*j*) of the Act ; and it has been so held by Wadsworth and Patanjali Sastri, JJ., in *Ranga Iyer* v. *Subbayya Goundar*[2]. The further question however is whether all intermediaries are tenants within the meaning of section 3 (*v*). If they were, it would lead to the anomalous position that a person who was not a tenant could make himself a tenant by parting with some measure of his interest in the land, in the present case by the creation of a sub-*kanom*. The word " intermediary " has to be read with the other parts of the definition ; and in my view the intermediary referred to must be an intermediary who pays rent or other consideration for his being allowed by another to enjoy the land of the latter. If the intermediary is one who had taken land as security and has not paid consideration or rent so that he may be allowed to enjoy possession, then he is not a tenant within the meaning of section 3 (*v*).

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1. (1884) I.L.R. 7 Mad, 442.
2. (1942) 2 M.L.J. 739 : I.L.R. (1943) Mad. 674.

It is further argued that, whatever may be the case with regard to the first defendant, defendants 2 and 3 are tenants. It would be strange indeed if defendants 2 and 3 had any stronger right to continue in possession of the land than the person from whom they derived their interests ; and I do not think that the definition of "tenant" in section 3 (*v*) permits of the interpretation that their learned advocate seeks to place upon it. The tenant is the person who enjoys the land of the person who has allowed him to enjoy the land. The land is not however the land of the first defendant but the land of the landlord, the mortgagor-plaintiff. Section 4 of Act XVII of 1946 also indicates that the Legislature was concerned with persons who were liable to eviction by their landlords or persons who put them into possession. Section 3 (*a*) distinctly says that "no tenant. . . . . shall be liable to be evicted by his landlord . . . . . . " and the suits referred to in section 4 are suits by landlords to evict their tenants. If the tenant is entitled to retain possession by virtue of this section, then the sub-tenants, who would be ordinarily entitled to similar relief against their landlords, would of course be able to retain possession too ; but if the person from whom they held is not a tenant and is liable to be evicted, the so-called sub-tenant of a person who is not a tenant would have no right to remain in possession.

The petition fails and is dismissed with costs.

V.S. ——— *Petition dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

A. K. Gopalan .. *Petitioner**

Penal Code (XV of 1860), section 503—Ingredients of the offence under—Speech directed against police force stationed at a particular locality in a district—Members of that force, if should have been actually frightened—Presence of such members among the audience, if should be known to the speaker to have been present among the audience.

Section 503 of the Indian Penal Code would be inapplicable unless the speech alleged to constitute criminal intimidation threatens injury to the person, reputation or property of an individual or group of individuals. Whether as a matter of fact any one was actually frightened or not, cannot affect the question of the liability of the speaker under section 503. Nor is it necessary for the speaker to know that any member or group of persons who are intended to be frightened by the speech was present among the audience. It is the intention of the speaker that has to be considered in deciding as to whether what he stated comes within the mischief of section 503.

Where a speech was directed against a particular police force stationed in a particular locality in a district and the purport of the speech was to cause fear in the minds of the group of police officials stationed in that district or place,

Held: The speech was addressed to a defined and ascertained body of individuals and was intended to frighten them with injury to their person, reputation or property and hence came within the mischief of section 503 of Indian Penal Code.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order of the Court of the Sessions Judge of North Malabar in Criminal Appeal No. 24 of 1946 dated 17th December, 1946.

N. Rajagopalan for *Messrs. Row and Reddy* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—For a speech delivered on 14th July, 1946, presiding over a meeting held at a cinema shed and situated in Kottaparamba in Badagara, the petitioner has been convicted under section 506 Indian Penal Code and sentenced to rigorous imprisonment for six months which conviction and sentence were upheld on appeal by the Sessions Judge of North Malabar who, in addition directed the petitioner to execute a security bond for Rs. 200 with two sureties for a like amount each to keep the peace for a period of 18 months under section 106 of the Criminal Procedure Code.

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*Crl.R.C. No. 11 of 1947. 23rd September, 1947.
(Crl.R.P. No. 11 of 1947).

Whether the speech in question comes within the mischief of section 503 of the Indian Penal Code is the only question argued before me. The petitioner's case is that the speech was a criticism of the police force in general in the interests of the public and not that he threatened with injury any person or class of persons with regard to their person, reputation or property. Portions of the speech extracted by the learned Sessions Judge show that the speech was very vehement in character and vulgar in tune. The Collector and the District Superintendent of Police have been dubbed as arch-rats and the other police officers as mice. But whatever that may be, unless the speech threatens injury to the person, reputation or property of an individual or a group of individuals, the provisions of section 503, Indian Penal Code, are not applicable. In Criminal Revision Case No. 10 of 1947, Rajamannar, J., observed as follows :—

> " I am inclined to hold that section 503 would have no application to a case in which an accused is charged with having threatened the police in general."

The learned Judge also held that the charge in that case was therefore defective. In the present case also the charge is in similar terms and the observations of the learned Judge apply with equal force to this charge.

But the learned Judge held that in that case, the threat was held out by the accused not to the policeforce in general, but to the members of the police force stationed in Cannanore and to such members of the force who would attempt to interfere with railway strikers and on that ground, in spite of the defect in the charge, it was held that section 503, Indian Penal Code, was applicable. Having read the entire speech evidenced by Ex. P-1, I am of opinion that even here the speech is directed not against the entire police force in the whole Province or in India, but to the particular police force stationed at Badagara, if not in the whole of the Malabar district. Such force is a compact body of individuals under the direction of a District Superintendent of Police and a District Magistrate and the speech is addressed to that defined and ascertained body of individuals and not to any undefined or unascertained group. Portions of the speech extracted by the learned Sessions Judge are sufficient to indicate that what the petitioner intended was to frighten the members of that force with injury to their person, reputation or property. Whether as a matter of fact any one was actually frightened or not, cannot affect the question of the liability under section 503, Indian Penal Code. It is the intention of the speaker that has to be considered in deciding as to whether what he stated comes within the mischief of section 503, of the Penal Code. P.W. 1 the police officer present at the speech, deposed that he felt, on hearing the speech, the assembled crowd would assault him. He also felt that even the freedom for the ordinary citizen was not available for the police and therefore he thought that it was advisable even to resign his post. He was frightened that he might be injured seriously. Though in cross-examination he has made certain other statements in some respects conflicting, it seems to me that the general effect of the evidence was that he was frightened. P.W.2, another police officer, present at the meeting was greatly frightened that he would be assaulted. The intention of the speaker can only be gathered from his words and the purport of the speech was to cause fear in the minds of the group of police officials stationed either in the Malabar district or in the Badagara town.

Mr. N. Rajagopalan for the petitioner argued very strenuously that the meeting was organized and convened by the members of the Communists party and that the speech was addressed to the Communists, their supporters and sympathisers present at the meeting and not to the public or to the police in Badagara or in Malabar. It was urged that the speaker did not know that police men were present at the meeting. I do not think that it is necessary for the speaker to know that any member or the group of persons who are intended to be frightened by the speech need be present among the audience. If the threat is held out to several persons to get them injured either in person, reputation or property, the person making the threat has been held to be guilty of this offence. Vide *Empress* v. *Ata Husain*[1].

1. (1886) 6 A.W.N. 41.

That there are passages in the speech which would cause fear and were intended to threaten the group of police officers cannot be denied.

Mr. N. Rajagopalan further contended that the speech as noted down by the police officer is not a correct report of what the accused spoke. I do not find that in either of the lower Courts the correctness of the speech has been questioned and that being so, it is too late for him to dispute the correctness of what P.W. 1 then and there recorded. Taking the view as I do that the intention of the speaker was to threaten the ascertained group of people, *viz.*, the members of the police force in Malabar and particularly in Badagara, I do not think that the criticisms levelled against the judgment of the lower appellate Court can be sustained. The conviction of the accused is therefore right. In the circumstances of the case the sentence is excessive, especially since the petitioner has been directed to execute a security bond under section 106 of the Criminal Procedure Code. In the case mentioned above Rajamannar, J., reduced the sentence of six months' rigorous imprisonment to a term of rigorous imprisonment for two months, for having delivered a speech which in many respects was similar to that delivered by the petitioner. I would therefore reduce the sentence passed on the petitioner to a period of two months' rigorous imprisonment. The order directing the petitioner to execute a security bond under section 106 of the Criminal Procedure Code will remain.

With this modification the petition is dismissed.

V.S. ——— *Petition dismissed. Sentence reduced.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE MACK.

Kopram Dhanalakshmamma and another .. *Appellants**

v.

Gadam Chetty Namberumal Chetty .. *Respondent.*

Madras High Court Original Side Rules, Order 17, rule 13—Scope and object of—Plaintiff allowed to withdraw suit with leave to file a fresh one—Costs of the first litigation awarded—Payment of costs is a condition precedent to filing of second suit—Nothing inconsistent between executable decree for costs and an order making the costs payable as a condition precedent.

O. 17, rule 13 of the Madras High Court Original Side Rules is based on a salutary principle that defendants in a suit should not be brought to Court unnecessarily a second time by a plaintiff who was given leave to withdraw his first suit, unless the costs of the first litigation were paid. There is nothing inconsistent between an executable order and an order making the costs payable as a condition precedent to the filing of the second suit. It would be wrong to interpret the rule as applying to cases where no order for costs had been passed and that if an executable decree awarding costs had been passed it would come within the scope of the words " unless the Court otherwise directs."

Appeal against the order of Kunhi Raman, J., dated 23rd January, 1948, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No. 2582 of 1947 amending the order, dated 20th January, 1947, in C.S. No. 32 of 1946.

R. Thirumalai Thathachariar and *N.R. Raghavachari* for Appellants.

K. Kuppuswami for Respondent.

The Judgment of the Court was delivered by

Mack, J.—This appeal raises a technical point of a very limited scope and arises out of an order passed by Kunhi Raman, J., on the Original Side. He granted leave to the plaintiff in C.S. No. 32 of 1946 to withdraw his suit with liberty to file a fresh suit and in his order directed the plaintiff to pay the defendant Rs. 500 towards advocate's fee plus other expenses of the defendant in taking out subpoenas to witnesses. That order was passed on 20th January, 1947. On 14th August, 1947, the plaintiff filed a second suit impleading his two children as co-plaintiffs and was met with an objection in the defendant's written statement that her costs had not been paid as a condition precedent required by the High Court's decretal

* O.S.A. No. 8 of 1948. 6th July, 1948.

order which gave effect to the judicial order of Kunhi Raman, J. After this objection was taken, the costs amounting to Rs. 618-4-0 were paid into Court on 19th November, 1947, and withdrawn by the learned counsel for the defendant in the suit without prejudice.

The contest centres round Order 17, rule 13 of the Original Side Rules of this Court in accordance with which the decretal order was drafted. This rule reads as follows :

"When a suit is allowed to be withdrawn with liberty to bring a fresh suit for the same matter, unless the Court shall otherwise direct, the order shall be drawn up so as to make the payment of the costs of the first suit a condition precedent to the plaintiff's bringing a fresh suit."

To overcome this hurdle the plaintiff filed the application under appeal before Kunhi Raman, J., to amend the decretal order and to bring it into conformity with the judicial order he passed on 20th January, 1947. Kunhi Raman, J., allowed the application accepting the contention that Order 17, rule 13 applied to cases where no order for costs had been passed and that as he had passed an executable decree awarding costs, this order was one which came within the scope of the words "unless the Court shall otherwise direct."

We are unable to accept his interpretation of Order 17, rule 13. This rule is based on a salutary principle that defendants in a suit should not be brought to Court unnecessarily a second time by a plaintiff who has been given leave to withdraw his first suit, unless the plaintiff has paid them the costs of the first litigation. We are unable to see anything inconsistent between an executable order and an order making the costs payable as a condition precedent to the filing of the second suit. If a decree imposing such a condition precedent was taken to be unexecutable it would mean that a defendant who was dragged to Court in a suit by a plaintiff who got leave to withdraw it would not be able to recover his costs at all in the event of the plaintiff not filing his second suit. We are therefore of the opinion that the decretal order giving effect to the judicial order of Kunhi Raman, J., was in conformity with his order and also in strict accord with the mandatory provisions of Order 17, rule 13. We do not think that he was correct in directing the amendment which he did and deleting the portion of the order making the payment of the costs of the first suit a condition precedent to the plaintiff's bringing a fresh suit.

In the result the appeal is allowed. We direct the respondent to pay the appellants their costs in this appeal only—advocate's fee Rs. 100.

V.P.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction.)

PRESENT :—MR. JUSTICE SUBBA RAO.

A. V. Sreenivasalu Naidu .. *Applicant**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922 *as amended), sections* 33 *and* 33-*A—Order of Appellate Assistant Commissioner—Ineffective appeal to Appellate Tribunal—Alternative remedy to prefer revision petition to Commissioner—Whether available—Specific Relief Act (I of* 1877), *section* 45*—Order compelling Commissioner to discharge statutory duties.*

The effect of sections 33 and 33-A of the Income-tax Act is that an assessee can either prefer an appeal against an order of the Appellate Assistant Commissioner to the Appellate Tribunal or he may elect the cheaper remedy and apply to the Commissioner to revise the order. If he so elects, and if the time prescribed for preferring an appeal has not expired, he must waive his right to prefer the appeal. Where an appeal is preferred but is not effective for the reason that it is dismissed as having been filed out of time, it cannot be said that the order of the Appellate Assistant Commissioner has been the subject of an appeal within the meaning of proviso (*c*) to section 33-A (2). Consequently in such a case the assessee has the right of preferring a revision to the Commissioner of Income-tax under section 33-A (2) of the Act. And where the Commissioner refuses to entertain such a revision petition the assessee may apply to the Court under section 45 of the Specific Relief Act and obtain an

* Applications Nos. 944 to 948 of 1948. 15th July, 1948.

order compelling the Commissioner to discharge his statutory functions to hear and determine such a petition.

S. Krishnamachariar for *A. C. Sampath Aiyangar* for Applicant.

C. S. Rama Rao Sahib for Commissioner of Income-tax, Madras.

The Court delivered the following

JUDGMENT.—This is a batch of applications under section 45 of Specific Relief Act for directing the Commissioner of Income-tax, Madras, to hear and determine the revisions filed by the petitioner against the orders of the Appellate Assistant Commissioner of Income-tax, Coimbatore Range. The facts are not in dispute and they may be briefly stated.

The Income-tax Officer, II Circle, Coimbatore, passed orders of assessment against the petitioner for the assessment years 1940-41, 1941-42, 1943-44, 1944-45 and 1945-46. Against the said orders of assessment the petitioner preferred Income-tax Appeals Nos. 237, 1253, 1254 and 1255 of 1945-46 and Income-tax Appeal No. 315 of 1946-47 to the Appellate Commissioner of Income-tax, Coimbatore Range. The Appellate Assistant Commissioner disposed of the appeals on the 6th December, 1946. The appeals were allowed in part, but the petitioner did not get the entire relief he claimed. Against the said orders the petitioner preferred Income-tax Appeals Nos. 3302, 3303, 3299, 3300 and 3301 of 1946-47 to the Income-tax Appellate Tribunal, Madras Bench. The Appellate Tribunal dismissed the appeals as time-barred. On 15th December, 1947, the petitioner applied to the Commissioner of Income-tax, Madras, under section 33-A (2) of the Indian Income-tax Act for revising the orders of the Appellate Assistant Commissioner, Coimbatore. This was numbered as I.T.R. Nos. 78 to 82 of 1947-48 on the file of the Commissioner of Income-tax, Madras. On 23rd December, 1947, the Commissioner of Income-tax declined to entertain the said applications on the ground that the orders of the Appellate Assistant Commissioner had already been made the subject of appeals to the Appellate Tribunal. The petitioner seeks the aid of this Court to compel the respondent to hear and determine the revisions, which he was bound in law to do.

The learned Counsel for the commissioner of Income-tax raised three contentions against the maintainability of this application :

(1) that the revisions were not maintainable against the order of the Appellate Assistant Commissioner,as those orders had been made the subject of appeals to the Appellate Tribunal within the meaning of section 33-A (2),provisio (*c*) ;

(2) that the Income-tax Act exhaustively defines the obligations and remedies of the tax-payer and so the remedy provided by section 45 of the Specific Relief Act is not available for the assessee ;

(3) that as the applicant had other specific and adequate legal remedy, the petitioner cannot ask for a relief under section 45 of the Specific Relief Act.

The answer to the first point turns upon the construction of proviso (*c*) of section 33-A (2). The relevant provisions of the Indian Income-tax Act read as follows :

"Section 33. (1) Any assessee objecting to an order passed by an Appellate Assistant Commissioner under section 28 or section 31 may appeal to the Appellate Tribunal within sixty days o the date on which such order is communicated to him.

(2) The Commissioner may, if he objects to any order passed by an Appellate Assistant Commissioner under section 31, direct the Income-tax Officer to appeal to the Appellate Tribunal against such order, and such appeal may be made within sixty days of the date on which the order is communicated to the Commissioner by the Appellate Assistant Commissioner.

(2-A) The Tribunal may admit an appeal after the expiry of the sixty days referred to in sub-sections (1) and (2) if it is satisfied that there was sufficient cause for not presenting it within that period.

(3) An appeal to the Appellate Tribunal shall be in the prescribed form and shall be verified in the prescribed manner, and shall, except in the case of an appeal referred to in sub-section (2), be accompanied by a fee of one hundred rupees.

(4) The Appellate Tribunal may, after giving both parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, and shall communicate any such orders to the assessee and to the Commissioner.

(5) Save as provided in section 66 orders passed by the Appellate Tribunal on appeal shall be final.

Section 33-A (1). The Commissioner may of his own motion call for the record of any proceedings under this Act in which an order has been passed by any authority subordinate to him and may make such inquiry or cause such inquiry to be made and, subject to the provisions of this Act, may pass such order thereon, not being an order prejudicial to the assessee, as he thinks fit: provided that the Commissioner shall not revise any order under this sub-section if—

(*a*) where an appeal against the order lies to the Appellate Assistant Commissioner or to the Appellate Tribunal, the time within which such appeal may be made has not expired, or

(*b*) the order is pending on an appeal before the Appellate Assistant Commissioner or has been made the subject of an appeal to the Appellate Tribunal, or

(*c*) the order has been made more than one year previously.

(2) The Commissioner may, on application by an assessee for revision of an order under this Act passed by any authority subordinate to the Commissioner, made within one year from the date of the order, call for the record of the proceeding in which such order was passed, and on receipt of the record may make such inquiry or cause such inquiry to be made, and, subject to the provisions of this Act, may pass such order thereon, not being an order prejudicial to the assessee, as he thinks fit:

Provided that the Commissioner shall not revise any order under this sub-section if—

(*a*) where an appeal against the order lies to the Appellate Assistant Commissioner or to the Appellate Tribunal but has not been made, the time within which such appeal may be made has not expired, or, in the case of an appeal to the Appellate Tribunal, the assessee has not waived his right of appeal, or

(*b*) where an appeal against the order has been made to the Appellate Assistant Commissioner the appeal is pending before the Appellate Assistant Commissioner, or

(*c*) the order has been made the subject of an appeal to the Appellate Tribunal:

Provided further that an order by the Commissioner declining to interfere shall be deemed not to be an order prejudicial to the assessee.

(3) Every application by an assessee under sub-section (2) shall be accompanied by a fee of twenty-five rupees."

Section 33 provides for an appeal against the order of the Assistant Commissioner to the Appellate Tribunal within sixty days of the date on which the order of the Assistant Commissioner is communicated to the party. Section 33 (2-A) gives a discretion to the Tribunal to admit an appeal after the expiry of the 60 days if there was sufficient cause for not presening the appeal in time. Under section 33-A (1) the Commissioner is empowered to revise the orders of any authority subordinate to him *suo motu* and section 33-A (2) provides a revision to the Commissioner against an order of an authority subordinate to him at the instance of the aggrieved party. The proviso to sub-clause (2) of section 33-A in so far as it is relevant deals with three contingencies when such power of revision cannot be exercised by the Commissioner: (1) when the time prescribed for preferring an appeal to the Appellate Tribunal has not expired, (2) when the assessee has not waived his right to prefer an appeal within the time so prescribed, and (3) where the order has been made the subject of an appeal to the Appellate Tribunal. It is clear from these two sections that the remedy by way of revision is an alternative to the right of appeal provided in section 33. It will be seen from the history of the legislation that section 33-A was introduced by Act XXIII of 1941. The revisional jurisdiction, which the Commissioner had before the Amendment Act of 1939 was taken away by the repeal of the old section 33. But the Legislature obviously found that another alternative remedy less costly was necessary to give relief where the stakes involved were small, and introduced the revisional power again. An assessee can either prefer an appeal to the Appellate Tribunal, or he may select the cheaper remedy and apply to the Commisioner to revise the order. If he so elects, if the time prescribed for preferring an appeal has not expired, he must waive his right to prefer an appeal. The object of the sections is clear. The assessee can agitate the validity of the order of the subordinate authority either before the Tribunal or the Commissioner. That was the intention of the Legislature, and, in my view, the provisions of the aforesaid two sections clearly bring out the intention. The learned counsel for the Commissioner contended that the same consequences would follow even if an appeal was filed and dismissed as out of time. If this contention is accepted, it will defeat the purpose of the enactment and I cannot accept the same unless the words used in the section clearly support such contention. Mr. Rama Rao Sahib contends that if an assessee exercises his option to prefer an

appeal and files an appeal, whether it is admitted or not the order is "subject of an appeal to the Appellate Tribunal" in clause (c) of the proviso. He argued that what matters is the intention of the aggrieved party. I cannot agree with this contention. The order is made the subject of an appeal only when it is the subject-matter of an effective appeal. If the appeal is not admitted and is disposed of on the ground that it was filed after the prescribed time, the order could not be said to be the subject of an appeal. Section 33 also supports the said view. Under section 33 (1) an assessee can prefer an appeal within 60 days and sub-section (2-A) empowers the Tribunal to admit an appeal even after 60 days if it is satisfied that there was sufficient cause for not presenting it within the period. This clearly indicates that till such order was made, the appeal was not admitted and, therefore, it must be treated as not having been legally on the file of the Tribunal.

Decided cases also support my view. In *Byya Reddi* v. *Gopala Rao*[1], a question arose as regards the construction of the words "There has been an appeal" within the meaning of Article 182 (2) of the Indian Limitation Act. The words "There has been an appeal" are obviously wider in scope than the words "the subject of an appeal." Even, so, Madhavan Nair, J., (as he then was) held that where an appeal memorandum presented to the High Court, was rejected as being out of time, there was no appeal to the Court within the meaning of Article 182 (2). The learned Judge accepted the argument that as the appeal to the High Court was not admitted as having been filed out of time, it should not be held that there has been an appeal against the decree of the appellate Court. In the present case the Appellate Tribunal refused to excuse the delay and did not admit the appeal.

Shivanath Prasad v. *Commissioner of Income-tax*[2], also supports the contention of the petitioner. The learned Judges held that rejection of an appeal against an assessment on the ground that the appeal is barred by time is an order refusing to entertain the appeal and is not an order confirming the assessment. In that case an application under section 66 (3) of the Indian Income-tax Act was taken out requiring the Income-tax Commissioner to state a case under section 66 (2) of the same Act. If the order of the Assistant Commissioner was considered as an order passed under sections 31 and 32, section 66 (2) of the Income-tax Act could be invoked. If, on the other hand, the order of the Income-tax Assistant Commissioner was not an order within the meaning of those sections, the petitioner was not entitled to the relief he asked for. The learned Judges held that the order of the Assistant Commissioner rejecting the appeal as one filed beyond time was an order refusing to admit the appeal and, therefore, the Assistant Commissioner's order could not be construed as one passed under section 31.

The next case relied upon by the learned counsel for the petitioner is *Mahant Krishna Dayal Gir* v. *Syed Abdul Gaffar*[3]. The question that arose for consideration in that case was whether a sale should be set aside on the ground of misdescription. Section 33 of the Bengal Land Revenue Sales Act says that no sale shall be annulled unless the ground relied upon shall have been declared and specified in an appeal made to the Commissioner under section 25 of the Act. Under section 25 of the Act an appeal to the Commissioner shall be presented within sixty days of the sale, but in that case the appeal was presented after the expiry of sixty days. The learned Judges held that section 63 has not been complied with, as there has been no appeal to the Commissioner under that section and therefore the suit to set aside the sale was barred.

The aforesaid three cases arose under different Acts but the principle laid down under those sections is clear and to my mind can be applied to the construction of clause (c) of the proviso. When it was held that there was no appeal when the appeal filed was rejected on the ground it was barred by limitation, it would obviously be unsound to hold that where an appeal had been rejected as out of time, the order had been the subject of an appeal. Indeed, the words "subject of an appeal"

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1. (1933) 66 M.L.J. 486 : I.L.R. 57 Mad. 741.
2. (1935) I.L.R. 57 All. 971.
3. (1917) 2 Pat. L.J. 402.

imply that the order appealed against has been decided on the merits. The learned counsel for the Commissioner relied upon a decision of the Judicial Committee in *Nagendra Nath Dey* v. *Suresh Chandra Dey*[1]. But the question that arose in that case was one of limitation. Their Lordships held that where an appeal irregular in form and insufficiently stamped was dismissed both on the ground of irregularity and upon the merits, it was nevertheless an appeal within the meaning of Article 182 (2) and though the judgment-debtors against whom execution was sought were not parties to the suit, time only ran against the decree-holder from the date of the decree-holder's decree dismissing the appeal. Dealing with the question on page 334 their Lordships observed :

"There is no definition of appeal in the Code of Civil Procedure but their Lordships have no doubt that any application by a party to an appellate Court, is an appeal within the ordinary acceptation of the term, and that it is no less an appeal because it is irregular or incompetent. The 1920 appeal was admitted and was heard in due course, and a decree was made upon it."

It will therefore be seen that that decision does not support the contention of Mr. Rama Rao Sahib, as in that case the appeal was admitted and was heard in due course and a decree was made upon it. This case was considered by Madhavan Nair, J., as he then was, in *Byya Reddi* v. *Gopala Rao*[2]. Here the learned Judge after reciting the observations of the Judicial Committee, stated thus :

"Having regard to the fact that the appeal with which they were concerned was admitted, which fact is stated in the judgment, the observations should not be made to apply to the question that I am called upon to consider. These observations must be understood with reference to the special arguments which were addressed to their Lordships in connection with the meaning of the term 'where there has been an appeal'."

For the aforesaid reasons I hold that the orders of the Assistant Commissioner have not been made the subject of an appeal to the Appellate Tribunal. If so, it is incumbent on the Commissioner to dispose of the revisions filed before him on the merits in accordance with law.

There is also not much force in the second contention of the learned counsel for the Commissioner. He argued that the petitioner had other specific and adequate legal remedy, as he could have filed the appeal to the Appellate Tribunal in time. It is true that the appellant could have preferred an appeal to the Appellate Tribunal against the orders of the Assistant Commissioner within six weeks from the said orders. But, under the Act, they were not bound to do so. They had alternative remedies and they are entitled to have resort to either of them, unless they are precluded from doing so by any provisions of the Act. When the Legislature for valid reasons gave them two remedies, it is not open to the Commissioner to say that they were bound to prefer the appeals. This argument obviously could not have any force if the appellant did not, in the first instance, prefer time-barred ineffective appeals and straight away preferred the revisions. This argument, if it had any merits, should equally apply to a case where an aggrieved person waived his right of appeal and preferred revisions, which were dismissed by the Commissioner. This argument should also apply to cases where a party exercises his option, allows the time to prefer appeals to run out and files a revision, which is dismissed by the Commissioner illegally. Obviously this contention would not have been open to the Commissioner in such cases. If so, it will equally be untenable in the case of a dismissal of a time-barred ineffective appeal, as in law it has no legal existence. To put in other words, when the option was exercised or when the circumstances of a particular case gave the aggrieved party the right of revision under the statute, it is, as it were, that the other remedy was not open to him. I therefore have no hesitation to reject this argument.

The learned counsel argues that the Income-tax Act exhaustively defines the obligations and remedies of the tax-payer and that, therefore, if a party is aggrieved by any order passed thereunder, he has to resort only to such remedy as provided by the Act. He contends that by implication remedy to the assessee provided under section 45 of the Specific Relief Act is taken away by the Legislature.

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1. (1932) 63 M.L.J. 329 : L.R. 59 I.A. 283 : I.L.R. 60 Cal. 1 (P.C.).

2. (1933) 66 M.L.J. 486 : I.L.R. 57 Mad. 741 at 747.

In support of this contention he relies upon the decision of the Judicial Committee in *Commissioner of Income-tax, West Punjab* v. *Tribune Trust, Lahore*[1]. Their Lordships held in that case that the reference under section 66 (2) was incompetent, as the order of the Commissioner on the assessee's application under section 33 was not prejudicial to the assessee in the sense that after the order it was in a worse position than before the order was made. Their Lordships also held that in that case the assessments were made by the Income-tax Officer in the exercise of his duty and could not be said to be a nullity merely on the ground that if they had been challenged in due time, they might have been set aside. In the course of the judgment their Lordships reviewed the various sections of the Act and pointed out that it exhaustively defined the obligations and the remedies of the tax-payer and that it would be incompatible with the scheme of the Act that he should have a collateral right, necessarily vague and undefined, founded on the principle of equity and good conscience. That decision does neither support the argument of the learned counsel directly, nor even remotely throw any light on his argument. The act may be self-contained ; it may provide in a comprehensive manner the rights and the remedies of the parties. If a party is aggrieved by an order under the provisions of the Act, he will have to resort to the remedy provided thereunder. But, if a party takes the remedy provided by the Act in strict conformity thereof, but the Tribunal constituted under the Act refuses to discharge its duties provided by the same Act, it is not open to the Tribunal or the authority to say that he cannot be compelled to discharge his statutory functions. Section 45 is intended only to govern such cases and to compel officers to discharge their statutory duties. I therefore also reject this argument.

I am clearly of opinion that this is a fit case for making an order under section 45 of the Specific Relief Act. The respondent is hereby directed to hear and determine I. T. R. Nos. 78 to 82 of 1947-48 preferred by the petitioner herein against the orders of the Appellate Assistant Commissioner of Income-tax, Coimbatore, in accordance with law. The respondent will pay the costs of the petitioner. One set.

B.V.V. *Applications allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction.)

PRESENT :—MR. JUSTICE SUBBA RAO.

Parthasarathy and another .. *Plaintiffs**

v.

Krishnamoorthy and another .. *Defendants.*

Madras Buildings (Lease and Rent Control) Act (XV of 1946), *sections* 7 *and* 12—*Scope and effect—Default in payment of rent—Landlord's right under section* 7 *to evict—Termination of tenancy by due notice under section* 111 (h), *Transfer of Property Act (IV of* 1882)—*Necessity—Sub-tenant not party to application for eviction—If bound by eviction order—Order of special tribunals—Jurisdiction of Civil Courts to question—Exclusion of jurisdiction by the Act—Effect—Question of jurisdiction—If can be raised for first time in the Civil Court.*

On a default in payment of rent a landlord filed an application before the Rent Controller under section 7 of Madras Act XV of 1946, praying for ejectment of the tenant but without issuing a notice terminating the tenancy as required by section 111, clause (*h*) of the Transfer of Property Act. The Rent Controller made an order for eviction and an appeal by the tenant to the Chief Judge of the Presidency Court of Small Causes was dismissed. In a suit by the tenant for a declaration that the order for eviction was invalid, without jurisdiction and unenforceable and for a permanent injunction restraining the landlord from enforcing the order,

Held, the object of Madras Act XV of 1946 is to prevent unreasonable eviction and not to confer any new rights of eviction on the landlord. The right of the landlord to immediate possession is limited by the provisions of section 7 of the Act. But by enacting that section the Legislature has not expressly or by implication repealed the provisions of the Transfer of Property Act so far as it related to the tenants governed by the Rent Control Act. The section only provides that no eviction shall lie except on the grounds specified in the section. Accordingly, unless and until a tenancy or lease is determined according to the provisions of the Transfer of Property Act, a landlord is not entitled to obtain an order for eviction or possession.

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1. (1948) 2 M.L.J. 14.

* C. S. No. 342 of 1948. 31st August, 1948.

The order of the Rent Controller and that of the Chief Judge of the Presidency Court of Small Causes in appeal were made without jurisdiction and are liable to be set aside by the Civil Court. Even though the jurisdiction of the Civil Court is excluded by the Act, the Civil Court has jurisdiction to set aside the order of the Rent Controller who exceeded the powers conferred on him under section 7 of the Act by ordering eviction when the landlord had not fulfilled the necessary condition of giving notice.

The fact that the tenant did not question the jurisdiction of the Rent Controller in the application filed by the landlord or in the appeal filed before the Chief Judge of the Presidency Court of Small Causes, will not preclude him from questioning the same in the Civil Court. Parties cannot confer jurisdiction on tribunals if otherwise they had not got such jurisdiction.

If a landlord had acquired a right to evict his tenant after giving a valid notice to quit, a person claiming to be a sub-tenant cannot claim higher rights than the tenant and is liable to be evicted. Even if he was not made a party to the proceedings before the Controller he would be bound by an order passed against the tenant obtained without any fraud or collusion.

(In the present case the sub-tenancy alleged was found against.)

V. V. Srinivasa Iyengar, *P. Srinivasa Iyengar* and *N.R. Raghavachariar* for Plaintiffs.

V. Radhakrishniah, *M.A. Srinivasan* and *M.A. Rajagopalan* for Defendants.

The Court delivered the following

JUDGMENT.—This is a suit for declaration that the order of the Rent Controller dated the 5th April, 1948, passed in L. Dis. No. 4985 H. R. C. of 1947 in favour of the defendant is invalid, without jurisdiction and unenforceable as against the plaintiffs and also for a permanent injunction restraining the defendant from enforcing the said order.

House, ground and premises No. 403, Mint Street, George Town, Madras, is owned by the defendant. The Corporation gave separate sub-numbers to portions of the said premises. In or about the middle of August, 1943, the first plaintiff obtained from the defendant a lease of a portion of that building numbered as 4/403, Mint Street, on a monthly rental of Rs. 55. Subsequently, by agreement between the parties the rent was increased to Rs. 60 per mensem. The first plaintiff failed to pay the rent in respect of the said premises for the month of July, 1947, before the end of August, 1947. In view of the default so made, the defendant filed an application before the Rent Controller, Madras, against the first plaintiff under section 7 of Madras Act XV of 1946 (hereafter called the Act) praying for ejectment of the first plaintiff from the said premises. To that application, the second plaintiff was not made a party. The Rent Controller made an order on the 5th April, 1948, for eviction of the first plaintiff. The first plaintiff preferred an appeal to the Presidency Court of Small Causes, Madras, against the said order of the Rent Controller and the appeal also was dismissed. The second plaintiff is the brother of the first plaintiff. He claims to be a sub-tenant under the first plaintiff since 1945 of a room in the said premises. The plaintiffs filed this suit for the aforesaid reliefs mainly on the ground that the Rent Controller had no jurisdiction to order eviction as there had not been a previous or antecedent determination of the tenancy in accordance with law. The second plaintiff states that as there was no termination of the tenancy in accordance with law, his interest in the sub-tenancy continues and as he is not a tenant within the meaning of the Act, he is not liable to be evicted by any order passed by the Rent Controller. Further, the Rent Controller's order could not affect his rights as sub-tenant to continue to occupy his portion of the premises as he was not a party to that order. The defendant in his written statement stated that this Court has no jurisdiction to entertain this suit and the second plaintiff is not a sub-tenant of the first plaintiff.

The following issues were framed :—

1. Whether the suit is maintainable ?

2. Whether the second plaintiff is a sub-tenant ?

Learned counsel for the defendant contends relying upon sections 7 and 12 of the Act, that this Court has no jurisdiction to entertain this suit. Section 7 reads as follows :

" (1) A tenant in possession of a building shall not be evicted therefrom, whether in execution of a decree or otherwise and whether before or after the termination of the tenancy, except in accordance with the provisions of this section :

Provided that nothing contained in this section shall apply to a tenant whose landlord is the Provincial Government :

Provided further that where the tenant denies the title of the landlord or claims right of permanent tenancy the Controller shall decide whether the denial or claim is *bona fide* and if he records a finding to that effect, the landlord shall be entitled to sue for eviction of the tenant in a Civil Court and the Court may pass a decree for eviction on any of the grounds mentioned in this section, notwithstanding that the Court finds that such denial does not involve forfeiture of the lease or that the claim is unfounded.

(2) A landlord who seeks to evict his tenant shall apply to the Controller for a direction in that behalf. If the Controller, after giving the tenant a reasonable opportunity of showing cause against the application, is satisfied—

(*i*) that the tenant has not paid or tendered the rent due by him in respect of the building, within fifteen days of the expiry of the time fixed in the agreement of tenancy with his landlord or in the absence of any such agreement by the last day of the month next following that for which the rent is payable, or,

(*ii*) that the tenant has after the commencement of this Act without the written consent of the landlord—

(*a*) transferred his right under the lease or sub-let the entire building or any portion thereof, or

(*b*) used the building for a purpose other than that for which it was leased, or

(*iii*) that the tenant has committed such acts of waste as are likely to impair materially the value or utility of the building, or

(*iv*) that the tenant has been guilty of such acts and conduct which are a nuisance to the occupiers of buildings in the neighbourhood, or

(*v*) that where the building is situated in a place other than a hill station, the tenant has ceased to occupy the building for a continuous period of four months without reasonable cause,

the controller shall make an order directing the tenant to put the landlord in possession of the building and if the Controller is not so satisfied, he shall make an order rejecting the application.

(3) (*a*) A landlord may apply to the Controller for an order directing the tenant to put the landlord in possession—

(*i*) in the case of a residential building, if he requires it for his own occupation and if he is not occupying a residential building of his own in the city, town or village concerned ;

(*ii*) in the case of a non-residential building, if he is not occupying for purposes of a business which he is carrying on, a non-residential building in the city, town or village concerned which is his own to the possession of which he is entitled :

Provided that where the tenancy is for a specified period agreed upon between the landlord and the tenant, the landlord shall not be entitled to apply under this sub-section before the expiry of such period :

Provided further that where a landlord has obtained possession of a building under this clause, he shall not be entitled to apply again under this clause :—

(*i*) in case he has obtained possession of a residential building, for possession of another residential building of his own ;

(*ii*) in case he has obtained possession of a non-residential building, for possession of anothe non-residential building of his own.

(*b*) The Controller shall, if he is satisfied that the claim of the landlord is *bona fide*, make an order directing the tenant to put the landlord in possession of the building on such date as may be specified by the Controller and if the Controller is not so satisfied, he shall make an order rejecting the application :

Provided that the Controller may give the tenant a reasonable time for putting the landlord in possession of the building and may extend such time so as not to exceed three months in the aggregate . . . . ."

Section 12 is in the following terms :—

" (1) (*a*) The Provincial Government may, by general or special order notified in the Fort St. George Gazette, confer on such officers and authorities as they think fit, the powers of appellate authorities for the purposes of this Act, in such areas or in such classes of cases as may be specified in the order.

(*b*) Any person aggrieved by an order passed by the Controller may, within fifteen days from the date of receipt of such order, prefer an appeal in writing to the appellate authority having jurisdiction.

(2) On such appeal being preferred, the appellate authority may order stay of further proceedings in the matter pending decision on the appeal.

(3) The appellate authority shall send for the records of the case from the Controller and after giving the parties an opportunity of being heard, and, if necessary, after making such further inquiry as he thinks fit either personally or through the Controller, shall decide the appeal.

(4) The decision of the appellate authority and subject only to such decision, an order of the Controller shall be final and shall not be liable to be called in question in any Court of law whether in a suit or other proceeding or by way of appeal or revision."

Under section 7 a tenant shall not be evicted except in accordance with the provisions of this section. Any person aggrieved by such an order can prefer an appeal under section 12 and under clause (4) of that section, the decision is made final and shall not be liable to be called in question in any Court of law whether in a suit or other proceeding or by way of appeal or revision. It is argued that the Act is a self-contained one and a combined reading of sections 7 and 12 clearly shows that the jurisdiction of civil courts is ousted. The law on the subject is well settled and it is not necessary to consider *in extenso* the various decisions. It is enough to extract the proposition of law so well stated in *Secretary of State* v. *Mask & Co.*[1]. Lord Thankerton says :

"It is settled law that the exclusion of the jurisdiction of the Civil Courts, is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. It is also well settled that even if jurisdiction is so excluded, the Civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure."

The same principle has been stated succinctly in another judgment of the Judicial Committee arising under section 16 of the Defence of India Act, *Emperor* v. *Sibnath Banerji*[2].

Lord Thankerton observed :

"Sub-section (1) assumes that the order is made in exercise of the power, which clearly leaves it open to challenge on the ground that it was not made in conformity with the power conferred."

The Civil Court can therefore always interfere if a special tribunal exceeds the limits of jurisdiction conferred upon it. As stated by Sir George Rankin in *Mohammad Nawaz Khan* v. *Bhagata Nand*[3], it is for the Civil Court to determine in the last resort the limits of the powers of a Court of special jurisdiction.

Mr. Radhakrishnayya, appearing for the defendant, relied on the Full Bench decision in *Manicka Gramani* v. *Ramachandra Ayyar*[4]. That was a decision arising under Madras Act VIII of 1865. The defendant was a shrotriemdar and the plaintiffs were tenants on the estate against whom orders of ejectment had been made under section 10 of the Rent Recovery Act. The suits were brought to have these orders set aside. The Full Bench held that the suits were not maintainable. In that case the question to be decided was whether a tenant against whom a judgment had been properly passed by the Collector under section 10 of the Rent Recovery Act could, in a separate suit in a Civil Court, call in question the order of ejectment. Under section 76 of that Act the Civil Court's jurisdiction was ousted. Under section 10 the Collector has jurisdiction to decide with regard to the propriety of any patta which the tenant to whom it has been tendered has refused to accept. An appeal has been provided for against the order of the Collector to the District Court under section 69. In that case the Collector decided as regards the propriety of the patta and also passed an order in ejectment as the tenant made default in complying with the conditions of the patta. The plaintiffs against whom an order of ejectment was passed filed suits to set aside the order of the Collector. Their Lordships held that the suit was not maintainable as on a construction of section 76 the intention of the Legislature to make the judgment and order of the Collector final except in cases specially provided for, was clear. This decision has no bearing at all on the question to be decided as in that case the Collector did not exceed his powers or act beoynd the jurisdiction conferred on him. It

1. (1940) 2 M.L.J. 140 : L.R. 67 I.A. 222 : I.L.R. (1940) Mad. 599 at 614 (P.C.).
2. (1945) 2 M.L.J. 325 : 1945 F.L.J. 222 (P.C.).
3. (1938) 2 M.L.J. 323 : L.R. 65 I.A. 301 : I.L.R. 1938 Lah. 514 (P.C.).
4. (1898) 8 M.L.J. 210 : I.L.R. 21 Mad. 482 (F.B.).

therefore follows that if the Rent Controller exceeded the powers conferred on him under section 7, the Civil Court has jurisdiction to set aside that order.

Mr. Radhakrishnayya next argued that as the first plaintiff did not question the jurisdiction of the Rent Controller in the application filed by the defendant under section 7 of the Act or in the appeal filed before the Presidency Court of Small Causes, he is now precluded from questioning the same in the Civil Court. It is settled law that parties cannot confer jurisdiction on tribunals if otherwise they have not got such jurisdiction. If, as contended by the plaintiffs, the Rent Controller has jurisdiction only to evict a tenant at the instance of the landlord who had a present right to possession, the order of the Rent Controller directing the eviction at the instance of the landlord who had not got such right was obviously an order passed without jurisdiction. If he had no jurisdiction the fact that the first plaintiff did not question the jurisdiction could not confer jurisdiction on the tribunal. This principle is so well-recognised that I need not cite any cases except to extract a passage from Halsbury's Laws of England, Vol. 8, page 532:

> " Where, by reason of any limitation imposed by statute . . . . a Court is without jurisdiction to entertain any particular action or matter, neither the acquiescence nor the express consent of the parties can confer jurisdiction upon the Court, nor can consent give a Court jurisdiction if a condition which goes to the jurisdiction has not been performed or fulfilled."

The law on this subject is fully and correctly stated in this paragraph. The condition, *viz.*, the right to evict was not fulfilled at the time the application under section 7 was filed before the Rent Controller and therefore the Rent Controller had no jurisdiction to entertain the application. His order is without jurisdiction and is therefore liable to be questioned in a Civil Court.

The next question is whether the Rent Controller had jurisdiction to order eviction in the particular circumstances of the case. The decision turns upon the construction of section 7 of the Act which I have already set out. Before I proceed with the construction of the section, it is as well that I give the circumstances under which the Act came to be passed and the state of law that existed prior to its enactment governing the relationship between landlord and tenant. The rights of lessor and lessee are governed by the Transfer of Property Act. Under section 105 a lease of immoveable property is a transfer of a right to enjoy such property for consideration. The said lease can be terminated in the manner provided by the Act, *viz.*, by efflux of time, by forfeiture or by giving the requisite notice to quit. Section 111 provides the manner in which the lease can be terminated. For the purposes of this case, the relevant clause is clause (*h*) of section 111, *i.e.*, on the expiration of a notice to determine the lease, or to quit, or of intention to quit the property leased, duly given by one party to the other. Under section 106 in the absence of a contract or local law or usage to the contrary, a lease of immoveable property for a purpose other than agriculture or manufacture, shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice expiring with the end of a month of the tenancy. If Madras Act XV of 1946 was not enacted, the plaintiffs could be evicted by the defendant only after the termination of the tenancy for one or other of the reasons mentioned in section 111 of the Transfer of Property Act. He should have to give notice of fifteen days expiring with the end of a month of the tenancy. Till the tenancy was terminated he had no right to evict the tenant.

In exercise of the powers conferred by clause (*bb*) of sub-rule (2) of rule 81 of the Defence of India Rules, His Excellency the Governor made an order, the Madras Non-Residential Building Rent Control Order, 1942, and in supersession of the said order, another order was passed in 1945. Owing to war conditions, house owners with the hope of getting high rents, were evicting tenants which they were entitled to do under the Transfer of Property Act. This eviction not only caused great hardship to the tenants but was impeding the war effort as many of the tenants happened to be persons in essential services. In the circumstances this order was passed imposing further restrictions on a landlord, who could, after the passing of the order, evict the tenant only if one or other of the events mentioned in that order happened. In supersession of this order, Madras Act XV of 1946

was passed. The preamble to this order makes it clear the purposes for which this Act was enacted. It says :

"Whereas it is expedient to regulate the letting of residential and non-residential buildings and to control the rents for such buildings and to prevent unreasonable eviction of tenants therefrom in the Province of Madras ; It is hereby enacted as follows."

So the main object of this Act is to prevent unreasonable eviction and not to confer any new rights of eviction on the landlord. The Act presupposes the existence of a landlord's right to immediate possession. But for this Act he could demand immediate possession ; but under this Act, his right to immediate possession is limited by the provisions of section 7. Though he has got a right to evict the tenant under general law, he cannot get possession unless one or other of the conditions specified therein have been complied with. Mr. Radhakrishnayya contended that the provisions of section 7 have superseded the contractual terms between the parties and the landlord's right to evict is now governed only by section 7 of the Act. If Mr. Radhakrishnayya's argument is accepted it would lead to the position that though the term of the contract was for a period of fifty years and there was no clause providing for forfeiture for non-payment of the rent within fifteen days of the expiry of the term fixed in the agreement of tenancy, the landlord would be entitled to evict the tenant on such default in payment of rent. If so construed the section would defeat the purpose of the legislation. Instead of giving the relief which the Legislature intended to give to the tenants, it would be depriving the tenants of the vested rights which they had before the enactment. Unless the section expressly says so or by necessary implication such an intention must be imputed to the Legislature, it is impossible to construe the section in the manner Mr. Radhakrishnayya asks me to do. The general principle governing the construction of Acts of this nature is well settled. A passage from Maxwell on the Interpretation of Statutes, 8th edition, may usefully be cited as it completely and accurately states the law on the subject. At page 73 the learned author says :

"One of these presumptions is that the Legislature does not intend to make any substantial alteration in the law beyond what it explicitly declares, either in express terms or by clear implication, or in other words, beyond the immediate scope and object of the statute. In all general matters outside those limits the law remains undisturbed. It is in the last degree improbable that the Legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness."

Another principle which may be borne in mind in construing section 7 of this Act may also be noticed. This is stated with clearness by the Court of Appeal in *Flannagan* v. *Shaw*[1]. It is unnecessary to state the facts of that case. Scrutton, L.J., refers to the words of A.L. Smith, J., in *Kutner* v. *Phillips*[2] :

"Now a repeal by implication is only effected when the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one, that the two cannot stand together" . . . . . . "Unless two acts are so plainly repugnant to each other, that effect cannot be given to both at the same time, a repeal will not be implied, and special acts are not repealed by general Acts unless there is some express reference to the previous legislation, or unless there is a necessary inconsistency in the two Acts standing together."

I will therefore proceed to consider whether by enacting section 7 of the Act, the Legislature expressly repealed the provisions of the Transfer of Property Act, so far as they related to the tenants governed by the Rent Control Act or whether I mus hold by necessary implication that such was the intention of the Legislature. There is no express provision in the Act or express words in section 7 repealing the provisions of the Transfer of Property Act in so far as the rights of the landlord and tenant are governed by this Act. Indeed the words of section 7 are couched in negative form and it is impossible to read in the section any such words of repeal. When the Legislature says that a tenant in possession of a building shall not be evicted therefrom except in accordance with the provisions of the section, it cannot possibly mean that the landlord can evict the tenants even if he has no right to evict them under the Transfer of Property Act. I cannot help thinking that if the Legislature

1. (1920) 3 K.B. 96.
2. (1891) 2 Q.B. 267 at 271, 272.

had intended to repeal the provisions of the Transfer of Property Act, it would have said so in plain terms. Can it be said that by necessary implication the Legislature intended to repeal the terms of the Transfer of Property Act?

Mr. Radhakrishnayya laid stress on the words " whether before or after the termination of the tenancy " in section 7 (1). It is argued that as under section 7 (1), the landlord could file an application for eviction before the termination of the tenancy, it necessarily follows that he could file the application before the right to evict accrued to him. I must concede that the words " before the termination of the tenancy " are rather ambiguous. But in my view, the word "termination" could be given in the context its natural meaning, the termination of the tenancy by efflux of time. If so understood, it would only mean that the landlord before the efflux of time, may get his right to possession by forfeiture or giving the requisite notice to quit.

Mr. Radhakrishnayya relied on the second proviso to section 7 (1) and pertinently asked why that proviso should have been enacted if the landlord could file a suit in spite of section 7 (1). That proviso only confers preliminary jurisdiction on the Rent Controller to decide whether the denial of the title of the landlord or the claim of permanent tenancy by the tenant was *bona fide* and in that particular contingency, the proviso also confers a limited jurisdiction on the Court for eviction on any of the grounds in section 7. From the scheme of the Act it is clear that a landlord, after the enactment of the Act, cannot file a suit for eviction against the tenant and this proviso is only an exception to that general prohibition. On the other hand, the proviso itself gives a clear indication that the Rent Controller has no jurisdiction to decide questions other than those that were specifically provided for in section 7 (1) of the Act and where it intended to give any jurisdiction which affected the rights of the parties in general law, it specifically stated so. It does not either expressly or by necessary implication say that the tenant cannot file a suit even questioning the jurisdiction of the Court in cases where the Rent Controller exceeded his jurisdiction. Learned counsel also relied on the proviso 1 to section 7 (3) (*a*) (*ii*) of the Act. Section 7 (3) (*a*) deals with a landlord's right to apply to the Rent Controller for an order directing the tenant to put the landlord in possession under certain contingencies. But the proviso says that he cannot do so if a term has been fixed, before the expiry of the term. This rule only confers a power on the landlord to evict the tenant subject to the proviso ; but neither the rule nor the proviso support the argument that the landlord can evict the tenant under section 7 (3) (*a*) of the Act in other cases before his right to possession accrued. The fact that the proviso makes it clear that the right under section 7 (3) (*a*) is subject to the term agreed upon between the parties cannot be construed to imply that the landlord can evict irrespective of the provisions of the Transfer of Property Act. It would be stretching the language to a breaking point.

Learned counsel also relied on clause (4) of section 12. It provides that the order of the Rent Controller cannot be questioned in a suit. As I have already pointed out, this clause necessarily cannot apply to orders passed by the Rent Controller without jurisdiction. If he acts within the limits of his power, his order is final and cannot be questioned in a Court of law. Mr. Radhakrishnayya also emphasised the word " tenant " in section 7 (1) and argued that if section 7 (1) is intended to apply to a case where the landlord has acquired a right to possession, the word, tenant would become meaningless as after the landlord acquired the right to evict, the person in occupation of his house ceases to be a tenant. This argument ignores the definition of the word tenant under the Act. Under the Act, " tenant " means any person by whom or on whose account rent is payable for a building and includes a person continuing in possession after the termination of the tenancy in his favour. If " tenant " under section 7 (1) is tenant as defined, the meaning of the section would be clear and there would not be any difficulty in construing the section. This view was also expressed in an unreported judgment of Somayya and Rajamannar, JJ., in C.M.A. No. 202 of 1945. The learned Judges in that case observed :

"When we speak of a suit by a landlord for eviction of a tenant, no doubt there is strictly an inconsistency, because if he were a tenant, the landlord could not evict him. For some reason or other either by efflux of time or by the issue of a notice to quit or by forfeiture and re-entry, a tenant must have ceased to be a tenant before the landlord can claim to evict him."

The construction I am putting on section 7 of the Act gets support from another Bench decision of this Court in *Narayanan Nair* v. *Kunhan Mannadiar*[1]. That case arose under the Malabar Tenancy Act. The facts are these. Four items of landed property had been leased by the jenmi to a tarwad. At the end of the term of the lease, the lands were held on a tenancy from year to year. The tenants in their turn sub-leased the properties. The suit was filed by the landlord for evicting the tenants and for obtaining possession. From the facts it is clear that at the time the suit was instituted, the tenancy was from year to year. The suit was governed by the provisions of section 14 of the Malabar Tenancy Act. The relevant provisions of that section are :

No suit for eviction of a cultivating verumpattamdar from his holding shall lie at the instance of his landlord except on the following grounds :—

(1) denial by the tenant of the landlord's title ;

(2) wilful waste committed by the tenant ;

(3) non-payment of rent ;

(4) collusion with a stranger to encroach on the holding or a part of it adversely to the landlord ;

(5) the holding being required by the landlord for his own cultivation, or for that of any member of his family, or for

(6) building purposes ;

(7) failure by the tenant to pay an advance of rent or to give security when directed so to do by a Court, pursuant to section 13 (3). A proviso to section 14 limits eviction to the part of the property encroached upon or required for building under clauses 4 and 6."

The landlord in that case did not terminate the tenancy in accordance with law but straight away filed the suit for eviction on one or other of the grounds mentioned in section 14. Their Lordships dismissed the suit and held that the plaintiff was not entitled to an order for possession. Some of the observations made by the learned Chief Justice are apposite and may be cited :

"Section 14 does not, in my view, confer upon a landlord any right to obtain eviction either upon the happening of the events specified in it or any other circumstances. It provides that no eviction shall lie except upon the grounds specified in the section. The section confers no rights whatever upon the landlord ; it does confer rights upon a tenant inasmuch as he can resist a claim for eviction brought by the landlord save when the claim is made on a ground set out in section 14 ; for instance, it would seem, that upon expiration by effluxion of time of a term of years of the land to which the Act applies, the landlord being unwilling for the tenant to remain, so that a tenancy from year to year, after the expiration of the term of years does not arise, a suit for possession could be resisted by the tenant in the absence of the landlord being able to show the existence of one of the grounds Nos. 1 to 7 contained in the section. Section 14 does not change, or in any way interfere with, the ordinary law, save to the extent to which it provides protection to the tenant."

Later on the learned Judge proceeds to observe :

"Unless and until a tenancy or a lease is determined, a landlord is not entitled to obtain from a Court an order for eviction or possession."

I have cited this passage *in extenso* as the principle equally applies to a construction of section 7 of the Act. Here, as in that case, for the protection of the tenants, section 7 has been enacted and it does not confer on the landlord any right of eviction upon the happening of the events specified in section 7. Here, as there, it only provides that no eviction shall lie except on the grounds specified in the section. For the aforesaid reasons I hold that the Rent Controller's order and that of the Presidency Court of Small Causes in appeal against that order were made without jurisdiction and they are liable to be set aside.

Issue 2.—The case of the second plaintiff is that he is a sub-tenant under the first plaintiff. The second plaintiff is the brother of the first plaintiff. There is no written rental agreement evidencing the tenancy. In support of the alleged subtenancy, the plaintiffs examined three witnesses. P.W. 1 is Jumna Sa, accountant in the office of the Commercial Discount House, Ltd. This company gave the second plaintiff a loan on the pledge of the goods in 403, Mint Street, which is the suit

1. (1947) 2 M.L.J. 559.

house, *viz.*, barley, arrow-root flour and tin sheets. This loan is techincally called key loan. The key of the room in which these goods were stored was handed over to this company. The accountant would go and give delivery as and when the second plaintiff sold the goods and the goods so sold had to be delivered to the purchasers. He admits in cross-examination that there was no board outside the room. The evidence is consistent also with the case of permissive possession of the second plaintiff. Even if the second plaintiff stored his goods in that room with the permission of his brother, the pledgee would have followed the same procedure. P.W. 2 is the first plaintiff himself. He deposes that he was a tenant under the defendant on a monthly rental of Rs. 55. He says that he sub-leased the room in the occupation of his brother to him in or about August 1945 and the latter began to pay rent only from March, 1947, and he told the defendant before he sub-let the premises to his brother. This witness is an interested witness and his evidence cannot be believed unless corroborated by reliable documentary or oral evidence. As I have already stated no lease deed was executed by the second plaintiff in his favour. He did not produce his accounts to show that he received any rent nor did he produce any receipts to support his case. Indeed the fact that a portion of the house has been under a sub-tenant was not stated either before the Rent Controller or even before the Chief Judge of the Court of Small Causes. That fact is mentioned for the first time in this suit. I am not inclined to accept the evidence of this witness. The second plaintiff is examined as P.W. 3. He supports his case in the plaint. He says he is a chemist and druggist and has taken one of the rooms from his brother on rent and was storing barley, arrow-root flour and tin plates in the said room and with the knowledge of the defendant. At first he was paying Rs. 12-8-0 and later the rent was increased to Rs. 15. In support of his evidence he filed his ledgers and day books for 1947-48, Exs. P-4, P-5 and P-6. The account books show that the door number of house No. 406 was corrected into house No. 403. The explanation offered is not satisfactory. He says that the house number was first entered by mistake as 406 and he corrected it into 403. It must be an extraordinary coincidence that the correction must find a place only in the relevant entry when in the entire page where this entry was found in both the ledger and the day book there were no similar corrections. Further though the tenancy started according to the evidence in the year 1945, no rent was paid till 1947. The only two entries in regard to payment of rent before September, 1947, when the application before the Rent Controller was filed are dated March 2nd, 1947, and January 12th, 1948. On 2nd March, there is a debit entry of Rs. 35 which the witness says represents the rent for January and February. In January, 1948, another sum of Rs. 50 is debited towards rent. Therefore the total amount of the rent paid from January to the end of December, 1947, is only Rs. 75. It is not explained why the rent for the other six months was not paid. These account books do not bear the seal of the Income-tax Officer or the Sales Tax Officer. The explanation offered by this witness was that he was not an Income-tax assessee and the Sale Tax Officer did not call for his accounts till now. I am of opinion that these entries in the account books were made after troubles arose between the parties or in anticipation of a possible attempt by the landlord to evict them from the premises. It is more likely and it is consistent with probabilities that the second plaintiff was allowed by his brother to be in permissive possession of a room in the premises which he has taken on lease from the defendant. The second plaintiff cannot have higher rights than his brother the first plaintiff. If the first plaintiff is liable to be evicted the second plaintiff being only in possession with his permission cannot obstruct delivery to the defendant.

Mr. V. V. Srinivasa Ayyangar for the plaintiffs contended that so far as the second plaintiff is concerned the Act has no application as he is not a tenant within the definition of the Act. Further he was also not a party to the proceedings before the Rent Controller and as such the order of eviction passed by the Rent Controller against the first plaintiff cannot bind the second plaintiff. In either view he maintains that the suit is maintainable at his instance. Assuming that the second plaintiff is a sub-tenant, he cannot be in a better position than the tenant himself. If the

tenant is liable to be evicted either under the terms of the contract or by virtue of the provisions of any statute regulating the rights of the parties, the sub-tenancy also would come to an end. Mr. Radhakrishnayya relied on *Yusuf* v. *Jyotishchandra Banerji*[1], in support of his contention that the sub-tenant has not got higher rights than the tenant and that he is not a necessary party to any proceedings against the tenant. In that case it was held that when a landlord obtains a decree for ejectment on forfeiture or determination of the lease by notice against his tenant, the latter's sub-tenants, licensees or servants in actual possession of the premises are " persons bound by the decree " within the meaning of rule 35 of Order 21, of the Code of Civil Procedure. It was also held that a valid notice to quit not only determines the original demise, but any sub-lease which the tenant might have made, provided the sub-tenant has no right independent of the right of his lessor. The principle of this case will apply with equal force to the present case. The sub-tenant derived his title from the tenant. If the right of the tenant to continue in possession is extinguished by statute the rights of the sub-tenant also must necessarily cease. The decision reported in *Timmappa* v. *Rama Venkanna*[2] also lays down the same principle. Farren, C.J., at page 313 observed:

> " A sub-lease differs from the assignment of a lease in that it creates no privity of contract between the sub-tenant and the landlord. . . . The English authorities show conclusively that a landlord putting an end by a proper notice to the tenancy of his tenant thereby determines the estate of the under-tenants of the latter. This is undoubted law—*Roe* v. *Wiggs*[3], *Mellor* v. *Watkins*[4]; Woodfall on Landlord and Tenant, page 359."

It is unnecessary to multipy cases on the subject. If the landlord acquired a right to evict his tenant, the first plaintiff, after giving a valid notice to quit under the provisions of the Transfer of Property Act, the second plaintiff who cannot claim higher rights than the tenant, is liable to be evicted and the fact that he was not made a party to the proceedings before the Controller, does not affect the question as he would be bound by the order that was passed against the tenant obtained without any fraud or collusion. I therefore find on issue 2 that the second plaintiff is not a sub-tenant and even if he were one, he would be liable to be evicted.

For the aforesaid reasons and in view of my finding on issue 1, the plaintiffs would be entitled to a decree as prayed for. The defendant will pay the costs of the first plaintiff and the second plaintiff will pay the costs of the defendant.

K.S. ——— *Decree for plaintiffs*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

Kandaswami Goundan and others .. *Petitioners*.*

The Essential Supplies (Temporary Powers) Act (XXIV of 1946), sections 3 and 7—Order made under section 3 punishable under section 7—Collector's order promulgated under Defence of India Rules prior to the enactment of Act XXIV of 1946—Contravention of—Whether punishable under section 7.

The Defence of India Rules expired on 30th September, 1946, and were replaced by the Ordinance XVIII of 1946 by which certain provisions of the Defence of India Rules were continued. This Ordinance again was substituted by Central Act XXIV of 1946, passed in November of that year. By Order No. 467, dated 15th June, 1946, promulgated under the Defence of India Rules, then in force, the Collector of Coimbatore had prohibited the sale of paddy to any person other than an authorised dealer or himself. Section 7 (1) of the Central Act XXIV of 1946 provided for penalties for contravention of an order made under section 3 of the Act and sale of paddy is one of the subjects contemplated by section 3. The petitioners were a seller and purchasers of paddy and the purchasers were not authorised dealers. The transaction took place on 5th February 1947. On the question whether a contravention of an order made prior to the enactment of the Central Act XXIV of 1946 is an offence on the ground that section 7 (1) makes punishable only an order made under section 3 and not an order deemed to be made under section 3,

Held, that the intention of the Legislature in the enactment of Act XXIV of 1946, was quite clear. It wanted to penalise the contravention of all orders which were the subject-matter of section 3 of the Act and it comprised within that category not only the orders which were specifically to be made under section 3 of the Act but also the orders whch were deemed to be made under the Act by virtue of section 17 of the Act, and that the petitioners were therefore guilty of the offence under section 7 (1) of the Act.

Emperor v. *Ranchhodlal Hirabhai*, 50 Bom.L.R. 295 followed.

1. (1932) I.L.R. 59 Cal. 739.
2. (1896) I.L.R. 21 Bom. 311.
3. (1806) 2 Bos. and P. (N.R.) 330.
4. (1874) L.R. 9 Q.B. 400.

* Crl.R.C. Nos. 1267 and 1307 of 1947. (Crl.R.P. Nos. 1152 and 1191 of 1947).

16th July, 1948.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898 praying that the High Court will be pleased to revise the judgments of the Court of Session of Coimbatore, dated 21st November, 1947 and passed in C.A. Nos. 111 and 108 of 1947 respectively preferred against the judgments of the Court of the Additional First Class Magistrate of Pollachi in C.C. Nos. 410 and 499 of 1947 respectively.

P. Basi Reddi and *P.S. Kailasam* for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—These two cases can be disposed of by a common judgment as the point arising in both of them is identical. I shall first of all deal with Cr.R.C. No. 1267 of 1947 which arises out of C.C. No. 410 of 1947 on the file of the Additional First Class Magistrate, Pollachi. The sole accused in that case was convicted by the trial Court of an offence under section 7 (1) of the Central Act XXIV of 1946 for selling paddy to a person other than the Collector or his agent. This conviction was upheld by the learned Sessions Judge of Coimbatore, and the aggrieved party comes up in revision. In Cr.R.C. No. 1307 of 1947 the three petitioners were the accused in C.C. No. 499 of 1947 in the Court of the same Additional First Class Magistrate, Pollachi. They were the purchasers of the quantity of paddy from the accused in the previous case and were convicted of an offence under the same section of the same Act for transporting paddy without a permit.

Though in the lower Courts the petitioners in both the cases questioned the credibility of the prosecution evidence and denied the actions attributed to them, in this Court the counsel in each of these cases has wisely not attempted to do so. I agree with the lower Court that the sale and transport of paddy as alleged by the prosecution are both true occurrences.

But the question is whether there was a contravention of section 7 (1) of the Central Act. The circumstances that led up to the contravention are that by Order No. 467, dated the 15th June, 1946, promulgated under section 81 (2) of the Defence of India Rules then in force, the Collector of Coimbatore had prohibited the sale of paddy to any person other than an authorised dealer or himself.

It is now proved beyond doubt whatever, that the petitioners in Cr.R.C. No. 1307 of 1947 are not authorised dealers at all and therefore the sale of paddy to them contravened the order of the Collector. As is well known the Defence of India Rules expired on the 30th of September, 1946 and were replaced by Ordinance No. XVIII of 1946 by which certain provisions of the Defence of India Rules were continued. This ordinance, again, was substituted by Central Act XXIV of 1946 passed in November of that year. The question is whether the contravention of the Collector's order No. 467 can be said to be an offence under section 7 (1) of the Central Act.

By section 3 of Ordinance XVIII of 1946 it was enacted that the Central Government, so far as it appears to it, to be necessary or expedient for maintaining or increasing supplies of essential commodities or for securing their equitable distribution and availability at fair prices can, by notification, provide for regulating or prohibiting the production, supply and distribution of such commodities, and trade and commerce therein, and power was given under section 4 to delegate the functions of the Central Government to any Provincial Government or such officer or authority subordinate to the Provincial Government as may be specified in the direction. By section 5 it was enacted that until other provisions are made under this Ordinance any order whether notified or not made by whatsoever authority under sub-rule (2) or sub-rule (3) of rule 81 of the Defence of India Rules in respect of any matter specified in section 3 which was in force immediately before the commencement of

the Ordinance shall, notwithstanding the expiration of the said rules, continue in force so far as consistent with the Ordinance and be deemed to be an order made under section 3. . . . etc. . . . Section 8 of the Ordinance provided that any person who contravened any order made or deemed to be made under section 3 shall be punishable with imprisonment. . . . . etc. It is undisputed that the sale of paddy was one of the subjects contemplated by section 3, and therefore if it was an offence to sell and transport paddy in derogation of the provisions of the Collector's order, dated 15th June, 1946, when the Defence of India Rules were in force, it was certainly an offence under the Ordinance as well, and that so long as the Ordinance was in force a person coud be convicted of that offence. This ordinance was replaced by the Central Act XXIV of 1946 which came into force on the 19th November, 1946. Section 3 of the Act is in the same terms as the corresponding section of the Ordinance, and section 7 (1) provided for penalties for contravening an order made under section 3. There was added in this Act section 17 which runs as follows :

" (1) Essential Supplies (Temporary Powers) Ordinance, 1946, is hereby repealed.

(2) Any order made or deemed to be made under the said Ordinance and in force immediately before the commencement of this Act shall continue in force and be deemed to be an order made under this Act ; and all appointments made, licences or permits granted and directions issued under any such order and in force immediately before such commencement shall likewise continue in force and be deemed to be made, granted or issued in pursuance of this Act."

At the time the alleged offence in this case was committed, that is, on 5th February, 1947, the statutory enactment in force was Act XXIV of 1946. I have already mentioned that the act complained against would have been an offence if the Ordinance previously repealed were in force ; but Mr. Kailasam for the petitioner raises the question that on a true and proper construction of section 7 (1) of the Act along with section 17 of the same enactment it is not possible to hold that a contravention of an order made prior to the enactment of Act XXIV of 1946 is an offence. What he states is that section 7 (1) makes punishable only an order made under section 3 and not an order which is deemed to be made under section 3 by virtue of section 17 of the Act which provides that any order made or deemed to be made under the Ordinance and in force immediately before the commencement of the Act shall be deemed to be an order made under the Act. In other words the argument is that the omission of the words in section 7 (1) " deemed to be made under section 3 " was a *casus omissus* and therefore the Act will not be applicable to the offence in question. He also invited my attention to similar provisions in a few other Acts recently passed by the various Legislatures. In Madras Act XIV of 1946 dealing with the continuance during a limited period, of the powers to control the production, supply, distribution, transport, and prices of essential articles, etc., which came into force on the first day of October, 1946, sections 9 and 12 are instructive in this connection. There is a specific provision in section 12 that a contravention of an order previously made under the Defence of India Rules or under the enactments which were continued under section 9 shall be punishable, etc. Therefore whenever the Legislature thought that the continuance of a previous order is to be in force after the coming into existence of a repealing and re-enacting statute it makes a specific provision to that effect. It is also instructive to refer to an Act of the Central Legislature, and that is Act X of 1947 called the Explosives (Temporary Provisions) Act, 1947. Under section 3 of that Act, all declarations and orders made under rule 88 of the Defence of India Rules or that rule as continued in force by the Emergency Provisions (Continuance) Ordinance, 1946 (XX of 1946), and in force immediately before the commencement of this Act, so far as they are not inconsistent with the provisions of this Act shall continue in force and be deemed to have been in force under the corresponding provision of section 2 of this Act. Section 4 states that if any person contravenes any order made or deemed to have been made under sub-section (2) of section 2, he shall be punishable, etc. So even in a Central Act, where it was thought desirable to make a contravention of any order deemed to have been made under a previous Act an offence it is definitely stated that the same shall be deemed to be an offence.

Central Act XVIII of 1947 which came into force on the 25th March, 1947, dealing with the prohibition and control of imports and exports is also useful to be referred to. Sections 4 and 5 of this Act are practically identical with sections 3 and 4 of Act X of 1947. Even here there is a provision making the contravention of previous rules and Ordinances as deeming to be a contravention of this Act and made punishable as such. If we are to be guided by the specific provisions made under the three Acts above referred to by me, it seems to me that there is something to be said for the argument of Mr. Kailasam ; but it is a well-known and accepted canon of construction of statutes that in construing a particular enactment it is not quite safe to rely upon the scheme and the provisions of other statutes though similar.

The identical point I am now considering came up for decision very recently before a Full Bench of the Bombay High Court reported in *Emperor* v. *Ranchhodlal Hirabhai*[1], where Chagla, C.J. and his two colleagues, Bhagwati and Tendolkar, JJ., have held that section 7 of the Essential Supplies (Temporary Powers) Act, 1946 (Act XXIV of 1946) makes punishable the contravention of orders deemed to be orders made under the Act by virtue of the provisions of section 17 (2) of the Act. The learned Judges overruled a previous decision of the same Court by Sen and Jahagirdar, JJ., passed on the 20th January, 1948 (Criminal Appeal No. 431 of 1947, unreported). The judgment overruled by the Full Bench had accepted a similar contention as is now raised by Mr. Kailasam ; but that point of view has been dissented from and overruled in Bombay. Having considered the arguments carefully and read the judgment of the Full Bench with the consideration it deserves, I am inclined to agree with the view of the Bombay High Court. All the three Judges were unanimous in holding that unnecessary and superfluous words have been omitted in passing Act XXIV of 1946. Bhagwati, J., in his judgment at page 301 observes as follows :

"When, however, Act XXIV of 1946 came to be enacted the draftsman in the main body of the Act set out provisions relating to orders made under the Act and section 3 thereof and it was only when he came to section 17 of the Act that he made provisions for the continuance in effect of the orders made under Ordinance XVIII of 1946 and orders which were deemed to be made under that Ordinance by virtue of the provisions of section 5 thereof. These orders were to be on the same footing as the orders which would be made by the Central Government under section 3 of the Act and the orders which would be made under section 3 of the Act and which under section 17 of the Act were deemed to be made under the Act were both treated on the same footing. In this view, it was not necessary to enact in the main body of the Act any special provisions for the orders which were deemed to be made under the Act. It would have been absolutely superfluous to do so in so far as under section 17 the same effect was given to the orders deemed to be made under the Act as to the orders made under section 3 of the Act. It is clear therefore that the deletion of the words 'orders deemed to be made under the Act' from the earlier sections of the Act which expression found its place in Ordinance No. XVIII of 1946 was advisedly made as unnecessary or superfluous. The intention of the Legislature in the enactment of Act XXIV of 1946 was quite clear. It wanted to penalise the contravention of all orders which were the subject-matter of section 3 of the Act, and it comprised within that category not only the orders which were specifically to be made under section 3 of the Act but also the orders which were deemed to be made under the Act by virtue of section 17 of the Act. This being the position, it could not be attributed to the Legislature that its intention was only to penalise orders made under section 3 of the Act and to exclude from the provisions of the penal section enacted therein orders deemed to be made under the Act by virtue of section 17 of the Act."

I am in entire agreement with the observations of the learned Judge. Tendolkar, J., also gives the reasons similar to those given by his colleagues. At page 303 the learned Judge observes as follows :

"As I read the ordinance, if the words 'or deemed to be made' had been omitted from all those sections as well as from section 8, it would have made no difference to the meaning of that Ordinance at all, because by virtue of section 5 of that Ordinance to which I have already referred certain orders were deemed to be made under section 3 and, to my mind the use of the alternative phraseology 'or deemed to be made' was entirely redundant and unnecessary. That being so no inference can arise from the fact that the Legislature has thought it fit to change the language of Ordinance No. XVIII of 1946 in enacting Act No. XXIV of 1946. The words 'or deemed to be made' are omitted in the Act not only from the penal section 7 but also from sections 13, 8, 9, 10, 15, 14 (1) and 16 (1) and (2) which correspond respectively to the sections of the Ordinance which I have enume-

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1. (1948) 50 Bom.L.R, 295.

rated above. The object in doing so was quite obviously to avoid the unnecessary repetition of these words in all these sections and to improve the drafting to that extent. I am unable to hold that any change in the law was either intended or effected by deletion of those words."

I do not intend to discuss this matter at any great length as I am in entire agreement with the observations of the learned Judges mentioned above, and I therefore hold that the contention advanced by Mr. Kailasam ought not to be accepted.

The next question is whether in the circumstances of the case the sentence of two months' rigorous imprisonment is excessive. It is stated that the petitioner in Criminal Revision Case No. 1267 of 1947 has already undergone imprisonment for over a week. I would in the circumstances of the case reduce the sentence of imprisonment to the period already undergone, but in addition impose a fine of Rs. 100 or in default rigorous imprisonment for two weeks. I would also reduce the sentence of imprisonment passed on the petitioners in Cr. R. C. No. 1307 of 1947 to the period they have already undergone. The fine imposed on the first petitioner will stand.

With these modifications the two revision petitions are dismissed.

V.P.S. *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MACK.

S. Venkatrama Aiyar .. *Appellant**

v.

Unnamalai Ammal and another .. *Respondents.*

Civil Procedure Code (V of 1908), Order 41, rule 23—Party who did not signify his intention of appealing against remand order by applying for stay—Appeal against remand order—If maintainable after the decision at re-hearing on remand.

In the case of a remand it may often be that the first appellate Court formulates an entirely fresh footing on which the parties should proceed to a fresh trial and if the parties do so without in any way signifying or indicating their non-acceptance of this new basis for a fresh hearing, by adopting the simple method of applying for stay of further proceedings under the remand order, they must be deemed to have accepted the new basis and submitted to a fresh trial on the new footing. After a decision in the re-hearing, an appeal against the order of remand is not sustainable and the remedy will be only by way of appeal against the decision at the re-hearing on remand. The wide privileges of appeal conferred by the Legislature should be exercised within the confines of reason and practicability. Observations in *Lakshmi* v. *Mani Devi*, (1911) 21 M.L.J. 1063 : I.L.R. 37 Mad. 29, treated as *obiter* and distinguished.

Authorities discussed.

Appeal against the order of the District Court, North Arcot, at Vellore, dated 5th March, 1946, in A.S. No. 287 of 1945 (O.S. No. 510 of 1943 on the file of the Court of the District Munsiff of Tiruvannamalai).

V. T. Rangaswami Aiyangar for Appellant.

A. Seshachariar for Respondents.

The Court delivered the following

JUDGMENT.—This is an appeal by the plaintiff against an order of the District Judge of Vellore, dated the 5th March, 1946, remanding the suit for fresh disposal on two further issues framed with permission to the District Munsiff to admit fresh evidence at his discretion. The entire records which have been called for to clear up some doubtful points show that the suit was dismissed on 3rd July, 1946, after a fresh hearing in compliance with the remand order, and at that fresh hearing the appellant who appeared through an advocate took the suit to a conclusion on the basis of the remand order without in any way objecting to it. The plaintiff filed this civil miscellaneous appeal against the order of remand on 4th September,

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*A.A.O. No. 508 of 1946. 30th July, 1948.

1946, *i.e.*, nearly two months after the final disposal of the suit. He has also filed an appeal before the District Judge against the ultimate dismissal of his suit.

Without going into the merits I think that a preliminary objection taken to the maintainability of this appeal must be upheld. It is conceded that it was filed in this Court in time, there being a long delay in the grant of a copy. The appellant however subsequent to the remand order did nothing whatsoever to signify to the learned District Judge his intention of appealing against the remand order or to apply to him for stay of further proceedings. Nor did he make any such application to this Court. He obviously took his chance of success or failure in the District Munsiff's Court on the basis of the remand order. Having failed there, he now seeks to undermine the remand order itself in this appeal. An appeal against a remand order is provided for by Order XLI, rule 23, Civil Procedure Code, and as it was admittedly filed in time Mr. Rangaswami for the appellant urges that it is maintainable. He relies on a Bench decision of this Court in *Lakshmi* v. *Manidevi*[1], in which the point which fell for direct decision was whether an appeal against a preliminary order in execution could be filed even after the date of the final order which merely carried out and was consequential to the preliminary order. No appeal had been filed against the final order itself. Sundara Ayyar and Phillips, JJ., held that such an appeal could be filed and made observations by way of analogy to the effect that an appeal against an order of remand could also be filed even after the date of the final decree consequential on remand. I have perused this decision very carefully and do not consider myself bound by all the observations therein so far as remand orders are concerned which did not fall directly for decision. Following that decision I should have had no hesitation at all in holding this appeal to be maintainable, although filed after the final decree consequent on remand, had the appellant signified his intention of appealing against the order of remand by applying for stay and had stay been refused—a most unlikely contingency. He did nothing of the kind and submitted himself to the scope of the remand order without making any protest.

No direct Madras decision on this point has been placed before me. There are however a number of decisions of the Calcutta High Court which have clearly held that such an appeal is not maintainable if the appellant raised no objection at or before the re-hearing of the suit. This has become well-established law in the Calcutta High Court in a number of decisions : *Madhu Sudan Sen* v. *Kamini Kanta Sen*[2], *Baikuntha Nath Dey* v. *Nawab Salimulla Bahadur*[3], *Mackenzie* v. *Narasingh Sahai*[4], the most recent decision placed before me on the point being *Sheik Salim* v. *Hajira Bibi*[5]. In *Madhu Sudan Sen* v. *Kamini Kanta Sen*[2], Maclean, C.J., made the following observation :

> " If a party desires to avail himself of the privilege conferred by section 588 (which corresponds to section 105, clause (2), Civil Procedure Code) in relation to an order of remand he ought to do so before the final disposal of the suit. He cannot be permitted to wait until after the final disposal of the suit and then to appeal against the interlocutory order without appealing from the decree in the suit."

The first three Calcutta decisions were in fact considered in *Lakshmi* v. *Mani Devi*[1], but that decision did not consider or decide the main point which arises for decision in the present civil miscellaneous appeal, *viz*., the obligation on the appellant who seeks to set aside a remand order to signify his protest against it before the suit on its basis is tried and taken to a conclusion. This point has been specifically decided by Page and Graham, JJ., in *Sheik Salim* v. *Hajira Bibi*[5], where it was clearly held that such an appeal was not maintainable inasmuch as the defendant-appellant did not raise any objection at the re-hearing of the suit on the merits, and no appeal was preferred from the final decree to the lower appellate Court. In the present case there is only this difference, *viz*., that the appellant has filed an appeal against

1. (1911) 21 M.L.J. 1063 : I.L.R. 37 Mad. 29.
2. (1905) I.L.R. 32 Cal. 1023.
3. (1907) 12 C.W.N. 590
4. (1909) I.L.R. 36 Cal. 762
5. (1927) I.L.R. 55 Cal. 506.

the judgment after remand in the District Court and has also simultaneously filed this civil miscellaneous appeal against the order of remand itself.

It appears to me that there are some fundamental differences between a preliminary decree in execution and a final decree worked out on its basis which formed the basis of fact in *Lakshmi* v. *Mani Devi*[1]. Their Lordships in that decision proceed on the assumption that remand orders and subsequent judgments on their basis were analogous to preliminary decrees and final decrees. I think I would be justified in regarding the expressions of opinion as regards remand orders in that decision as being in the nature of *obiter dicta* and outside the scope of the matter which fell for decision. In the case of a remand it may often be that the first appellate Court formulates an entirely fresh footing on which the parties should proceed to a fresh trial and if the parties do so without in any way signifying or indicating their non-acceptance of this new basis for a fresh hearing, by adopting the simple method of applying for stay of further proceedings under the remand order, they must be deemed to have accepted the new basis and submitted to a fresh trial on the new footing. The only difference between the facts here and those in *Sheik Salim* v. *Hajira Bibi*[2], is that no appeal was preferred from the final judgment after remand to the lower appellate Court, and that judgment was sought to be undetermined by filing an appeal against the order of remand after the final decree. I do not think that the fact that the appelant here has also filed an appeal in the lower appellate Court makes any difference. In fact that appears to me now his only and correct remedy. It is also manifestly embarrassing, apart from other considerations, that one appeal against the remand order should be pending in the High Court and another appeal against the decree after remand should be simultaneously pending before the District Judge. The appellant having chosen to take his chance of a decision in his favour on the basis of the remand order must seek his relief in the lower appellate Court.

I should like to deal with the final argument that the appellant cannot be deprived of his statutory right of appeal against the remand order to this Court. Successive Indian Legislatures have sought to safeguard the rights of litigants by very generous provision for appeals and second appeals, not by any means complimentary to trial Judges. The cycles of appeals the law permits in India have no parallel in the juristic history of any other country so far as I am aware. It is necessary that these wide privileges of appeal should be exercised within the confines of reason and practicality.

The appeal is in the result dismissed with costs and an advocate's fee of Rs. 35.

Leave granted.

K.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAGESA SASTRI.

Chekku and others .. *Appellants**

v.

Mukthiar Managers of Poomulli Mana Krishnan Nambudripad and another .. *Respondents.*

Madras Tenants and Ryots Protection Act (XVII of 1946), *section* 4, *clause* (3)—*More than one proceeding for sale of holding pending—Stay of proceedings—Single deposit of two years' rent—Sufficiency.*

Where there are more than one proceeding for sale of a holding to recover rent, it is not necessary for the tenant to deposit in each proceeding either the amount payable under the decree or order if any or an amount equivalent to the rent for two years preceding the commencement of the Act, whichever is less, as the case may be.

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1. (1911) 21 M.L.J. 1063 : I.L.R. 37 Mad. 29. 2. (1927) I.L.R. 55 Cal. 506.

*A.A.A.O. Nos. 15 and 16 of 1948. 12th August, 1948.

Section 4, sub clause (3) of Madras Act XVII of 1946 requires only one deposit of the maximum amount equivalent to rent for two years immediately preceding the commencement of the Act to entitle the tenant to claim that all proceedings for sale of that holding should be stayed under the Act. If there be two decrees in execution it would be necessary to pay the aggregate of both the decree amounts or an amount equivalent to rent for two years immediately preceding the commencement of the Act whichever is less.

Where the proceedings are in different Courts the deposit may be made in any of the Courts where a proceeding is pending and the fact of that deposit having been made may be intimated to the other Court where another proceeding for sale of the holding is going on and it will be the duty of that Court to stay the proceeding before it where it is satisfied that deposit of the required amount has been made in the other court though not before itself.

Appeals against the orders of the Subordinate Judge's Court, Ottapalam, dated 31st July, 1947, in A.S. Nos. 50 and 51 of 1947 preferred against the orders of the Court of the District Munsiff, Ottapalam, dated 3rd February, 1947, in E.A. Nos. 56 and 57 of 1947 in E.P. Nos. 4 and 5 of 1946 respectively in O.S. Nos. 462 of 1943 and 466 of 1943 respectively.

C. S. Swaminathan for Appellants.

N. Sundara Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—These two appeals raise one common point and it is sufficient to deal with one of them. I will take A.A.A. O. No. 15 of 1947.

This is an appeal by the tenant who is the judgment-debtor in O.S. No. 462 of 1943. The landlord obtained a decree for the sale of his holding for arrears of rent due up to the year 1118 of the Mayalaylam, era. E.P. No. 4 of 1946 was filed by the landlord in execution of the said decree. Subsequent to this suit there was another suit instituted by the landlord against the same tenant for recovery of arrear for the years 1119, 1120 and 1121 of the Malayalam era. That suit O.S. No. 287 of 1946 also was for sale of the holding. The tenant made a deposit of two years' rent for the years preceding the commencement of the Madras Act XVII of 1946, in O.S. No. 287 of 1946. The deposit was made on 4th December, 1946, well within two months' period from the commencement of the Act. The Act came into force on 8th October, 1946. On 6th December, 1946, he filed E.A. No. 695 of 1946 in E.P. No. 4 of 1946 praying the Court to record the deposit made in respect of the holding in O.S. No. 287 of 1946 and asked also for stay of execution of the decree in E.P. No. 4 of 1946. The lower Court by its order, dated 11th December, 1946, recorded the fact of deposit of the two years' rent in the later suit but took care to add that the sufficiency and validity of the deposit were left open to be considered in in further proceedings. On the 17th January, 1947, the tenant filed a statement E.P. No. 4 of 1946 that the deposit made by him in the pending suit should be treated as a deposit in the execution petition No. 4 of 1946 and that the execution petition should be stayed. He also filed an application for extension of time under section 4, clause (4) of the Act. The landlord opposed the application for stay of E.P. No. 4 of 1946 and contended that the deposit made in the pending suit can only be sufficient for purpose of staying that alone and that the tenant should make another deposit of two years' rent if he wanted E.P. No. 4 of 1946 to be stayed though the holding was one and the same, both in the suit and in the execution proceedings. He pointed out that there was no second deposit made as required by the Act and that the application for extension of time was not really sustainable under section 4, clause (4). Both the lower Courts have agreed with the contention of the landlord and state that they find nothing in the Act to relieve the tenant from his obligation to make separate deposits both in the suit and in the execution proceeding if he wants to get stay of both. The tenant has appealed against these orders of the lower Courts.

In appeal it is contended for him by Mr. Swaminatha Aiyar that the deposit is required only under section 4, clause (3) and that on a proper construction thereof a single deposit of an amount equivalent to rent of two years immediately preceding

the commencement of the Act would be sufficient to enable him to ask for stay of both the pending suit and the execution proceeding. He submits that it could not have been the intention of the Legislature that there should be several deposits of two years' rent for the specific period being made in each of the proceedings sought to be stayed. The object of the Act according to him is to prevent a sale of the particular holding of the tenant pending further legislation by the Government possibly with a view to confer greater benefits on the tenants in possession and it would seem to be more in consonance with the policy of the Act if the two years' rental on the holding for the period immediately preceding the Act was secured to the landlord by a deposit. It is conceded now before me that so far as the suit is concerned that the necessity for the deposit is only because of the expression "other proceeding for the sale of the holding to recover rent" occurring in sub-clause (3). With regard to the execution proceedings also, it is only because of those very words that the deposit is required. In other words as both the proceedings related to claims not for eviction of the tenant but only for bringing to sale the holding of the tenant for recovery of rent, sub-clause (3) of section 4 alone would be applicable. Sub-clause (3) omitting the words which are really unnecessary for the purposes of this case would read as follows :

" In the case of a proceeding for sale of a holding to recover rent, the tenant shall within two months from the date of the commencement of the Act deposit in the Court for payment to the landlord the amount payable under the decree or order or an amount equivalent to rent for two years immediately preceding the commencement of this Act, whichever is less."

The question for consideration is whether where there are more than one proceeding for sale of a holding to recover rent, it is necessary for the tenant to deposit in each proceeding either the amount payable under the decree or order if any or an amount equivalent to the rent for two years preceding the commencement of the Act whichever is less as the case may be. I am inclined to construe clause (3) as requiring only one deposit of the maximum amount equivalent to rent for two years immediately preceding the commencement of this Act to entitle the tenant to claim that all proceedings for sale of that holding should be stayed under the Act. A single deposit is sufficient but it must satisfy the requirement of clause (3) so far as the amount to be deposited is concerned. If there are two decrees in execution it would be necessary to pay the aggregate of both the decree amounts or an amount equivalent to rent for two years immediately preceding the commencement of the Act whichever is less. The word " proceeding " must be construed to include " proceedings " as well in the plural and it is unnecessary in my opinion that for a stay of each proceeding there must be a separate deposit of the amount required under clause (3). I am fortified in this conclusion by a reference to clause (5) of section 4 which indicates that where two proceedings are stayed in respect of the same holding it would be sufficient if there is one deposit of each year's subsequent rent. It is not contended before me that even in such a case clause (5) would require two or more deposits of each year's rent in each of the proceedings that may be pending. I therefore hold that the lower Courts were wrong in their view that the deposit which was made in the pending suit could not be taken into account in allowing the tenant to claim the benefit sought under section 4. I may add that it was pointed out that the proceedings in respect of the same holding may perhaps be in different Courts and the sub-clause (3) does not give any indication as to in what Court the deposit should be made if really one deposit would be sufficient. It was argued that the intention is that in each of the Courts where a proceeding was pending there must be a separate deposit of the requisite amount. I do not agree with this contention. The deposit may be made in any of the Courts where a proceeding is pending and the fact of that deposit having been made may be intimated to the other Court where another proceeding for sale of the holding is going on. It will be the duty of that Court then to stay the proceeding before it under section 4 where it is satisfied that deposit of the required amount has been made in the other Court though not before itself. In the circumstances it is unnecessary to deal with the petitions filed by the tenant for extension of time.

In the result the orders of the lower Court are set aside. These second appeals are allowed with costs throughout and there will be stay of proceedings in execution both in E.P. No. 4 of 1946 in O.S. No. 462 of 1943 on the file of the Court of the District Munsiff of Ottapalam and also in E.P. No. 5 of 1946 in O.S. No. 466 of 1946 on the file of the same Court. No leave.

K.S. ——— *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE YAHYA ALI.

M.V. Shanmugavel Nadar and Sons, Virudhunagar by partner, M. V. S. Singaravel Nadar .. *Applicant**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

Excess Profits Tax Act (XV of 1940), *section* 8 (1)—*Business previously carried on and owned in partnership by Hindu undivided family and a stranger—Disruption of family and carrying on of business by partnership scomposed of members of the family and same stranger—If " change " in the persons carrying on the business.*

There is a change in the persons carrying on a business within the meaning of section 8 (1) of the Excess Profits Tax Act, 1940, when the business which was previously carried on and owned by the Hindu undivided family and a stranger is on disruption of the family being carried on and owned by a partnership composed of the members of the quondam family and the stranger.

Govindarajulu v. *Commissioner of Income-tax, Madras*, (1944) 1 M.L.J. 112 : I.L.R. 1944 Mad. 504 (F.B.), applied.

It cannot be said that when the family was carrying on business in partnership with the stranger all the members of the family were also persons carrying on the business and that there was no change in the persons carrying on the business.

Pichappa Chettiar v. *Chockalinga Pillai*, (1934) 67 M.L.J. 366 (P.C.), relied on.

Case referred to the High Court by the Income-tax Appellate Tribunal, Madras Bench, under section 66 (1) of Act XI of 1922 as amended by section 92 of the Income-tax (Amendment) Act of 1939 (Act VII of 1939) in 66 R.A. 5 Madras 1945-46 on its file.

N. T. Raghunathan and *N. T. Ramanujam* for Applicant.

C. S. Rama Rao Sahib for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—The question for decision in this case is :

" Whether there is a change in the persons carrying on the business within the meaning of section 8 (1) of the Excess Profits Tax Act, 1940, when the business which was previously carried on and owned by the Hindu undivided family and a stranger is on disruption of the family being carried on and owned by a partnership composed of the members of the quondam family and the stranger."

The facts of the case which appear from the statement of the case are as follows :

" The appellants are a registered firm of 8 partners. This partnership commenced from the 25th February, 1942. Prior to 25th February, 1942, there was a partnership between two parties of which one was P. Pachayappa Nadar and another was the Hindu undivided family of M. V. Shanmugavel Nadar Sons. This family consisted of 7 male members. A partition in the family took place and the seven members individually became partners along with P. Pachayappa Nadar on 25th February, 1942."

Section 8 (1) of the Excess Profits Tax Act is as follows :

" As from the date of any change in the persons carrying on a business, the business shall, subject to the provisions of this section, be deemed for all the purposes of this Act except for the purposes of determining the amount of the statutory percentage to have been discontinued and a new business to have been commenced."

In section 2, clause (17) " a person " is defined as including a Hindu undivided family. The legal position in this case before the disruption of the joint family was that there were two persons carrying on a business, namely, (1) P. Pachayappa Nadar and (2) the Hindu undivided family of M. V. Shanmugavel Nadar Sons.

*Case Referred No. 17 of 1946. 2nd August, 1948.

After 25th February, 1942, the Hindu undivided family as such ceased to be the person carrying on the business along with Pachayappa Nadar. From that date, 8 persons began to carry on the business, namely, the seven members of the *quondam* family and Pachyyappa Nadar. There was therefore clearly a change in the persons carrying on the business within the meaning of section 8 (1) of the Excess Profits Tax Act.

It was contended on behalf of the petitioner that really there was no change in the persons carrying on the business because when the family was carrying on business in partnership with Pachayappa Nadar, it must be deemed that all the members of the family were also persons carrying on the business. This contention is obviously unsound having regard to well-established principles of Hindu Law. Their Lordships of the Judicial Committee in *Pichappa Chettiar* v. *Chockalinga Pillai*[1], accepted as correct the following proposition of law in Mayne's Hindu Law (9th edition) at page 398 :

> " Where a managing member of a joint family enters into a partnership with a stranger the other members of the family do not *ipso facto* become partners in the business so as to clothe them with all the rights and obligations of a partner as defined by the Indian Contract Act. In such a case the family as a unit does not become a partner, but only such of its members as in fact enter into a contractual relation with the stranger. . . . . . "

A further contention was sought to be raised that actually besides the managing member of the family other members also entered into contractual relationship as partners. This is a contention founded on facts and there is no trace of this contention before the tribunal at any stage of the proceedings. The petitioner cannot be permitted to raise this new ground at this stage.

The following observations of Leach, C.J., in *Govindarajulu* v. *Commissioner of Income-tax, Madras*[2], are apposite in this connection :

> " Where a Hindu joint family separates and its members carry on the family business in partnership, there is a change in ownership. The business is no longer owned by the joint family but by the firm, an entirely different entity and the fact that as before the profits continue to be divided equally between the same persons makes no difference."

Though these observations were made in dealing with sections 25 (4) and 26 (2) of the Income-tax Act, they apply *a fortiori* to this case in which the governing words are of much wider import.

The Excess Profits Tax Officer as a matter of concession and in accordance with instructions from Government set off the share of the deficiency of Pachayappa Nadar against his share of excess profits, because he continued to be a partner even after the change in the persons carrying on the business. An application was made to us to extend such a concession to the case of the managing member of the family who though in different capacities was the same person both before and after the change. This is not a matter which has been referred to us nor could it be properly the subject of a reference, depending, as it does, entirely on the grant of a concession in accordance with instructions from the Government. We cannot accede to this request on behalf of the petitioner.

The answer to the question framed is that in the circumstances set out in the question, there is a change in the persons carrying on the business within the meaning of section 8 (1) of the Excess Profits Tax Act. The petitioner will pay the costs of the reference, Rs. 250.

K.S. *Reference answered.*

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1. (1934) 67 M.L.J. 366 (P.C.).
2. (1944) 1 M.L.J. 112 : I.L.R. 1944 Mad. 504 at 512 (F.B.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

Periaswami Nadar .. *Petitioner.**

Criminal Procedure Code (*V of* 1898), *sections* 309 *and* 401—*Trial by jury—No misdirection or non-direction in the charge—Judge's opinion not to accept prosecution evidence—Jury finding accused guilty—Acceptance of verdict by Judge—Proper procedure—Power of High Court to interfere—Fit case for interference by Provincial Government.*

In a trial by jury, in the charge of the Judge to the jury there was neither any misdirections nor instances of serious non-direction. But though on a reading of the charge it would seem that if the Judge were trying the case without a jury he would not have accepted the prosecution evidence, he concurred in the majority verdict of guilty of 3 to 2, of the jury.

Held, that the learned Judge would have been well advised if, consistently with the expression of opinion which he gave in the charge to the jury, he had disagreed with their verdict and referred the matter to the High Court under section 307 of the Code. As the High Court could not exercise its limited powers in appeals against the verdict of the jury in a case where there are no misdirections or instances of non-direction, it is a fit case where the Provincial Government can interfere under section 401 of the Code.

Appeal against the order of the Assistant Sessions Judge, Tuticorin, of the Court of Session of Tinnevelly division in C.C. No. 123 of 1947, dated 20th January, 1948.

N. Somasundaram and *M. S. Sethu* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court delivered the following

JUDGMENT.—Agreeing with the majority verdict of 3 to 2 of the jury the learned Assistant Sessions Judge of Tinnevelly division at Tuticorin, convicted the appellant of an offence under section 392 read with section 397, Indian Penal Code and sentenced him to rigorous imprisonment for a period of seven years. Having carefully gone through the learned Judge's charge to the jury, the learned counsel for the appellant, the Public Prosecutor and myself were not able to find any circumstance vitiating the charge. The learned Judge has clearly and concisely put before the jury the law on the point and explained to them the sections of the Penal Code which have application to the case. Then the learned Judge analysed the evidence of the witnesses, brought out the salient points for and against the prosecution and left, as he ought to do, the final decision to the jury. On a reading of the charge it would seem that if he were trying the case himself without a jury but with the aid of assessors, he would certainly not have accepted the evidence of the prosecution witnesses. The learned Judge has made it clear that there are very many infirmities in the case as put forward by the prosecution and such of those infirmities as tend very favourably to the accused has been placed before the jury in the forefront, as it were. In these circumstances, the jury would have been well advised if they had returned a verdict of not guilty, but the jury by a majority came forward with a verdict of guilty against the prisoner.

It is when circumstances like the present arise that section 307 of the Criminal Procedure Code has to be applied. The learned Judge would have been well advised if, consistently with the expression of opinion which he gave in the charge to the jury, he had disagreed with their verdict and referred the matter to the High Court and nothing could have been said against such a procedure but he has not chosen to do so and there is no provision of law under which this Court can now go into the merits of the case since there is concurrence in the opinion of the jury by the learned Judge. As there are no misdirections or instances of serious non-direction, this Court's limited power in appeals against the verdict of jury cannot be exercised. I would therefore confirm the conviction and the sentence which is the minimum that could be imposed under section 397, Indian Penal Code in the circumstances.

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*Cr.A. No. 78 of 1948. 31st July, 1948.

In my opinion, this is eminently a fit case where the Provincial Government might take up the matter and exercise their power under section 401, Criminal Procedure Code and release the appellant by the remission of the sentence.

V.P.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MACK.

Nandula Bhavani Sankaram .. *Petitioner**

v.

Saladi Mangamma and others .. *Respondents.*

Suits Valuation Act (VII of 1870), *section* 8—*Partition suit by alienee from coparcener—Jurisdictional value—Mode of determining—Civil Procedure Code (V of* 1908), *Order* 6, *rule* 17—*Amendment sought ousting pecuniary jurisdiction of the Court—Proper procedure.*

Where a suit for partition is filed by an alienee of family property from a coparcener, the suit must be valued for purposes of jurisdiction on the basis of the value of the share of the alienor-coparcener in the entire joint properties and not on the value of the property purchased by the alienee-plaintiff.

In such a suit the alienee-plaintiff included only certain items of the joint family and on objection being raised on that ground he sought to amend the plaint by including the entire family property. The amendment was disallowed by the trial Judge on the ground that if it was allowed, it would take the suit out of his pecuniary jurisdiction. On the question, as to the proper procedure to be followed,

Held : The Judge would have been in order in allowing the plaint to be amended and then returning it for re-presentation in the amended form to the higher Court having jurisdiction.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the District Munsiff of Narasapur, dated 5th March, 1947, in I. A. No. 219 of 1947 in O. S. No. 76 of 1946.

V. Parthasarathi for Petitioner.

Ch. Raghava Rao, K. S. Champakesa Aiyangar and *N. Jaganmohan Rao* for Respondents.

The Court delivered the following

JUDGMENT.—This petition raises a question of jurisdiction and court-fee. The petitioner is the plaintiff ; he and the twelfth defendant were brothers. One Nagabhushanam, the deceased father of the first and second defendants, made a gift of some lands in the plaint A and B schedules on 9th March, 1935, to the twelfth defendant. In a partition between the plaintiff and the twelfth defendant the A and B scheduled lands were allotted to the share of the plaintiff. These lands admittedly formed part of Nagabhushanam's joint family property and there were, according to the plaint, recitals in the gift deed that Nagabhushanam would make his sons agree to the gift or that he would make other arrangements to compensate them. The ninth defendant was impleaded as a purchaser from the Official Receiver of the B schedule property after adjudication of the second defendant as an insolvent, under a sale deed under cover of which he is said to have entered into possession. The plaint schedule C comprises the joint family property of Nagabhushanam's family including the A and B schedule lands. The plaintiff sued to enforce his rights to A and B schedule property by a plaint framed as for a general partition with the following main prayer : for

" dividing the plaint C schedule properties into three equal shares, putting the properties described in schedules A and B in one share in the said partition, allotting the said share to the one-third share which has to fall to late Nagabhushanam Garu's representatives, allotting the properties described in schedules A and B to the plaintiff, ejecting defendants 1 to 10 from the B schedule property and delivering possession of the same to the plaintiff."

Objection was taken by the defendants that C schedule in the plaint did not include all the joint family property and on this objection the plaintiff applied

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*C.R.P. No. 671 of 1947. 13th August, 1948.

for inclusion of further joint family property in D schedule and the addition of defendants 13 to 15 as parties. The plaintiff adopted this course in order to avoid the contention that the suit was bad as one for partial partition. The learned District Munsiff disallowed the amendment on the ground, as I understand his order, that if he allowed it, it would take the suit outside his pecuniary jurisdiction. It is common ground before me that if the D schedule property comes into the suit, the one-third share of Nagabhushanam which the plaint seeks to partition would be in excess of the pecuniary jurisdiction of the District Munsiff. It is settled Law as both sides admit that for purposes of jurisdiction in a joint family partition suit, it is the plaintiff's interest in the property that must be valued. This has been recently confirmed in *Muyyarikandi Kalandar* v. *Muyyarikandi Kunhipakki*[1], a Bench decision of our High Court.

The learned advocate for the petitioner would seek to apply the principle laid down in that decision to this suit also and to argue on its basis that the value of the smaller share he claims should determine both court-fee and jurisdiction. There are manifest objections to the adoption of this course. In the first place, as the lower Court has rightly pointed out, the acceptance of it would enable every purchaser of a small share of the joint family property from a coparcener possessed of a very large estate to file a partition suit which would normally be filed in the District Court or Sub-Court in the Court having the lower jurisdiction. The suit is one essentially in the first instance for a partition of the share of Nagabhushanam out of which the plaintiff seeks for an equitable relief for the recovery of the lands gifted to his brother by Nagabhushanam and which were allotted to him at the family partition.

There is no Madras decision in point. The District Munsiff has rightly followed in the circumstances a decision of the Bombay High Court in *Mahadeo Gopal* v. *Hari Waman*[2], which is not regularly reported but is found in the All India Reports. It was held that in cases such as these for purposes of jurisdiction the suit must be valued as the value of the share of the alienor-coparcener in the entire joint properties. In the great majority of cases the value of the relief claimed by the plaintiff coincides with the relief he himself seeks. But in this exceptional type of cases the plaintiff has been asking in the first instance for a very wide relief out of which a far smaller relief should accrue to himself. In such a case jurisdiction must clearly be determined by the value of the greater relief for which the plaintiff asks. I have no hesitation in holding that the learned District Munsiff's finding as regards the valuation and court-fee in case he allowed the amendment sought by the petitioner is correct. The learned District Munsiff felt himself embarrassed in giving effect to his correct finding and in allowing the amendment on the ground that if he did so, he would be ousting his own jurisdiction. I think that he would have been in order in returning the plaint for re-presentation in the amended form to the higher Court having jurisdiction including in it the D schedule lands and impleading the defendants 13 to 15. This course will now be adopted. I direct the parties to bear their own costs throughout.

B.V.V. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Kanjanur Sri Agneswaraswami Devasthanam by its Superintendent Chithiah Mudaliar .. *Appellant**

v.

Thillai Govinda Pandithan .. *Respondent.*

Civil Procedure Code (V of 1908), Order 41, rules 23 and 27—Fresh evidence—When to be admitted in appeal—Admission of fresh evidence—Not a ground for remand—Ramand can be ordered only when it is found necessary to set aside the decree.

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1. (1947) 1 M.L.J. 112.
2. A.I.R. 1945 Bom. 336.

* A.A.O. No. 151 of 1947. 13th August, 1948.

Without indicating that he was of opinion that the defendant, notwithstanding the exercise of due diligence, could not produce the document at the trial it is not open to an appellate judge to admit such document as material for the purpose of deciding the defence of the defendant.

The admission of fresh evidence affords no ground for remanding a suit, because the evidence could and should be considered by the appellate Court, together with the evidence already on record. An order of remand can only be passed when the Court has decided that it is necessary to set aside a decree.

Appeal against the order of the Court of the Subordinate Judge, Kumbakonam, dated 8th February, 1947, in A. S. No. 101 of 1946 (O. S. No. 109 of 1945, District Munsiff Court, Valangaiman).

K. S. Desikan and *K. Raman* for Appellant.

R. Gopalaswami Aiyangar for Respondent.

The Court delivered the following

JUDGMENT.—The appellant, basing his right to possession of the suit property on a lease executed in 1935, filed the suit out of which this civil miscellaneous appeal arises. The District Munsiff decreed the suit. In appeal, the learned Subordinate Judge came to somewhat different conclusions on questions of fact; and admitted in evidence certain documents tendered by the defendant. He then said:

"I should think that the matter requires re-consideration as to whether the defendant is entitled to a permanent tenancy so long as he pays rent or so long as he renders services. I find that in the interests of justice the suit should be remanded."

The learned advocate for the appellant attacks this order on two grounds: (1) that the documents were improperly admitted, and (2) that in any event, the provisions of Order 41, rule 23 were not complied with and that the remand order was wrong.

The order admitting the documents was this:

"I find that these documents are material for the purpose of deciding the defence of the defendant . . . ."

There is nothing in this order which indicates that the learned Judge gave his mind to the requirements of Order 41, rule 27. It is difficult to fit these words into the framework of any one of the three clauses to Order 41, rule 27 (1). They would appear to be more in accordance with Order 41, rule 27 (1) (*c*) than with either of the other two clauses; but the application was made under Order 41, rule 27 (1) (*b*). The learned Judge has given no indication that he was of opinion that the defendant, notwithstanding the exercise of due diligence, could not produce the document at the trial.

Even if the documents were properly admitted in evidence, there would still be no ground for an order of remand; for an order of remand can be passed only when the Court has decided that it is necessary to set aside a decree. The admission of fresh evidence affords no ground for remanding a suit, because the evidence could and should be considered by the appellate Court, together with the evidence already on record.

This appeal is therefore allowed, and A. S. No. 101 of 1946 remanded to the Sub-Court, Kumbakonam, for re-consideration of the petition for admission of the additional evidence in the light of the provisions of Order 41, rule 27. If the documents are not admitted, then clearly there will be no ground for remand. Even if they are, the learned Judge will have to consider whether it is necessary to set aside the decree and remand the suit. The costs of this appeal will abide the result.

K.S. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO.

The Official Receiver of Ramnad .. *Appellant**

v.

P. L. P. Devarayan Chettiar and others .. *Respondents.*

Provincial Insolvency Act (V of 1920, as amended by Act XXV of 1948), sections 28 and 28-A—Section 28-A retrospective—Father's power of alienation of son's share in joint family properties also vest in Official Receiver after adjudication of father—Institution of partition suit by sons—No right in receiver to act on behalf of sons after suit.

The first respondent obtained a decree against the 2nd respondent and his two sons in 1934. In 1935, the 2nd respondent was adjudicated an insolvent and in 1936, the Official Receiver took possession of two villages belonging to the joint family. In 1942, the sons instituted a partition suit. The Official Receiver had in his hands an amount which represented the collection of rents from the two villages for the years 1936 to 1945. He had declared a dividend in which the first respondent got his share. On the question, whether the first respondent could attach 2/3 share of the amount in the hands of Official Receiver as representing the sons' shares of the income,

Held : After the amendment of the Provincial Insolvency Act, by Act XXV of 1948, which is clearly retrospective, the father's disposing power over his sons' shares vested in the Official Receiver after the father's adjudication. But the position became different after the institution of the partition suit by the sons as it brought about a disruption of the status of the family and terminated the father's power. Hence, the creditor would be entitled to attach only the 2/3 share of the income which represented the collections in respect of the two villages after the institution of the partition suit and upto 1945.

Appeal against the order of the Subordinate Judge's Court, Devakottai, dated 13th November, 1945, in E. P. No. 82 of 1945, in O. S. No. 52 of 1934.

K. Krishnaswami Aiyangar and *N. C. Raghavachari* for Appellant.

M. Murugappa Chettiar for Respondents.

The Court delivered the following

JUDGMENT.—The Official Receiver of Ramnad is the appellant. The matter arises in execution of the decree in O. S. No. 52 of 1934. The first respondent obtained a decree in O. S. No. 52 of 1934 against the second respondent and his two sons. The decree is dated the 16th October, 1934. The second respondent was adjudicated an insolvent on the 14th September, 1935, in I. P. No. 77 of 1934. In 1936 the Official Receiver took possession of two villages belonging to the joint family. In 1942 the sons instituted a suit for partition, O. S. No. 74 of 1942, Sub-Court, Devakottai, to which they impleaded as parties their father, the Official Receiver and some of the creditors. The creditors, however, were dismissed from the suit very early before the trial of the suit and there was a preliminary decree in the suit on the 30th September, 1943. The Official Receiver has in his hands an amount which represents the collection of rents from the two villages for the years from 1936 to 1945. He had already declared a dividend in which the first respondent also got his share on the 11th November, 1941.

The first respondent now attached two-third share of the amount lying in the hands of the Official Receiver which he claims, represents the sons' shares of the income of the properties of the two villages from 1936 to 1945. The Official Receiver resisted the claim on various grounds but on the basis of the Full Bench decision in *Rama Sastrulu* v. *Balakrishna Rao*[1], which laid down that the father's disposing power over the son's share never vested in the Official Receiver after the adjudication of the father as that power was not property within the meaning of sections 2 (*d*) and 28 (2) of the Provincial Insolvency Act, the Court directed the attachment of the two-third share.

In this appeal by the Official Receiver it is contended on his behalf that in view of the recent amendment of the Provincial Insolvency Act by Act No. XXV of

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* A.A.O. No. 207 of 1946. 4th August, 1948.

1. (1942) 2 M.L.J. 457 : I.L.R. (1943) Mad. 83 (F.B.).

1948, the basis of the decision of the Court below cannot be sustained. In my judgment the contention of the learned advocate for the appellant must be upheld in view of the clear language of the new section 28-A which was introduced by Act No. XXV of 1948 in the Provincial Insolvency Act, 1920. That section reads as follows :

"The property of the insolvent shall comprise and shall always be deemed to have comprised also the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the insolvent for his own benefit at the commencement of his insolvency or before his discharge."

There are two provisions which are not relevant for the purpose of decision of this case. The section is clearly retrospective as it says

"........... shall comprise and *shall always be deemed to have comprised* also the capacity ......"

The basis, therefore, of the decision of the Court below falls to the ground in view of the Amending Act No. XXV of 1948. The position, therefore, in 1936 when the Official Receiver took possession of the property was that in the right of the father and manager of the joint family the Official Receiver was entitled to take possession of the entire property and also collect rents and profits for applying them for the discharge of the debts of the father which were not tainted by illegality or immorality. This was the principle laid down by Madhavan Nair, J., in *Shankaranaraina* v. *The Official Receiver, South Kanara*[1], following the earlier Bench decision in *Official Assignee, Madras* v. *Ramachandra Aiyar*[2]. The position, however, was different after the institution of the partition suit. Under the law as it stood before the Full Bench decision in *Rama Sastrulu* v. *Balakrishna Rao*[3], it was clearly understood that the father could not exercise the power of disposition over the sons' shares after a suit for partition had been instituted as it would bring about disruption of the status of the family and terminate the power of the father to alienate the shares of the sons for the discharge of his own debts on the basis of the pious obligation theory. The receiver who collected the rents from the shares of the sons in the properties after 1941 till 1945 cannot, therefore, be said to have collected them in exercise of the power of the father and for the purpose of applying them for the discharge of the debts of the father as that power had come to an end with the institution of the partition suit. The creditor, therefore, would be entitled to attach the two-third share of the income which represents the collections in respect of the two villages after the institution of the partition suit and upto 1945. The attachment effected, therefore, by the lower Court will be confined only to such amounts.

The appeal is, therefore, partly allowed and the order of the lower Court is modified accordingly. The parties will bear their own costs in this Court. The Official Receiver will, of course, be entitled to deduct the legitimate expenses that he had incurred for making the collections and it is only the net collections that would be attachable.

V.P.S. *Appeal allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDARAJACHARI AND MR. JUSTICE MACK.

Amirthalingam Pillai .. *Petitioner.**

Privy Council—Leave to appeal against judgment of High Court in Criminal appeal against judgment of moffusil Court—Jurisdiction of High Court to grant.

The High Court has no jurisdiction to grant leave to appeal to the Privy Council against its judgments in criminal appeals arising out of the judgments of moffusil Courts.

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1. (1932) 36 L.W. 581.
2. (1922) 43 M.L.J. 569 : I.L.R. 46 Mad. 54.
3. (1942) 2 M.L.J. 457 : I.L.R. (1943) Mad. 83 (F.B.).

* U.S.R. No. 5999 of 1948. 4th August, 1948.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to grant leave to the petitioner to appeal to His Majesty in Council against the judgment of the High Court, dated 1st March, 1948, in R.T. No. 2 of 1948 referred to the High Court for confirmation of the sentence of death passed on the petitioner (first accused) by the Sessions Judge of the Court of Session, West Tanjore division, in C.C. No. 62 of 1947.

D. A. Shanmughasundaraswami for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Order of the Court was made by

Govindarajachari, J.—This is an application for leave to appeal to His Majesty in Council against the judgment of this Court in R.T. No. 2 of 1948 dated 1st March, 1948, confirming the conviction and sentence of the petitioner in Sessions Case No. 64 of 1947 in the Court of Session, West Tanjore division. The petitioner was convicted of murder and sentenced to death.

When the application was first filed it was stated to be under clause 15 of the Letters Patent. It was then pointed out by the High Court office that clause 15 of the Letters Patent would not apply to criminal cases. The learned advocate for the petitioner then quoted two other provisions of law, section 223 of the Government of India Act, 1935 and rule 2 of the Judicial Committee Rules, 1925.

The High Court office again pointed out that the application cannot be maintained under those provisions either. The learned advocate then asked that the matter may be posted before Court for orders.

As the question is one of jurisdiction we directed notice to issue to the Public Prosecutor.

Mr. Swami the learned advocate for the petitioner has attempted to invoke the jurisdiction of this Court in several ways. He first cited two decisions of the Privy Council. The first was the one reported in *F. W. Gillet & Co., Ltd.* v. *Lumsden*[1], which dealt with the revised statutes of Ontario, 1897, Chapter 48, section 1. The other was the decision in *Davis* v. *Shaughnessy*[2], which was concerned with Article 68 of the Code of Civil Procedure of Quebec. In both these statutes an appeal to the King in Council was provided and in both there was a requirement that the Court from whose judgment the appeal was sought to be filed should be approached for leave. We are not here concerned with the nature of the jurisdiction which a court exercises when it is approached for leave. As has been pointed out in several cases that jurisdiction is discretionary.

We are concerned rather with the question whether there is any jurisdiction at all in the High Court to grant leave to appeal against judgment in criminal appeals arising out of the judgments of mofussil Courts. There is no statutory provision conferring on this Court jurisdiction similar to that conferred under the two statutes just mentioned.

The learned advocate then argued that he was invoking the jurisdiction of this Court under section 561-A of the Criminal Procedure Code read with section 223 of the Government of India Act, 1935. As regards the former section it saves such inherent power as had existed in this Court prior to its enactment. It is, however, impossible to maintain that there was any inherent power in this Court to grant leave to appeal to His Majesty in Council. It is true that section 223 of the Government of India Act, 1935, preserves the jurisdiction of this Court to the extent it existed before the establishment of the Dominion but if as we have just indicated there is no inherent power or jurisdiction in this Court to grant leave to appeal to His Majesty in Council, section 223 would not advance the contention of the petitioner any further.

1. (1905) A.C. 601 (P.C.). 2. (1932) A.C. 106 (P.C.).

The learned advocate then relied on rule 2 of the Judicial Committee Rules, 1925. That rule does not give any right of appeal nor is it concerned with conferring jurisdiction upon or defining the jurisdiction of either the Judicial Committee or of the Courts from which appeals may be taken to the Judicial Committee. It only assumes the existence of two classes of appeals (1) appeals which may be brought to the Judicial Committee in pursuance of leave obtained from the Court appealed from and (2) appeals brought in pursuance of special leave to appeal granted by His Majesty in Council. If, as we are inclined to think, there is no jurisdiction in this Court to grant leave to appeal in cases of the present description it is not possible to rely on rule 2 as creating such jurisdiction. The Judicial Committee Rules deal only with the procedure which is to be followed in regard to the several appeals which may be taken to the Judicial Committee. It may be mentioned that when those rules were framed in 1925, appeals could be taken to the Privy Council with leave of the High Court in criminal cases arising out of its original criminal jurisdiction, subject to the conditions laid down in clause 41 of the Letters Patent and rule 2 might have had those appeals in view and possibly some others. Finally the learned advocate said that under clause 8, Letters Patent, granted in 1800, the Supreme Court at Madras had the same powers as the Court of the King's Bench in London but assuming that we have inherited the jurisdiction of the Supreme Court in this respect, the learned advocate has been unable to show us that in like circumstances the Court of the King's Bench had any inherent power to grant leave to appeal to a higher tribunal.

The result is that whichever way we may look at this question, it is not possible to maintain that this Court has any jurisdiction to grant leave to appeal in the present case. In the course of the discussion between the learned advocate and the High Court office a reference was made to clause 41 of the Letters Patent of this Court but the learned advocate did not rely on this provision in the course of his argument before us. It was held in *Hemayetuddin Ahmed* v. *Emperor*[1] that there is no jurisdiction under that clause to grant leave to appeal to His Majesty in Council against judgment of Presidency High Courts in criminal appeals against the judgments of the Courts of Session in the mofussil. Besides it was enacted in 1943 that clause 41 of the Letters Patent "shall cease to have effect" [*see* section 7 (1) of Act XXVI of 1943].

We say nothing as to the jurisdiction of the King in Council which is founded on prerogative. The petitioner may, if he is so advised, move the Judicial Committee for special leave.

The present petition, however, does not lie and must be dismissed.

We have been asked by the learned advocate for the petitioner to grant a certificate under section 205 of the Government of India Act, 1935. We are not satisfied that the case involves a substantial question of law as to the interpretation of the Constitution Act or any order in Council made thereunder. So far as we can see there is no difficulty in interpreting section 223 of the Government of India Act which was the only section of that Act referred to in the course of the argument. We must accordingly refuse to grant the certificate prayed for.

B.V.V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE YAHYA ALI.

P. Chellaiah Pillai, Tuticorin .. *Applicant**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922), sections 2 (1) (a) and 4 (3) (viii)—Grazing fee realised from letting out of lands—If agricultural income—If exempt from assessment.

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1. (1930) I.L.R. 58 Cal. 344.

* Case Referred No. 37 of 1947. 4th August, 1948.

The grazing fee realised by the lease of land for purpose of pasture for cattle used solely for agricultural purposes would constitute agricultural income within the meaning of section 2 (1) (*a*) of the Income-tax Act and as such would be exempt from assessment to income-tax.

The pasturing of cattle is so closely allied to agriculture that it has to be considered as part and parcel of it and where land is leased for grazing of cattle required for agricultural pursuits, it must be deemed to be used for an agricultural purpose.

Brojobasi v. *Ramsankar*, (1915) 23 Cal.L.J. 638; *Emperor* v. *Probatchandra Barua*, (1924) I.L.R. 51 Cal. 504 and *Beohar Raghubir Singh* v. *Commissioner of Income-tax, U.P., C.P. and Berar*, I.L.R. (1947) Nag. 425, followed.

Yuvarajah of Pittapuram v. *Commissioner of Income-tax, Madras*, (1946) I.T.R. 92; *Maharaja Sir Pateshwari Prasad Singh* v. *Commissioner of Income-tax, U.P. and C.P.*, (1947) I.T.R. 181 and *Raja Durga Narain Singh* v. *Commissioner of Income-tax*, (1947) I.T.R. 235, distinguished.

Case referred to the High Court by the Income-tax Appellate Tribunal, Madras Bench, in R.A. No. 333 of 1946-47 dated 14th May, 1947, under section 66 (1) of the Indian Income-tax Act, 1922 (Act XI of 1922) as amended by section 92 of the Income-tax (Amendment) Act, 1939 (Act VII of 1939) for decision.

T. R. Sangameswaran and *S. V. Sundararajan* for Applicant.

C. S. Rama Rao Sahib for Respondent.

The Judgment of the Court was delivered by

Yahya Ali, J.—The question referred by the Income-tax Tribunal to this Court for decision under section 66 (1) of the Income-tax Act is:

"Whether in the absence of any evidence to show that the land was used for agricultural purpose the grazing fee of Rs. 2,873-8-0 realised from the letting out of the lands would constitute agricultural income."

The reference was made at the instance of the assessee and counsel for the applicant at the outset pointed out that in the way in which the question has been formulated by the Bench, he has been virtually stated out of the case. The frame of the question is such that the only possible answer that can be given in its present form would be against him. Having regard to the facts of the case and the various contentions that have been placed before us, we consider it necessary to re-formulate the question in order to furnish the correct answer to the real question that arises from the order of the Tribunal. The counsel for the department has no objection. The question will therefore be re-framed as follows:

"Whether in the circumstances of the case, the grazing fee of Rs. 2,873-8-0 realised from the letting out of the lands would constitute agricultural income within the meaning of section 2 (1) (*a*) of the Act."

The assessee according to the facts set out in the statement of the case is a landlord and had realised the income under assessment from graziers. The land was let out for grazing and we are informed by learned counsel for the assessee that the land is situate in a village at a distance of six miles from Tuticorin. The Tribunal was of the view that the assessee had failed to establish that the income in question came within the exception of section 4 (3) (*viii*) which exempts agricultural income altogether from assessment. The reason for that conclusion was that the assessee did not adduce any evidence before the Bench to show that the land that was let out for grazing was used for agricultural purposes. In the circumstances mentioned above, there seems to be no room for doubt that the grazing of the land was by cattle used for agricultural purposes. Having regard to the fact that it was a village and the land was taken on lease by a grazier and the assessee was a landlord and the lease was specifically for grazing purposes, it cannot be disputed that the purpose of the lease was agricultural.

There was considerable discussion at the Bar with regard to the precise connotation of the terms "agriculture" and "agricultural purpose." But for the purposes of this case and in the view we have taken of the correct finding as appears from the statement of the case, it seems scarcely necessary to embark upon a lengthy discussion of the question raised as to whether the use of land for purposes of

pasture amounts to a use for agricultural purposes and whether the income derived from that source is agricultural income for the purposes of the Act. A brief reference to a few of the cases cited will be sufficient. In *Emperor* v. *Probatchandra Barua*[1], the question arose with regard to the income from pasturage—whether the income derived from permanently settled estates from that source was liable to income-tax. It was conceded by the department that the income from pasturage was derived from land which was used for agricultural purposes and that the assessee was entitled to exemption under section 4 (3) (*viii*) of the Act. The learned Judges, Rankin and Page, JJ., observed :

"In the circumstances that such income is derived from fees realised from graziers who graze their cattle in the forest areas and waste lands there is nothing to render inapplicable the definition of 'agricultural income' contained in clause (*a*)."

This case was sought to be distinguished on the ground that there was no discussion with reference to the question and that the matter proceeded upon a concession. In *King-Emperor* v. *Alexander Allan*[2], the lands were used as pasture lands for cattle and the question was whether that would be deemed to be used solely for agricultural purposes within the meaning of section 63 (3) of the Madras District Municipalities Act. It was held that in such circumstances the land used as pasture land for cattle should be deemed to be land used for agricultural purposes. In that case it was pointed out that the word "agriculture" is not to be restricted to tillage or cultivation and that all land used for pasture for cattle must be held to be land used solely for agricultural purposes. "Agricultural lands" include lands set apart as "pasture grounds only" and also lands used for "rearing livestock." It was pointed out by the learned Judges that if it could be shown that the waste lands were in reality pasture grounds or lands used for rearing livestock, they would have held that they were lands used solely for agricultural purposes. The Calcutta High Court in a later case took the same view with regard to pasture land. In *Surendra Kumar* v. *Chandrataranath*[3], the question was whether the lease, *inter alia*, of certain areas for grazing cattle on the banks of a tank was a lease for agricultural purposes for the purposes of the Bengal Tenancy Act. In that case it was not specifically mentioned in the lease that the cattle were for purposes of cultivation. Graham, J., said :

"It appears to be settled that, where land has been let out for the purpose of grazing cattle on it, the lessee may be a raiyat provided the grazing is ancillary to cultivation

* * * *

But as was pointed out in the case just referred to above, it is necessary to bear in mind that the term 'agriculture' is of wider import than the term 'cultivation'. The mere fact that cultivation is not expressly referred to does not therefore conclude the matter. Speaking for myself I should have thought that when a lease speaks of the objects in view as 'stacking grass for cattle' and 'grazing cattle' it ought fairly to be deemed to be a lease for agricultural purposes, though no doubt it is conceivable that cattle may be kept for purposes having nothing to do with agriculture."

In the present case we may point out that it is not the case of the department that the cattle which grazed the land were used for any other purpose than agriculture. We may conclude this line of cases by referring to a recent decision of the Nagpur High Court in *Beohar Raghubir Singh* v. *Commissioner of Income-tax, U.P., C.P. and Berar*[4]. This was a case which arose under the Income-tax Act and the question was, among others, whether pasturing of cattle is an agricultural process. Referring to a decision in *Emperor* v. *Probatchandra Barua*[1], Bose and Hemeon, JJ., said :

"the pasturing of cattle is so closely allied to agriculture that it has become (*sic*) to be considered part and parcel of it and the meaning of the term is now so well established that there is no longer room for doubt."

With that observation with respect we are in entire agreement.

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1. (1924) I.L.R. 51 Cal. 504.
2. (1901) 12 M.L.J. 393 ; I.L.R. 25 Mad. 627.
3. A.I.R. 1931 Cal. 135.
4. I.L.R. (1947) Nag. 425.

Mr. Rama Rao Sahib referred to some decisions which appear to us to be distinguishable on the facts. The case of *Yuvarajah of Pittapuram* v. *Commissioner of Income-tax, Madras*[1], was not a case in which any question of pasture land was involved. It related to the income derived from forests of spontaneous growth by the sale of wood, bark, leaves, other usufruct of trees, minor forest produce, etc. Next reference was made to two cases *Maharajah Sir Pateshwari Prasad Singh* v. *Commissioner of Income-tax, U.P. and C.P.*[2] and *Raja Durga Narain Singh* v. *Commissioner of Income-tax*[3]. Both the cases are concerned with the nature of the income which arises from the sale of grass. A vital point of distinction, to our minds, exists between mere sale of grass and lease of land for purpose of pasture for cattle used solely for agricultural purposes. Lastly reference may be made to *Brojobasi* v. *Ramsankar*[4]. To a considerable extent we get from that case a lead as to the proper distinction that has to be drawn in such cases. The headnote itself says :

> "A land may be used for the grazing of cattle required for agricultural pursuits, or it may be used for the grazing of cattle required for avocations totally unconnected with agriculture. In the former contingency, but not in the latter, the holding is used for an agricultural purpose and a right of occupancy may be acquired therein."

We concur with that distinction and the view that in a case where land is leased for grazing of cattle required for agricultural pursuits, it must be deemed to be used for an agricultural purpose.

We therefore answer the question that we have framed in the affirmative and hold that the grazing fee of Rs. 2,873-8-0 being agricultural income should be excluded from the assessment under section 4 (3) (*viii*) of the Act. The applicant will get his costs, Rs. 250 from the respondent.

V.S. *Reference. answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

P. Sundaresan and others .. *Appellants**

v.

P. Venkatesiah and others .. *Respondents.*

*Madras Buildings (Lease and Rent Control) Act (XV of 1946), section 7—Scope—Decree for ejectment—Act coming into force later—Effect—Eviction of tenant—Liability of tenant to pay rent—*Res judicata*—Execution proceeding—Order passed without jurisdiction—Order refusing to stay execution—Appealability.*

Section 7 of the Madras Act XV of 1946 makes provision for the remaining in possession of a tenant, unless he has done something which would disentitle him to do so. The various acts which would disentitle him are set out in sub-section (2). Section 7 (1) shows that the Act applies to tenants against whom a decree for eviction has been passed as well as to other tenants. The fact that the landlord obtained the decree for ejectment long before the Act came into force will not entitle him to eject the tenant, and the latter being in the position of a tenant is liable to pay rent to the landlord so long as he remained in possession.

An order passed without jurisdiction in an earlier execution proceeding or at an earlier stage of the same proceeding would not operate as *res judicata* in a subsequent proceeding or at a later stage of the same proceeding.

An appeal lies against an order of the lower Court refusing to stay execution.

Veeraraghavayya v. *Rattamma*, (1948) 1 M.L.J. 425, followed.

Appeal against the order of the City Civil Court, Madras, dated 27th September, 1947, in E.A. No. 1402 of 1947 in E.P. No. 252 of 1947 in O.S. No. 169 of 1940.

Kasturi Seshagiri Rao and *N. S. Narayanachari* for Appellants.

K. Sanjeevi Naidu for Respondents.

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1. (1946) I.T.R. 92.
2. (1947) I.T.R. 181.
3. (1947) I.T.R. 235.
4. (1915) 23 Cal.L.J. 638.

* A.A.O. No. 472 of 1947.

13th August, 1948.

The Court delivered the following

JUDGMENT.—The matter arising in this civil miscellaneous appeal is whether in view of the provisions of section 7 of Madras Act XV of 1946 the defendants are able to resist the execution of the decree for eviction passed in O.S. No. 169 of 1940.

An agreement was entered into between the plaintiffs and the defendants, who belong to one family, whereby the plaintiffs were to own the whole of the family house—which is the subject-matter of the dispute—and in return for which they executed a promissory note in favour of the defendants. The defendants were however allowed to remain in possession of two rooms as tenants of the plaintiffs, the further arrangement being that the interest due on the promissory note executed by the plaintiffs in favour of the defendants should be set off against the rent due for the two rooms. The plaintiffs alleged that not only did the tenants fail to pay the rent and that the tenancy was therefore at an end ; but that they had trespassed into a third room. It was finally held in Letters Patent Appeal that although the plaintiffs and the defendants had not become divided and that the family house still remained technically an asset of the joint family, so that the plaintiffs and the defendants were tenants-in-common, yet in view of the fact that the defendants had agreed to hold the two rooms as tenants of the plaintiff and to pay a rent therefor, it was not open to them under section 116 of the Evidence Act to deny the right of the plaintiffs as long as they were in possession. The Court therefore confirmed the decree of the Courts below evicting the defendants from these two rooms.

The plaintiffs attempted to execute their decree and were met with obstructive tactics at every stage. On 15th July, 1947, in the absence of the judgment-debtor, E.P. No. 252 of 1947 was ordered to be executed. The defendants then filed various applications which dragged on the proceedings until Madras Act XV of 1946 had become law. E.A. No. 1402 of 1947, the order on which is now under consideration, was filed for a short stay of execution pending an application for review to the High Court. During the course of that application the defendants drew the attention of the Court to the provisions of section 7 in Madras Act XV of 1946 and said that the Court had no jurisdiction to evict them. That application was in due course dismissed. Hence this appeal.

Section 7 of Madras Act XV of 1946 makes provision for the remaining in possession of a tenant, unless he has done something which would disentitle him to do so. The various acts which would disentitle him are set out in sub-section (2). Section 7 (1) shows that the Act applies to tenants against whom a decree for eviction has been passed as well as to other tenants. There can be no doubt that the fact that the plaintiffs obtained a decree long before the Act came into force would not entitle them to dispossess the defendants. Strictly speaking, the appellants were not tenants ; but were estopped from contending so because of the provisions of section 116 of the Evidence Act. The definition of " tenant " in this Act would however make the defendants tenants within the meaning of the Act; because a tenant according to section 2 (4) " means any person by whom . . . . rent is payable." Because of the estoppel, the defendants are bound to pay rent to the plaintiffs as long as they remain in possession.

Ordinarily, the earlier order in the same execution proceedings passed on 15th July, 1947, would operate as constructive *res judicata* with regard to the same matters raised at subsequent stages of the execution application ; but where an order is passed by a Court without jurisdiction, that would not necessitate the Court's again acting without jurisdiction. In other words, an order passed without jurisdiction in an earlier proceeding or at an earlier stage in the same proceeding would not operate as *res judicata* in a subsequent proceeding or at a later stage of the same proceeding. This principle has been well accepted, and it is unnecessary to quote a large number of decisions to that effect. Reference may however be made to *Madhavarao* v. *Papayya*[1], in which this principle was laid down with regard to a decree passed in a suit which was alleged in a subsequent suit to

1. (1946) 1 M.L.J. 287 : I.L.R. 1946 Mad. 760.

operate as *res judicata*. Similarly, in *Gajadhar Prasad* v. *Firm Manulal Jagarnath Prasad*[1], it was held that an order which was *ultra vires* would not operate in subsequent proceedings as *res judicata*.

The only other question remaining is whether an appeal lies against the order of the lower Court refusing to stay execution. That question was fully considered in *Veeraraghavayya* v. *Rattamma*[2]. It is argued that that decision of a single Judge is not correct, and various decisions of other High Courts have been quoted in support of that contention. There was a difference of opinion in the High Courts of Allahabad and Calcutta on the one hand and that of Lahore and this High Court in *Subramania Pillai* v. *Kumaravelu Ambalam*[3], on the other. The judgment in *Veeraraghavayya* v. *Rattamma*[2] does not refer to the Full Bench decision in *Chidambaram Chettiar* v. *Krishna Vathiar*[4], where the learned Judges had to consider the scope of the present section 47 as compared with that of section 244 of the old Code. They discussed various decisions of other High Courts and came to the conclusion that,

> " the scheme of the corresponding section 47 of the present Code is not to specify any particular questions at all, but to include all questions relating to the execution, discharge or satisfaction of a decree as being within its scope."

Phillips, J., who delivered a dissenting judgment, referred to *Subramania Pillai* v. *Kumaravelu Ambalam*[3], relied on by the learned Judge in *Veeraraghavayya* v. *Rattamma*[2] and dissented from it. The majority however followed *Subramania Pillai* v. *Kumaravelu Ambalam*[3]. There can therefore be no doubt as regards the law in this High Court. The learned advocate for the respondents has cited *Malmal Vitil Krishnan Nair* v. *Kavalappara Moopil Nair*[5], in which it was held that there was no appeal against an order by the appellate Court refusing to stay execution under Order 41, rule 5; but the learned Judges came to that conclusion because the application under consideration was not one filed in the Court executing the decree. They held that section 47 applied only to orders passed by the Court executing the decree.

In the view taken by the lower Court, it was unnecessary to consider whether on any of the grounds set out in section 7 (2) of the Madras Act XV of 1946 the landlords were entitled to evict the tenants. That question will now however have to be considered in view of the above findings.

The appeal is therefore allowed and E.A. No. 1402 of 1947 remanded for disposal in the light of the provisions of section 7 of Madras Act XV of 1946. The costs will abide the result.

B.V.V. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

The Province of Madras, represented by the Collector of Madras .. *Petitioner**

v.

R. B. Poddar Firm through its managing partner, Motilal Fomra .. *Respondent.*

Civil Procedure Code (V of 1908), *sections* 80, 115 *and Order* 6, *rule* 17—*Suit against Provincial Government after notice under section* 80—*Prayer for amendment of plaint introducing new cause of action inconsistent with the original one—If can be allowed—Interference in revision with order allowing amendment—Principles.*

A suit against the Provincial Government (after the necessary notice under section 80, Civil Procedure Code), as originally framed was for a declaration that the acquisition by the Government of certain ground and premises belonging to the plaintiff was illegal, *mala fide*, unreasonable, *ultra vires* and without jurisdiction and for granting a permanent injunction restraining the defendant from proceeding with the said acquisition or from taking possession of the said property. Pending the suit, an application was made to amend the plaint by the addition of a new paragraph to the

1. (1925) I.L.R. 4 Pat. 440.
2. (1948) 1 M.L.J. 425.
3. (1915) I.L.R. 39 Mad. 541.
4. (1916) 32 M.L.J. 13 : I.L.R. 40 Mad. 233 (F.B.).
5. (1914) 27 M.L.J. 171.

* C.R.P. No. 580 of 1947. 3rd September, 1947.

effect that since the institution for the use of which the original acquisition had been intended had ceased to exist as an entity on account of its dissolution there was no further necessity for the acquisition at all and therefore the defendant should not take any further steps in relation to the said acquisition. The amendment was allowed. In revision, on a contention that as the amendment introduced a new cause of action, it could not be allowed without the imperative pre-requisite of a notice under section 80, Civil Procedure Code.

Held, that as the amendment allowed had introduced a fresh cause of action which was outside the scope of the suit as originally framed and inconsistent with the allegation made earlier, the trial Judge was not justified in allowing the amendment as admittedly no previous notice had been served on the Government informing them of this new cause of action.

Held, further, that as the lower Court had acted with material irregularity in the exercise of jurisdiction, the High Court had the power to interfere in revision and set right the matter.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Madura, dated 15th January, 1946, in I.A. No. 1041 of 1945 in O.S. No. 67 of 1945.

The Government Pleader (*K. Kuttikrishna Menon*) for Petitioner.

V. V. Srinivasa Aiyangar for *P. V. Subramaniam* for Respondent.

The Court delivered the following

JUDGMENT.—An application to amend the plaint in O.S. No. 67 of 1945 on the file of the Sub-Court of Madura by the addition of a paragraph 19-A, to the original plaint has been allowed by the learned Subordinate Judge and the Provincial Government represented by the Collector of Madura seeks to revise that order on the ground that as the amendment introduces a new cause of action, it cannot be allowed without the imperative pre-requisite of a notice under section 80 of the Code of Civil Procedure.

The suit as originally framed was for a declaration that the acquisition by the Government, of certain ground and premises belonging to the plaintiff and set forth in the schedule to the plaint was illegal, *mala fide*, unreasonable, *ultra vires* and without jurisdiction and for granting a permanent injunction restraining the defendant (Provincial Government) from proceeding with the said acquisition or from taking possession of the said property. Pending the suit, an application was made to amend the plaint by the addition of the new paragraph to the effect that since the Madura-Ramnad Central Co-operative Bank, Ltd., for the use of which the original acquisition had been intended had ceased to exist as an entity on account of its dissolution there was no further necessity for the acquisition at all and therefore the defendant should not take any further step in relation to this acquisition.

The learned Subordinate Judge found that even though the proposed amendment would introduce an additional cause of action, as it would, if decided in favour of the plaintiff, terminate to the litigation, such a prayer should be allowed in order to avoid multiplicity of suits. The learned Judge relied upon the decision in *Ezra* v. *Secretary of State*[1], for the proposition that where an amendment of plaint is necessitated by the discovery of facts previously unknown to the plaintiff and the relief asked for in the plaint is not altered by the amendment, a further notice under section 80 of the Civil Procedure Code was not necessary and since the lower Court is entitled to take notice of subsequent events, it was bound to allow the amendment.

The learned Government Pleader contends that since the proposed amendment introduces a new cause of action, the Court has no jurisdiction to allow the amendment because a previous notice as contemplated by section 80 of the Civil Procedure Code stating the cause of action has not been given by the plaintiff. The question, therefore, is whether the learned Judge acted with material irregularity in the exercise of his jurisdiction in allowing the amendment. The suit as originally framed was based upon the action of the Government which according to the plaintiff was *mala fide*, illegal and *ultra vires*. The plaintiff now says that during the course of the suit, it has come to his knowledge that the purpose for which the acquisition was intended to be made has ceased to exist and therefore there is no

1. (1902) I.L.R. 30 Cal. 36.

necessity at all for such acquisition. The subsequent facts certainly introduce a new cause of action which is inconsistent with the original one. Thus, I have no hesitation in holding that a fresh cause of action is introduced into the suit by means of this amendment.

If there were a suit between two parties where the compelling necessity of a notice under section 80 of the Code of Civil Procedure did not exist, probably an amendment like this if allowed in its discretion by a lower Court would not be interfered by this Court. But in this case, section 80 is an insuperable bar: Notice stating the cause of action has to be given to the Government and a suit can be filed only 60 days thereafter. Admittedly no such notice is given. In *Bhagchand Dagdusa* v. *Secretary of State*[1], the Privy Council has laid down that section 80 has to be strictly complied with and is applicable to all causes of action and all kinds of reliefs. In *The Government of the Province of Madras* v. *Al. Ar. Rm. Vellayan Chettiar*[2], this Court has held that section 80 of the Civil Procedure Code is explicit and mandatory. Where the section has not been complied with, a Court has no jurisdiction to try the action instituted against the Government. There can be no question of waiver and no question of estoppel. Even where the Central Government succeeded to the ownership of a railway company against whom, after proper notice under the Indian Railways Act, a suit had been filed and where the succession was pending the suit, it was held that the suit is not maintainable against the Government representing the railway company without fresh notice under section 80—see *Governor-General of India in Council* v. *Raghunandan Shenoy*[3]. In a very recent decision in *Al. Ar. Rm. Vellayan Chettiar* v. *The Government of the Province of Madras*[4], Lord Simonds in delivering the judgment of their Lordships of the Judicial Committee has re-affirmed the imperative words of a notice under section 80.

It is contended by Mr. V. V. Srinivasa Aiyangar on the authority of *Ezra* v. *Secretary of State*[5], that the subject-matter of the amendment came into existence during the pendency of the suit and therefore no fresh notice was necessary. Having carefully perused that decision I do not consider that it goes to that extent. The learned Judges there made it clear that what was sought to be added by the amendment was only to embody certain further materials in support of the plaintiff's contention. It is not a case where the amendment sought for introduced a new cause of action. A more instructive case is *Manindra Chandra Nandi* v. *Secretary of State for India*[6], where Sir Ashutosh Mukherjee, J., observes that where a new cause of action is sought to be introduced in addition to a cause of action specified in the plaint against the Government, notice under section 80 is a pre-requisite. To the same effect is a decision in *McInerny* v. *Secretary of State for India*[7]. As I am of opinion that the amendment now allowed has introduced a fresh cause of action which was out-side the scope of the suit as originally framed and was inconsistent with the allegation made earlier, the learned Sub-Judge was not justified in allowing the amendment now, as *ex concesis* no previous notice has been served on the Government. informing them of this new cause of action.

Mr. V. V. Srinivasa Aiyangar next urges that even if I am of opinion that the amendment was wrongly allowed, still, I have no power to interfere as the lower Court had jurisdiction to act as it did. The trend of modern authority in our Court is to the effect that where a lower Court has acted with material irregularity in the exercise of jurisdiction, this Court has the power to interfere in revision and set right the matter. In this connection reference may be made to *Chinta Chandramma* v. *Gunna Sethan Naidu*[8], *Ibramsa Rowther* v. *Mohamad Esuf Rowther*[9], *Sundarammal* v. *Ameenlal*[10], which are all instances where the lower Court wrongly allowed an

1. (1927) 53 M.L.J. 81 : I.L.R. 51 Bom. 725 (P.C.).
2. (1944) 2 M.L.J. 65.
3. (1946) 2 M.L.J. 65.
4. (1947) 2 M.L.J. 208 (P.C.).
5. (1902) I.L.R. 30 Cal. 36.
6. (1907) I.L.R. 34 Cal. 257 at p. 281.
7. (1911) I.L.R. 38 Cal. 797.
8. (1930) 61 M.L.J. 316.
9. (1929) 30 L.W. 557.
10. (1926) 98 I.C. 867.

amendment and the High Court set it aside in revision. Recently my learned brother Rajamannar, J., in *Elaya Pillai* v. *Ramaswami Jadaya Goundan*[1], has allowed a civil revision petition where the lower Court wrongly amended the plaint. Therefore, the contention of Mr. V. V. Srinivasa Aiyangar that this Court has no power to interfere where it is convinced that the order of the lower Court was irregular in the exercise of its jurisdiction is unsupported by any recent ruling of this Court.

In this view, I set aside the order of the learned Subordinate Judge and direct that I. A. No. 1041 of 1945 be dismissed with costs throughout. The respondent, if so advised, may apply to the lower Court for the refund of any additional court-fee paid by him as a result of the amendment and the lower Court will direct the refund.

V.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO.

Vadula Satyanarayanamurty .. *Appellant**

v.

The Official Receiver, West Godavary and others .. *Respondents.*

Transfer of Property Act (IV of 1882), section 82—" Contract to the contrary "—Meaning—Maintenance decree—Charge—Sale of some items so charged—Indemnity given to purchaser for loss that may be caused by sale in execution of maintenance decree—Payment by purchaser to avoid sale in execution of the maintenance decree—Right of purchaser to claim contribution from the other items charged—Indemnity clause if a " contract to the contrary."

The words " contract to the contrary " occurring in section 82 of the Transfer of Property Act has to be interpreted as meaning a contract between the mortgagee on the one hand and the mortgagor or mortgagors on the other and not a contract *inter se* between the mortgagors or their representatives in interest.

Damodaraswami v. *Govindarajulu*, (1943) 1 M.L.J. 291: I.L.R. 1943 Mad. 531 (F.B.) followed.

A decree for the payment of maintenance was charged on several items of property of the judgment-debtor. The latter sold some of the items so charged and the sale deed in favour of the vendee contained also an indemnity in his favour charging some of the other items for the amount of loss that might possibly accrue to the vendee in case the properties sold to him were to be sold in execution of the maintenance decree. The properties were in fact brought to sale in execution of the maintenance decree and the vendee was obliged to pay a sum of Rs. 1,500 to avert the sale. In a suit by him for contribution from the other items in the possession of the purchasers from his vendor,

Held, that the indemnity clause contained in the sale deed did not constitute a " contract to the contrary " within the meaning of that expression occurring in section 82 of the T.P. Act so as to negative the right to claim contribution from the other items. But as there was a security created under the indemnity, the vendee can only proceed to enforce his claim for contribution after realising such amount as is possible to realise from the items charged as security and giving credit to it.

Appeal against the decree of the Court of the Subordinate Judge, Ellore, in A. S. No. 131 of 1944, preferred against the decree of the District Munsiff, Tanuku in O. S. No. 51 of 1940.

V. Suryanarayana for Appellant.

Ch. Raghava Rao, *P. Satyanarayana Raju*, *V. Viyyanna*, *P. Somasundaram*, *P. Suryanarayana* and *G. Chandrasekhara Sastri* for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff is the appellant. The suit was for recovery of a sum of Rs. 2,293-12-7 by selling the lands in the possession of the various defendants who have been impleaded as parties to the suit. The wife of the first defendant who is the 36th defendant obtained a maintenance decree in O. S. No. 41 of 1921, Sub-Court, Rajahmundry, against the first defendant. The decree also gave a charge against the properties of the first defendant which are items 1 to 42 of the plaint schedule. The plaintiff purchased on 13th February, 1931, under Ex. P an extent of five acres and 82 cents from the first defendant and the deed of sale executed in his favour contained also an indemnity in his favour charging items 30,

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1. (1946) 2 M.L.J. 373.

* S.A. No. 2319 of 1945. 10th August, 1948.

31, 32 and 34 for the amount of loss that might possibly accrue to the plaintiff in case the properties sold to him were to be sold in execution of the maintenance decree. The decree-holder in O. S. No. 41 of 1921, in fact, brought the properties purchased by the plaintiff to sale and the plaintiff was obliged to pay a sum of Rs. 1,500 to avert the sale. He now claims that he is entitled to contribution from the other items in the possession of the various defendants, some of whom were also purchasers from the first defendant and the Official Receiver of the various items. As many as 17 issues were framed in the suit. The learned District Munsiff recorded findings on issues 1, 3, 7, 8, 15, 16, 2 and 6. In the view he took of the case, he was of opinion that as the plaintiff had an indemnity, in respect of which a charge was also created over items 30, 31, 32 and 34, he was not entitled to contribution. The result was that the suit was decreed with costs against items 31, 32 and 34 in the possession of defendants 2, 5, 49 and 52 to 55 and was dismissed in respect of other items. As regards item 30 which was sold in Court auction in pursuance of the maintenance decree and the surplus sale proceeds of which were in Court, the decree of the District Munsiff was that the surplus sale proceeds of item 30, if any, remaining in deposit in the Sub-Court to the credit of O. S. No. 41 of 1921 should be proceeded against by the plaintiff and credited towards this decree.

In so far as the plaintiff's suit for contribution was dismissed, he preferred an appeal to the Sub-Court. The learned Subordinate Judge agreed with the view of the learned District Munsiff, and following a Full Bench of this Court in *Damodaraswami* v. *Govindarajulu*[1], he dismissed the appeal.

In this second appeal, the only question that was argued was that the Courts below have entirely misunderstood the decision of the Full Bench in *Damodaraswami* v. *Govindarajulu*[1] which overruled the earlier decisions to the contrary and followed the decision in *Ramabhadrachar* v. *Srinivasa Iyengar*[2]. I think that this contention is well founded. The decision of the Full Bench far from supporting the contentions of the defendants, as the learned Subordinate Judge wrongly assumed, supports the plaintiff. The argument that was accepted by the Courts below was that the indemnity clause contained in Ex. P constituted a "contract to the contrary" within the meaning of section 82 of the Transfer of Property Act. The expression "contract to the contrary" occurring in section 82 was interpreted by the Full Bench as meaning a contract between the mortgagee on the one hand and the mortgagor or mortgagors on the other and not a contract *inter se* between the mortgagors or their representatives in interest. In view of this express and binding decision on the point, it is unnecessary to refer to the earlier cases. I am therefore of opinion that the view of the Courts below that the plaintiff was not entitled to contribution from the other items is unsustainable.

There is, however, a security created under Ex. P under the indemnity clause contained therein. The plaintiff can only proceed to enforce his claim for contribution after realising such amount as is possible to realise from items 30, 31, 32 and 34 and giving credit to it. This was also the course adopted by the plaintiff in *Ramabhadrachar* v. *Srinivasa Iyengar*[2]. I think that the owners of the other items would be entitled, on the principle of marshalling contained in section 81 of the Transfer of Property Act, to insist that the plaintiff should proceed first against items 30, 31, 32 and 34 and then only enforce a claim for contribution against the other properties for the balance. The trial Court, however, has not decided issues 4, 5 and 9 to 14; and in the view that the claim for contribution is maintainable, these issues have now to be determined. It will be open to the parties to urge all the contentions that are open to them under those issues and raised by them in their written statements. Liberty is also given to both the parties to adduce such evidence as they choose to place before the Court on those issues. The second appeal is therefore allowed, and the suit is remanded for disposal of the issues above specified in the light of this judgment. The parties will bear their

1. (1943) 1 M.L.J. 291 : I.L.R. 1943 Mad. 531 (F.B.).
2. (1900) I.L.R. 24 Mad. 85.

own costs in this Court and also in the lower appellate Court. The District Munsiff will provide for costs of the trial before him. The decree of the District Munsiff against items 30, 31, 32 and 34 with costs as decreed by him will stand.

If any item of property has been sold and the amount of sale consideration is available, the claim for contribution will attach to the amount that is available. Court-fee paid on the memorandum of second appeal and in the lower appellate Court will be refunded.

No leave.

V.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Musaliyam Veettil Kottulungal Muhammad .. *Petitioner**

v.

Vallur Manakkal Akkiraman Namboodiri .. *Respondent.*

Madras Tenants and Ryots Protection Act (XVII of 1946), *section* 4 (1) (a) *and Malabar Tenancy Act (XIV of* 1930), *section* 3 (v)—' *Tenant* '—*Who is*—*Defendant in suit for redemption of a mortgage under a document described as* " Kaivasam panayam "—*If entitled to ask for stay under section* 4 (1) (a) *of Act XVII of* 1946.

The word " tenant " in section 3 (*v*) of the Malabar Tenancy Act has a much wider meaning than under the general law and is intended to include such persons as are specified in that section, but not all persons enjoying land under one of the customary tenures of Malabar law. One will, therefore, have to consider from a perusal of the relevant deed itself whether its primary object is that the person put into possession should enjoy the land or whether it is primarily intended that the land should be a security for the debt.

Where under a document described as " *Kaivasam panayam* " Rs. 500 were paid to the owner of the property who demised it to the petitioner who was to hold it in possession according to the custom of " *Muthal Kudima Nyayam* " and to pay a nominal purappad and who was directed not to make any improvements, on a question whether the person put into possession under such a document, described as a usufructuary mortgage is a " tenant " within the meaning of the Malabar Tenancy Act and entitled to apply under section 4 (1) (*a*) of Act XVII of 1946 for stay of a suit for redemption of the mortgage,

Held, that the general terms of the document are those of a usufructuary mortgage. From the fact that the mortgagee was to hold it in possession according to the custom of "*Muthal Kudima Nyayam*" it cannot be said that it is an indication that the document is not what it purports to be, *i.e.*, a usufructuary mortgage. " Purappad " in the present case does not mean rent in the ordinary sense of the word. Hence, the person in possession under such a document is not a " tenant " under the Malabar Tenancy Act and so is not entitled to ask under section 4 (1) (*a*) of the Madras Act XVII of 1946 for stay of the suit to redeem the mortgage.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the District Munsiff, Ponnani, dated 17th February, 1947, in I. A. No. 3255 of 1946 in O. S. No. 585 of 1946 on its file.

K. P. Ramakrishna Aiyar for Petitioner.

S. Venkatachala Sastri for Respondent.

The Court delivered the following

JUDGMENT.—The fifth defendant, who is the petitioner here, filed an application (I A. No. 3255 of 1946 in O. S. No. 585 of 1946 of the District Munsiff's Court, Ponnani) praying that the suit may be stayed, as it fell within the mischief of section 4 (1) (*a*) of Madras Act XVII of 1946. The application was dismissed.

The suit in question was one for redemption of a mortgage under a document described as *Kaivasam panayam.* Rs. 500 were paid to the respondent, who demised the property to the petitioner, who was to hold the property in possession according to the custom of *Muthal Kudima Nyayam.* He was to deduct the interest

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* C. R. P. No. 767 of 1947. 25th February, 1948.

on the panayam (mortgage) amount and Government revenue and to pay as purappad a bunch of plantains worth Rs. 0-9-5 and As. 4. He was directed not to make any improvements on the property nor erect any buildings. In default of payment, he had to pay interest. If the panayam amount was tendered after one year, he was bound to surrender the property. The question is whether the person put into possession under this document, described as a usufructuary mortgage, is a tenant within the meaning of the Malabar Tenancy Act.

Section 4 (1) (*a*) of the Madras Act XVII of 1946 says :

> " All suits . . . . . for the eviction of tenants from their holdings or land as the case may be or in which a claim for such eviction is involved . . . . . and which are pending at the commencement of this Act . . . . . . shall be stayed . . . . . ."

The Act applies to tenants as understood in the Malabar Tenancy Act. " Tenant " is defined in section 3 (*v*) of the Malabar Tenancy Act as :

> " Any person who has paid or has agreed to pay rent or other consideration for his being allowed by another to enjoy the land of the latter, and includes an intermediary, kanomdar, kuzhikanomdar, and verumpattamdar of any description."

I have no doubt that this suit does involve the eviction of the petitioner ; and so section 4 (1) (*a*) of the Act XVII of 1946 will apply and the petitioner will be entitled to a stay if he is a tenant within the meaning of section 3 (*v*) of the Malabar Tenancy Act. The word " tenant " in the Malabar Tenancy Act has a much wider meaning than under the general law and is intended to include such persons as are specified in that section, but not all persons enjoying land under one of the customary tenures of Malabar law. He is admittedly not a kanomdar, kuzhikanomdar or verumpattamdar. Reference has been made to the decision in *Pottentakath* v. *Krishnan*[1] in which Happell, J., held that a usufructuary mortgagee would not be a tenant within the meaning of section 3 (*v*) of the Malabar Tenancy Act. One will, however, have to consider from a perusal of the deed itself whether its primary object is that the person put into possession should enjoy the land or whether it is primarily intended that the land should be a security for the debt. An examination of the document itself is therefore necessary for determining whether the petitioner is or is not a tenant.

As I have already pointed out, the document is described as a usufructuary mortgage and in general its terms are those of a usufructuary mortgage ; but the petitioner relies on the passage : " You may, therefore, hold the property in possession according to the custom of *Muthal Kudima Nyayam* " and also upon the circumstance that some purappad—which ordinarily means rent—is payable. The second point is, I consider, covered by a Bench of this Court in *Vasudevan Nambudiri* v. *Raman Nambudiri*[2], where the learned Judges were construing a document described as a *Kaivasam panayam*, though its terms were somewhat different from what they are in this case and in which the expression panayam purappad was used. The learned Judges came to the conclusion that " purappad " did not in such a context mean rent in the ordinary sense of the word. Similarly, there seems to be no reason for concluding that " purappad " in the present document means rent in that sense. This decision has been followed by Satyanarayana Rao, J., in no less than three cases (C. R. P. Nos. 26 of 1947, 194 of 1947 and 201 of 1947) where the learned Judge held that the document was a usufructuary mortgage and not a lease.

There remains the question as to what significance should be attached to the clause set out above. " *Kudima Nyayam* " according to Sundara Ayyar's Malabar and Aliyasanthana Law (page 442) means a kind of service tenure by which a grant is made by a wealthy landlord to his prædial slave or lowly tenant. It is a personal service grant in which a nominal fee is paid to the landlord and, presumably, the slave or menial tenant is not to be allowed to alienate that land, nor would he be entitled to make the landlord liable for any improvements which he

1. (1942) 2 M.L.J. 154. 2. (1940) 2 M.L.J. 712.

might make on the land. In the document under consideration (Ex. D-1) it is expressly stated that the person to whom possession was given should not make any improvements, nor erect any buildings; and the purappad was quite nominal. So presumably the use of the expression "*Kudima Nyayam*" merely meant that a nominal purappad should be paid and that the person entering into possession should have no power to alienate the property or to make any improvements. It did not apparently mean that the primary purpose of the transaction was to lease the land. That it was not a "*Kudima Nyayam*" grant in the sense of the word in times gone by is shown by the fact that a sum of Rs. 500 was paid, which of course could not have been paid by the slaves or menial cultivators to whom grants were made in ancient times. I do not consider therefore that the clause "You may therefore hold the property according to the custom of "*Kudima Nyayam*" is an indication that Ex. D-1 is not what it purports to be, *i.e.*, a usufructuary mortgage.

The petition is dismissed with costs.

V.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE YAHYA ALI.

Messrs. P.A. Raju Chettiar and Brothers, Jewellers, Coimbatore .. *Applicant**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922), section 26-A—Deed of partnership not disclosing the real partners or their shares—If can be registered—Right of Income-tax Officer to examine genuineness of deed of partnership sought to be registered.

If a registration has to be obtained under section 26-A of the Indian Income-tax Act, it can only be by a genuine firm which specifies in the partner ship deed the actual shares of each partner and when that is not done, the Income-tax Officer is competent, if not bound, to reject that application.

When an application for registration of a firm is made, the Income-tax Officer is entitled to examine whether the partnership is genuine, whether each of the partners mentioned in the partnership deed is a real partner, whether the shares are specified properly, whether the shares specified are real ones and whether the profits which are to be distributed under the deed of partnership will truly be the profits of those particular individuals. If he finds that there is no genuineness with regard to any of these things it is open to him to reject the application on the ground that there is no genuine partnership brought into existence by the deed. Where the person shown as a partner has merely given her name as a partner on behalf of her minor sons, whose guardian she was, and the capital belonged to the minors who alone were entitled to the profits, there is no genuine partnership which can be registered. A strict and rigid compliance with section 26-A and the rules is essential and there is no scope for any equitable considerations.

Case referred to the High Court by the Income-tax Appellate Tribunal under section 66 (1) of the Indian Income-tax Act, 1922 (XI of 1922) as amended by section 92 of the Income-tax (Amendment) Act (VII of 1939) in 66 R.A. 81 Madras 1944-45 on its file.

The Advocate-General (*K. Rajah Aiyar*) and *K. Srinivasan* for Applicant.

C. S. Rama Rao Sahib for Respondent.

The Judgment of the Court was delivered by

Yahya Ali, J.—The question referred to this Court by the Income-tax Appellate Tribunal under section 66 of the Income-tax Act for decision is—

"Whether the firm purported to have been brought into existence by the deed of partnership, dated 14th August, 1941, can in law be registered under section 26-A of the Indian Income-tax Act."

The proved facts are these. Raju Chettiar and Ramaswami Chettiar who were brothers constituted a joint Hindu family and carried on business as jewellers. Ramaswami died in 1934 (that date is now mentioned by the applicant's advocate while the Tribunal said that the date was not ascertainable). The widow Ranganayaki Ammal and two minor sons Viswanathan and Ranganathan survived

* Case Referred No. 19 of 1946. 12th August, 1948.

Ramaswami. The family was being assessed in the status of a Hindu undivided family upto the assessment year 1940-41. On 19th August, 1940, there was a partition of the undivided family and that partition was recognised by the Income-tax department under section 25-A. On the same date a deed of partnership was entered into between Raju Chettiar and the two minor sons of Ramaswami Chettiar constituting themselves into a partnership; the minors being represented by their mother Ranganayaki Ammal and the partnership was to come into effect from the 14th April, 1939. In 1940-41 assessment a claim was made on the strength of this deed of partnership, dated 19th August, 1940, that, as the separated members were carrying on the business, the firm should be registered under section 26-A as from 14th April, 1939. This contention was repelled on the ground that the partition took place only on 19th August, 1940 and consequently the question of registering the firm for the assessment for 1940-41 did not arise. Subsequently it appears to have been realised that there could be no valid partnership between an adult and two minors and by way of legalising the transaction a fresh deed of partnership was executed on 14th August, 1941. The members of that partnership according to the new deed were Raju Chettiar and Ranganayaki Ammal. In the course of the assessment for 1941-42 which is the subject-matter of the present reference, an application was made under section 26-A for the registration of the firm brought into existence under the partnership deed, dated 14th August, 1941. The Income tax Officer held an enquiry into the petition and came to the conclusion that there was no genuine partnership between Raju Chettiar and Ranganayaki Ammal and the share, shown as belonging to Ranganayaki Ammal did not belong to her and the deed did not specify the real partners and their shares and that therefore there was no real firm in existence which could be registered under the Act. Appeals against the refusal of registration brought before the Appellate Assistant Commissioner and the Tribunal failed. The Tribunal in its order under section 33 recorded the finding that the deed, dated 14th August, 1941, did not bring into existence any genuine partnership between Raju Chettiar and Ranganayaki Ammal. The facts found by the Tribunal in that order are that at the end of the year of account 1940-41 the capital standing to the credit of the family account was Rs. 1,20,000 and that amount was transferred to the account of Raju Chettiar and the minors, Rs. 60,000 to the credit of Raju Chettiar, and Rs. 30,000 to the credit of each of the minors. Those credit entries were on the same day reversed and the sum of Rs. 60,000 which stood to the credit of the two minors was transferred to the account of Ranganayaki Ammal, and in that way it was exhibited in the accounts of the new firm that Ranganayaki Amma contributed to the new partnership a capital of her own Rs. 60,000. The Tribunal found that the capital alleged to have been contributed by her was not her own capital but that of the two minors. It was further found that the deed made express provision that the profits were to be credited to the minors in equal shares as per the desire of their mother and on these facts the conclusion was reached that Ranganayaki Ammal was not a partner in her own right, but was only a nominee on behalf of her two minor sons.

Appearing for the assessee at whose instance this reference was made by the Tribunal the learned Advocate-General advanced the following propositions :

(1) It is open to the guardian of a minor whose father was a member of the partnership to continue an ancestral business after the father's death if the continuance of the same is for the benefit of the minor.

(2) When in such circumstances the business is continued, the guardian alone can be a partner and not the minor, the only manner in which the business can be lawfully carried on by the guardian being by the guardian becoming a partner in his or her own name and utilising the minor's assets, if necessary, for furnishing the required capital for the continuance of the business. In such a case if profits are received, the guardian will duly transfer them to the minor. This is the only lawful method by which the guardian can discharge the duty of conserving and protecting the interests of the minor in the business left by the minor's father. It

is argued in this connection that there is nothing in section 26-A of the Income-tax Act to militate against the right of the guardian either to enter into a partnership on behalf of the minors in his or her own name, or to utilise the minors' moneys towards capital for that business or to make over the profits to the minors.

(3) There can be no apprehension of any revenue being lost to the Income-tax department as even if the firm is registered with Raju Chettiar and Ranganayaki Ammal as partners, it will be open to the department under section 40 to assess the share of profits received by the minors in their personal accounts.

These propositions were elaborated with considerable citations of authority. In *Joykisto Cower* v. *Niyyanund Nundy*[1], it was held that the guardian of a Hindu minor was competent to carry on an ancestral trade on behalf of the minor and following that decision Wallis and Munro, JJ., held in *Sanka Krishnamurthy* v. *Bank of Burma*[2] that the widow and natural guardian may in India carry on a family business belonging to a minor son by a manager. In such a case such guardian and not the minor is the person personally liable on contracts entered into in the course of the business. Creditors of the business have no right of direct recourse against the minor ; but as the guardian will be entitled to indemnity for liabilities properly incurred out of the assets of such business, creditors of the business can proceed directly against such assets for liabilities properly incurred by the guardian. *Khorasany* v. *Acha and four*[3] was the case of a Mohamedan widow who entered into partnership contract with her deceased husband's partner and continued the business so as to bind her minor children. It was held following the leading case on the subject *Imambandi* v. *Mutsaddi*[4] that a Mohamedan widow is not competent to enter into a contract binding on her minor children. It is argued that the principle on which that authority is based is of general application.

Strong exception was taken to the statement which is found in the order of the Tribunal made under section 33 (but not in the statement of the case) that Ranganayaki Ammal has no beneficial interest in the share that the deed purports to assign to her and this was indicated in that order as one of the reasons supporting the conclusion that she could not be a member of the partnership in her own name. That statement appears to have been adopted from an observation of Beaumont, C.J., in *Central Talkies Circuit, Matunga*, In re[5], which is to the following effect :

> "If the Assistant Commissioner had any evidence before him to lead to the conclusion that the mother in this case was not really entitled to a beneficial interest of $4\frac{1}{2}$ annas share, I think he was justified in refusing to register the deed."

With great respect we are of opinion that the correct legal position has been stated rather widely in that passage. There can conceivably be cases where a person who has no beneficial interest, such as a trustee appointed under a testament, will have to continue a partnership in which the deceased was a partner and being a legal owner, the trustee despite the fact that he has no beneficial interest will have to join the new partnership as a member in his own name. Such illustrations can be easily multiplied, *viz.*, *Fry* v. *Shials' trustees*[6], where Lord Skerrington held that where a business is carried on by testamentary trustees on behalf of the minors who are beneficiaries under a will the business is not the property of the beneficiaries but of the trustees. The present case, however, as we shall show presently, stands on an entirely different footing, having regard in particular to the language of section 26-A and of the various rules bearing on the question. We shall deal further with the first two propositions after disposing of the last.

With reference to the third proposition reliance was placed on a number of cases : *Kirpaldas* v. *Commissioner of Income-tax*[7], *Shapurji Pallonji* v. *Commissioner of Income-tax, Bombay*[8], *Commissioner of Income-tax, Madras* v. *Mr. Saldanha*[9], *The Probynenbad*

1. (1878) I.L.R. 3 Cal. 738.
2. (1911) 21 M.L.J. 620 : I.L.R. 35 Mad. 692.
3. (1928) I.L.R. 6 Rang. 198.
4. (1917) 35 M.L.J. 422 : L.R. 45 I.A. 73 : I.L.R. 45 Cal. 878 (P.C.).
5. (1941) I.T.R. 44.
6. (1915) 6 T.C. 583.
7. (1941) I.T.R. 505.
8. (1945) I.T.R. 113.
9. (1932) 62 M.L.J. 600 : I.L.R. 55 Mad. 891 (S.B.).

Stud Farm, In re[1], *Hotz Trust* v. *Commissioner of Income-tax*[2], *Trustees of the Tribune Press* v. *Commissioner of Income-tax*[3]. In those cases registration of the firm had been made on a particular basis as disclosed in the deed of partnership which was submitted for registration. Subsequently facts came to the notice of the Income-tax authorities which affected the individual assessments of the parties ; either the shares were found on enquiry to be different or new partners were found to exist or existing partners were held not to be genuine partners. In such cases when the department sought to make the assessment in accordance with the real facts found by them as to the constitution of the partnership, pleas were put forward based on estoppel on the ground that the partnership in accordance with the deed had been duly registered under section 26-A. In all these cases that contention was repelled and it was held that the Income-tax Officer could not in any way be estopped from enquiring into the question as to the identity of the persons who actually received the profits. In the case of *Shapurji Pallonji* v. *Commissioner of Income-tax, Bombay*[4], Kania, J. (as he then was), said :

> " That only means that in making the firm's assessment, and showing the distributive share of each partner, the Income-tax Officer should show the amount according to the instrument registered. That, however, is not in respect of the assessment of the individual partner, and does not preclude the officer from inquiring whether the income shown against the individual partner's name is the true income of this partner, or stands in his name as a nominee of another partner or another person."

To the same effect are observations in *Hotz Trust case*[2], which was followed by this Court in the *Commissioner of Income-tax, Madras* v. *Mr. Saldanha*[5]. That was the case of a mother acting on behalf of her minor children and it was held that section 40 and the following sections of the Income-tax Act are enabling sections under which the Income-tax Officer can take steps to assess the trustees or guardians as representing their separate beneficiaries or wards, as the case may be, if he so chooses. But the sections do not compel the Crown to resort to them. All the cases cited in support of the third proposition can, in our view, be distinguished on a short ground. Those are cases where registration had been, under a wrong or a different impression, granted of a partnership constituted in a particular manner, but in the course of the individual assessment made on the partners it was found that different persons have received the profits and the assessment of the income in the hands of those persons at the rates applicable to each of them was necessary in the interests of revenue. In such circumstances option is given to the Income-tax Officer either to act according to the distributive shares recorded in the deed of partnership which has been registered or to make the assessment upon persons who are found upon enquiry to have actually received those profits. Because there are such enabling provisions in existence, it does not seem to us to be a valid argument that knowing even at the time of the application under section 26-A that the real constitution of the partnership is otherwise, the Income-tax Officer should nevertheless register the firm on the basis of the incorrect particulars and later compute the income at the time of assessment in the hands of the actual recipients of the profits. No case has gone to the length of holding that in view of the existence of sections 40 to 42 in the statute irrespective of who the real partners and what their shares are, the partnership should be registered, since the Income-tax Officer has the power under the law to tax whosoever is in actual receipt of the income.

We may now revert to the first two propositions advanced by the learned Advocate-General. Under the general law a trustee may be entitled in certain circumstances to carry on the testator's business on behalf of the beneficiaries and if he does so he will do it in his own name. A guardian like Ranganayaki Ammal may also be similarly situated but the question that we have to consider under section 26-A of the Income-tax Act is a strictly limited one. There can be no doubt upon the authorities that the Income-tax Officer is entitled to examine when an application for registration of a firm is made whether the partnership is genuine, whether each of the partners mentioned therein is a real partner,

1. (1936) I.T.R. 114.
2. (1930) I.L.R. 11 Lah. 724.
3. (1935) I.L.R. 16 Lah. 829.
4. (1945) I.T.R. 117.
5. (1932) 62 M.L.J. 600 : I.L.R. 55 Mad. 891 (S.B.).

whether the shares are specified properly, whether the shares specified are real ones and whether the profits which are to be distributed under the deed will truly be the profits of those particular individuals. If he finds that there is no genuineness with regard to any of these things it is open to him to reject the application on the ground that there is no genuine partnership brought into existence by the deed. In the present case it has been found as a fact that Ranganayaki Ammal is not a real partner but that she has given her name as a partner on behalf of her minor sons because that was considered to be the only way in which a lawful partnership could be brought into existence. In view of the transfer of capital belonging to the minors which was effected in her name and the provision in the partnership deed, dated 14th August, 1941, that the amount of profits due to her shall be credited, half in the name of Viswanathan and the other half in the name of Ranganathan, and the circumstance that the entire management was to be in the hands of Raju Chettiar who should have full power to operate on the bank accounts, it was considered that Ranganayaki Ammal was not a real partner and the half share shown in the partnership deed as belonging to her was really not her share but the real shares were one-fourth belonging to each of the minors. On these grounds it was held by both the Appellate Assistant Commissioner and the Tribunal that there was no genuine firm in existence. In coming to this conclusion they were also guided by the previous history of the matter, namely, the first deed of partnership of 19th August, 1940, purporting to be between Raju Chettiar and the two minors.

It may in this connection be profitable to make a brief reference to the section itself and the relevant rules. Section 26-A provides for an application being made to the Income-tax Officer on behalf of any firm constituted under an instrument of partnership specifying the individual shares of the partners. The remaining details as to who should make the application and what particulars they should contain are relegated to rules. Under rule 2 any firm constituted under an instrument of partnership specifying the individual shares of the partners may register with the Income-tax Officer, the particulars contained in the deed on an application made in that behalf. It is required that such an application should be signed by all the partners not being minors, personally and the rules also mention the time when the application should be made in each case. Rule 3 prescribes the form of the application. In the form it has to be certified in paragraph 3 that the profits or loss, if any, of the relevant period were divided or credited as shown in section B of the schedule. Section B requires that particulars should be given of the apportionment of the income, profits or gains of the business in the previous year between the partners who in that previous year were entitled to share in such income, profits or gains. Rule 4 says that if on receipt of the application, the Income-tax Officer is satisfied that there is a firm in existence constituted as shown in the instrument of partnership and that the application has been properly made, he shall enter at the foot of the instrument a certificate stating that the instrument has been registered with him and it will have effect for the assessment year in question. If the Income-tax Officer is not so satisfied he shall pass an order in writing refusing to recognise the instrument. All these provisions are made with a view eventually to satisfy section 23 (5) of the Act which lays down the procedure with regard to the assessment of a firm whether registered or unregistered. In the case of a registered firm the sum payable by the firm itself shall not be determined but the total income of each partner of the firm including therein his share of its income, profits and gains of the previous year shall be assessed and the sum payable by him on the basis of such assessment shall be determined. It is manifest therefore that section 26-A as well as the rules and the particulars required in the form have all been designed to enable the assessment to be done on registered firms in the manner provided under sub-section (5) (*a*) of section 23. It is for this purpose of the utmost importance that the real partner should be disclosed and the precise shares of each of the partners should be mentioned and these particulars should represent the real state of affairs. The purpose of the entire scheme of the assessment of registered firms will be defeated if it is found that either the firm is not genuine or that the shares mentioned therein are not true. A strict and rigid compliance with the require-

ments of section 26-A and the rules is, in our opinion, essential and there is no scope for any of the equitable considerations put forward by the learned Advocate-General. It may be that in the peculiar circumstances of the case the only manner in which the interests of the minor could be served was by the guardian acting in the partnership deed as the partner while as a matter of fact she was not the partner and a share of eight annas being shown as belonging to her, while as a matter of fact the real shares were of four annas to each of the minors. The profits which were represented to be the property of Ranganayaki Ammal were in fact and in truth the profits belonging to the minors. In view of the consideration that all the facts have been fully set out in the partnership deed and there is no attempt at concealment any suggestion of fraud or *mala fides* may be eliminated. But it has been held by high authority that even a simulate arrangement is one which cannot be recognised. In *Ayrshire Pullman Motor Services and D. M. Ritchie* v. *Commissioner of Inland Revenue*[1], Lord President (Clyde) said,

> "The agreement could not have stood for a minute if it had been possible to say of it on the facts that it was either a fraud or a mere simulate arrangement."

This view was again emphasized by Lord Sands in the same case. It must be remembered that registration of firms under the Income-tax Act is not a general or common law right, but it is a privilege given to the firm in order to enable them to get the benefit of the lower rates of assessment applicable to the individual partners wherever such rates are lower than the rate applicable to the computed income of the firm as a whole. If a firm desires to have this privilege it must conform strictly and rigidly to the requirements provided by the law. We may refer in this connection to an observation made by a Full Bench of this Court in *Kannappa Naicker & Co.* v. *Commissioner of Income-tax*[2]. In that case an application for registration was refused on the ground that the individual shares of the partners were not specified in the instrument of partnership. The real information was however otherwise within the knowledge of the Income-tax Officer. The learned Judges said,

> "Notwithstanding this knowledge, the Income-tax Officer—and his action has been upheld by the Commissioner—presumably with the view that he was rigidly bound by the words of the section and that as in the instrument of partnership these individual shares were not given, registration must be refused. The object in requiring this information is in order that the Income-tax authorities may determine what the profits received by each of the partners from the partnership profits is and in order to prevent the profits from being distributed to the partners otherwise than in accordance with the shares of the partners as shown in the instrument of partnership registered under the Act and to prevent any partner returning his income below its real amount. We think that this is a hard case in view of the fact that Income-tax authorities were really aware of the shares of the partners; but the words of the sub-section do not seem to us to permit of any elasticity of construction. Section 28 (2) also points to the same conclusion. The individual shares of the partners must be specified in the instrument of partnership. They were not. That being so, the Income-tax Officer could refuse registration on that ground."

The appeal made to us by the Advocate-General on behalf of the assessee that this was the only legal manner in which the guardian could have acted is of no avail. It may be one of those hard cases mentioned by the Full Bench in the case cited above, but a correct legal expedient will have to be devised to surmount the difficulty. One devise was attempted in the partnership deed on the 19th August, 1940, but that was, on the face of it, an admittedly illegal instrument. Whatever the proper solution of the matter may be, if a registration has to be obtained under section 26-A, it can only be by a genuine firm which specifies the actual shares of each partner and when that is not done, the Income-tax Officer is competent, if not bound, to reject that application.

The answer to the question referred by the Tribunal is that the firm purported to have been brought into existence by the deed of partnership dated 14th August, 1941, cannot be registered under section 26-A of the Income-tax Act. The applicant will pay the respondent's costs, Rs. 250.

K.S. ——— *Reference answered.*

1. (1929) 14 T.C. 754.
2. (1937) 1 M.L.J. 619 : I.L.R. 1937 Mad. 814 : (1937) I.T.R. 49 at 61 (F.B.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice*, AND MR. JUSTICE YAHYA ALI.

C. V. Govindarajulu Iyer, Shevapet .. *Applicant**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922), *section* 22 (1), (2), 28 (1) (a) *and* 34—*Failure to furnish return after general notice under section* 22 (1)—*Levy of penalty under section* 28 (1) (a) *in course of proceedings under section* 34 *read with section* 22 (2)—*Legality—Proceedings for assessment commenced by notice under section* 22 (1)—*When terminate.*

On an assessee's failure without reasonable cause to furnish a return of his total income as required by a general notice under section 22 (1) of the Income-tax Act, the Income-tax Officer is legally right in levying a penalty under section 28 (1) (*a*) in the course of proceedings taken by him under section 34 read with section 22 (2) to assess such incomes which had not previously been assessed at all. So long as the proceedings under section 34 relate to the assessment for the same period as the original assessment, the Income-tax Officer will be competent to levy a penalty on any ground open to him under section 28 (1), even though it relates to the prior proceedings. There is nothing in the language of section 28 which prevents an Income-tax Officer, if he is satisfied in the course of a proceeding under section 34, that a default has occurred under section 22 (1), from levying a penalty.

There can be no lapse of what was a valid general notice under section 22 (1) which initiated the assessment proceedings. Once assessment proceedings have thus commenced, they can only come to an end by either an order of assessment or an order declaring that no assessment can be made. In a case where the proceedings have not thus come to an end, when eventually proceedings are taken under section 34, such proceedings must be deemed to relate to the proceedings which commenced with the public notice under sub-section (1) of section 22.

Case referred to the High Court by the Income-tax Appellate Tribunal, under section 66 (1) of the Indian Income-tax Act (XI of 1922), as amended by section 92 of the Income-tax (Amendment) Act (VII of 1939), in Application 66 R.A. No. 200 (Madras), 1946/47 on its file for decision.

K. Srinivasan for Applicant.

C. S. Rama Rao Sahib for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—The question for decision in this case has been framed by the Tribunal in the following manner :

"Whether on the assessee's failure without reasonable cause to furnish a return of his total income as required by a notice under section 22 (1), the Income-tax Officer was legally right in levying a penalty under section 28 (1) (*a*) in the course of the proceedings taken by a him under section 34 read with section 22 (2) to assess such income, which had not previously been assessed at all."

The facts are not in dispute. The applicant in spite of general notice under section 22 (1) of the Act did not within the prescribed time submit his returns for two successive years ending 12th April, 1942, and 12th April, 1943. The department, however, did not proceed to issue notices under section 22 (2) of the Act within the respective years of assessment. Subsequently on the 25th January, 1945, the Income-tax Officer issued notices under section 34 of the Act calling upon the assessee to deliver to him within 35 days of the receipt of the notices the returns in forms attached to the notices of the respective years. In pursuance of these notices, the assessee submitted his returns for the two years within the specified time on the basis of which assessments were made in respect of the two years. Pending these proceedings notices under section 28 of the Act were also issued by the Officer for levying penalty for failure of the applicant to file his returns pursuant to the general notices under section 22 (1) of the Act and eventually imposed a penalty of Rs. 1,226-7-0 for the year ending 12th the April, 1942, and Rs. 7,981-3-0 for the year ending 12th April, 1943. The penalty levied was confirmed by the Appellate Assistant Commissioner and the Tribunal. An application was made or a reference to this Court, but it was confined to the penalty in respect of the

* Case Referred No. 15 of 1947. 11th August, 1948.

assessment year ending 12th April, 1943, with which alone we are concerned in this reference.

Before us it was contended by the learned counsel for the applicant that it was not competent for the Income-tax Officer to levy a penalty in the course of a proceeding under section 34 of the Act for a default not committed in the course of that proceeding. He developed his contentions thus : the proceeding under section 34 relates to escaped assessment, *i.e.*, assessment which escaped totally or partially and is separate and distinct from a prior proceeding which generally culminates in an assessment order or in a declaration that no assessment can be levied on the persons concerned. If there has been an assessment under section 23 of the Act and thereafter there is a proceeding under section 34 because of the escape of any item of income from assessment, then penalty can be levied only in respect of defaults and other acts committed in the course of that proceeding only and not in the course of the proceeding which ended with the assessment. He relied upon the ruling of the Allahabad High Court in *Mayaram Durga Prasad* v. *Commissioner of Income-tax, United Provinces*[1], in support of this contention. In that case (which was decided under the old Act of 1922) the assessee submitted a return for the year in question showing an amount of Rs. 2,650 as his income. This return was accepted and a tax levied on that basis. Subsequently it was discovered that the assessee had made a much larger income and proceedings under section 34 of the Act were commenced and the assessee was called upon to make a fresh return. This time he made a return showing an income of Rs. 38,327 and the Income-tax Officer accepted the figure. In addition to an assessment made on the income as thus disclosed, the Officer also imposed a penalty on the assessee for concealing particulars of his income and for furnishing inaccurate particulars of his income. The question of law referred to the High Court on these facts was as follows :

> " When an assessee in answer to an original notice under section 22 (2) has returned his income below its real amount and has been assessed accordingly and later in reply to a notice under section 22 (2)/34 returns his income at the correct figure, is the imposition of a penalty in respect of the concealment of income in the former return authorised by sub-section (1) of section 28."

The learned Judges answered the question in the negative. They point out that there are three ingredients which go to make up a condition precedent to the infliction of a penalty, namely, (1) that the Income-tax Officer should be satisfied that the assessee has deliberately furnished inaccurate particulars and returned an income below the real amount, (2) that there was a determination by the Income-tax Officer that the assessee has furnished inaccurate particulars of the income, and (3) a refusal on the part of the Income-tax Officer to accept the return as correct. They then point out that in that case the return of the income in pursuance of section 34 has been accepted as correct and has formed the basis of the assessment. The main ground on which they held that the levy of penalty was wrong appears to us to be this : that the proceedings which terminated in the original assessment were no longer before the Income-tax Officer and the proceedings under section 34 of the Act were fresh proceedings in respect of escaped income and as these two proceedings are distinct from one another no penalty can be imposed in the later proceedings for anything committed in the course of the former proceeding. Reliance was placed on the use of the present perfect tense, namely, " has concealed and has furnished." One apparent difference between the facts in that case and the facts in the present case is that in this case there was originally an assessment which was final but for the provisions of section 34 of the Act. In the case before us, admittedly there has been no such assessment ; nor has there been any order that the applicant was not liable to be assessed to income-tax. In these circumstances it becomes difficult to accept the contention of the learned counsel for the assessee that there is a separate proceeding for the assessment of the income for the concerned period distinct and separate from the proceeding

1. 5 I.T.C. 471.

which must be deemed to be initiated with the publication of the general notice under section 22 (1) of the Act.

But apart from this difference in the facts between the present case and the facts in the Allahabad case, we are inclined to the view that so long as the proceedings under section 34 relate to the assessment for the same period as the original assessment, the Income-tax Officer will be competent to levy a penalty on any ground open to him under section 28 (1), even though it relates to the prior proceeding. There may be one possible qualification of his power, and that is when the default or the act which is the basis of the imposition of the penalty was within the knowledge of the officer who passed the final order in the prior proceeding and if that officer had failed to exercise his power under section 28 during the course of the proceeding before him. Possibly in that case he would have no power. But it appears to us that there is nothing in the language of section 28 which prevents an Income-tax Officer if he is satisfied in the course of a proceeding under section 34 relating to a particular period of assessment that a default has occurred under section 22 (1) from levying a penalty. With due respect to the learned Judges of the Allahabad High Court, we do not agree that for the purpose of section 28, the two proceedings are separate and distinct. It is true that it has been pointed out that once an assessment is made or an order is passed by the Income-tax Officer that no assessment can be levied, the proceedings are closed and these proceedings cannot be re-opened and the result of these proceedings cannot be altered in any manner except in the manner provided by sections 34 and 35 of the Act—Vide *Burn & Co., In re*[1], *Commissioner of Income-tax, Bombay and Aden* v. *Khemchand Ramdas*[2]. It is also clear that under section 34 of the Act there is no *de novo* assessment in the sense that it is open to the assessee also to show that he has been wrongly assessed in respect of matters which are not covered by the notice under section 34. Essentially the proceedings under section 34 whether partially or totally, relate to the same proceeding which must be deemed to have commenced with the publication of the general notice under section 22 (1). In some respects and in some cases it may lead to supplemental assessment. In other cases it may result in assessment for the first time, as in this case where there has not been any assessment before. We do not find any justification for the artificial separation of a proceeding under section 34 from a proceeding relating to the original assessment or to proceedings which started before a notice under section 34, so long as they all relate to the same assessee and the same period. In any event, such an artificial distinction cannot be imported into a construction of section 28 of the Act. The language is very wide, because it says that " if the Income-tax Officer. . . . . . . in the course of *any* proceedings under the Act is satisfied." Of course, the expression " any proceeding " must mean proceeding relating to a particular period of assessment in respect of a particular assessee.

It was further contended by learned counsel for the assessee that in this case because there was no notice under section 22 (2) and no action was taken by the Income-tax Officer during the year of assessment, the general notice under section 22 (1) and the default committed by him in not submitting a return as required by that notice lapsed, as it were, at the end of the year. We are unable to accept this contention which does not appear to have any legal basis to support it. There is no lapse in the sense that after a year there could not be a valid assessment at all by the Income-tax Officer. It has been held by a Bench of the Bombay High Court that if the assessee himself submits a return, though after the end of the year of assessment, the Income-tax Officer can proceed to make a valid order of assessment without an individual notice served upon him under section 22 and taking action under section 34—see *Harakchand Makanji & Co.* v. *The Commissioner of Income-tax, Bombay City*[3]. This shows that there could be no lapse of what was a valid general notice under section 22 (1) which initiated the assessment proceedings.

1. (1933) I.L.R. 61 Cal. 132.
2. (1938) I.T.R. 414 at 424 and 426.
3. (1948) I.T.R. 119.

Once assessment proceedings have thus commenced, they can only come to an end by either an order of assessment or an order declaring that no assessment can be made. In this case admittedly there is no such order and when eventually proceedings are taken under section 34, such proceedings must be deemed to relate to the proceedings which commenced with the public notice under sub-section (1) of section 22.

Finally the learned counsel for the applicant asked us to treat the notice under section 34 calling upon the assessee to submit his return within 35 days of its receipt as an extension of time granted to him in his discretion for the delivery of the return within the meaning of the proviso under section 32 (1). This point was not raised before the Tribunal and the applicant cannot be permitted to raise it before us; nor do we think that there is any substance in this point.

The answer to the question must be in the affirmative. The applicant will pay the costs of this reference, Rs. 250.

K.S. — *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. P. V. RAJAMANNAR, *Chief Justice*, AND MR. JUSTICE YAHYA ALI.

The Commissioner of Income-tax, Madras .. *Applicant**

v.

Messrs. D. Arokiaswami Chetti & Co. .. *Respondent.*

Income-tax Act (XI of 1922), section 26-A—Existence of operative instrument of partnership—If essential for renewal of registration—Partnership Act (IX of 1932), section 17—Effect.

Income-tax Act (XI of 1922), S. 66—Reference by department on question decided against it—Assessee not applying for reference on other question decided against him—If can ask Court to deal with it as being covered by the words "on the facts and circumstances of the case."

For the renewal of registration of a firm under section 26-A of the Income-tax Act, the existence of an instrument of partnership operative at the time of the application or relating to the accounting period is essential. Section 26-A does not refer in terms to renewal of registration. Every renewal of registration is in effect a registration under that section. A firm constituted for three years must be deemed to have come to an end on the expiry of three years specified in the deed and after that the firm cannot be registered under section 26-A though the partners and their shares remained unaltered. There is nothing in section 17 of the Partnership Act to justify a conclusion that there is no necessity for an operative deed of partnership to entitle a firm to obtain renewal of registration.

Where the department has made a reference on a question decided against it but the assessee has not chosen to apply for a reference as regards another question decided against him, it cannot be said that such question will be covered by the routine clause "on the facts and circumstances of the case" in the reference by the department. The Court is not compelled to deal with the question of law with reference to which there has been no application to refer to the Court.

Case referred to the High Court by the Income-tax Appellate Tribunal under section 66 (1) of the Indian Income-tax Act (XI of 1922), as amended by section 92 of the Income-tax Act (VII of 1939), in 66 R.A. No. 58 (Madras) of 1945-46 on its file.

C. S. Rama Rao Sahib for Applicant.

T. M. Krishnaswami Aiyar for *M. Subbaraya Aiyar* for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—The question referred for our decision in this case is as follows:

"Whether on the facts and in the circumstances of this case, the application of the assessee for renewal of registration satisfied the requirements of section 26-A and the rules made thereunder and whether the firm is entitled in law to renewal of registration for purposes of the assessment for 1944-45 (accounting year ended 5th July, 1943)."

The three individuals who are the partners of the respondent firm executed a deed of partnership on the 30th August, 1939, in and by which it was declared that

* Case Referred No. 67 of 1946. — 9th August, 1948.

they shall carry on business in partnership for a period of three years from 28th May, 1939. It was *inter alia* provided in that deed that,

> " On the expiration of three years, if there is no unity between the partners, after paying off all the liabilities of the firm, and after taking back the capital contributed by the partners, the balance of profit or loss shall be divided equally; if any dues to the firm remain uncollected, and if proceedings have to be instituted, No. 1, Arokiaswami Chetty shall attend to them."

The firm was registered with the Income-tax Officer and a certificate of registration was granted for the year 1940-41. For the year 1941-42 the certificate was again renewed by the Income-tax Officer and likewise for the following two years 1942-43 and 1943-44. We are concerned in this reference with an application for renewal of registration for the assessment year 1944-45. The Income-tax Officer refused to grant a renewal on the ground that the partnership deed in force during the accounting period was not in existence as the firm had been dissolved. He also held that there should be a firm constituted under an instrument of partnership and there being no partnership during the relevant year, the application was incompetent. The Appellate Assistant Commissioner on a construction of the deed held that after the expiry of the period of three years if there were no differences between the partners by virtue of the terms of the deed, a partnership at will would come into existence which would of course continue until dissolved according to law. He therefore granted the application for registration. Before the Tribunal both the points were argued, namely, (1) on a construction of the deed of partnership, after the expiry of the three years fixed therein a partnership at will must be deemed to have come into existence and (2) that for the purpose of renewal it was not necessary that there should be an instrument of partnership operative at the time of the application or relating to the accounting period and it was sufficient if the partners and the shares remained unaltered. The Tribunal disagreed with the Appellate Assistant Commissioner on the first point. They held that once the period of three years was over, the deed ceased to be operative, *i.e.*, after the expiry of 29th May, 1942. But they held that under the provisions of section 26-A of the Act and the relevant rules framed under the Act, it was not necessary that there should be an instrument operative at the time of the application for the grant of a renewal of registration already granted when a deed of partnership was in force. In coming to this conclusion they relied upon section 17 of the Partnership Act. The Commissioner of Income-tax thereupon made an application for a reference of the question of law in the terms already set out above and the Tribunal granted the application and have drawn up a statement of the case and referred the question to us.

We do not agree with the view of the Tribunal that for a renewal of registration there is no necessity for the existence of an instrument of partnership operative at the time of the application or relating to the accounting period. Section 26-A does not refer in terms to renewal of registration. It follows that every renewal of registration is in effect a registration under that section. Sub-section (1) of that section clearly lays down that the application must be made on behalf of a firm constituted under an instrument of partnership. Nor is there anything in the rules made under section 59 of the Act which leads to a different conclusion. The substantive rule dealing with renewal is rule 6. It runs thus :—

> " Any firm to whom a certificate of registration has been granted under rule 4 may apply to the Income-tax Officer to have the certificate of registration renewed for a subsequent year. Such application shall be signed personally by all the partners (not being minors) of the firm or by all persons (not being minors) who were partners in the firm immediately before dissolution and by the legal representative of any such person who is deceased and accompanied by a certificate in the form set out below. . . . ."

It was contended that in this case the application was signed personally by all the partners of the firm and it complied with all the requisite conditions because it was stated that the partners and the shares remained unaltered. But, in our opinion, there is one fundamental defect in the application which precludes the respondent from taking advantage of rule 6. According to the finding of the Tribunal the firm constituted under the deed of partnership came to an end on the 29th May

1942. On this finding it must follow that on the date of the application in this case, there was not in existence the firm to whom a certificate of registration was originally granted under rule 4. That firm must be deemed to have come to an end on the expiry of three years specified in the deed.

The Tribunal relied upon section 17 of the Partnership Act, clause (*b*) of section 17, is the material provision and it is as follows :—

> " Subject to contract between the partners . . . . . . where a firm constituted for a fixed term continues to carry on business after the expiry of that term, the mutual rights and duties of the partners remain the same as they were before the expiry, so far as they may be consistent with the incidents of partnership at will."

This provision must be read along with another provision in section 42 the material portion which is as follows :—

> " Subject to contract between the partners a firm is dissolved—
>
> (*a*) if constituted for a fixed term, by the expiry of that term."

In this case it has been found by the Tribunal that the deed of partnership does not contain a contract to the contrary. The result is that on the expiry of the prescribed term, the firm as such became dissolved. If, thereafter, the partners of the dissolved firm continued to carry on business, no doubt their mutual rights and duties would be governed by section 17 of the Act, but the partnership in law would be a different partnership, a partnership at will which must be deemed to come into existence immediately on the expiry of the prescribed period. We do not think that there is anything in the provisions of section 17 to justify the conclusion that there is no necessity for an operative deed of partnership to entitle a firm to obtain renewal of registration. No other rule has been relied upon to support the conclusion of the Tribunal.

For the assessee it was sought to be contended that the Tribunal erred in it finding that the deed ceased to be operative after the expiry of 29th May, 1942. It was said that according to the terms of the deed it must be construed as a deed providing for a partnership for three years in the first instance and thereafter at will. Objection was taken on behalf of the department that it is not competent to this Court to go into that question as it was an independent question of law which had not been referred to this Court. The learned counsel for the assessee conceded that if it be held that the question as to whether the deed was operative after the the expiry of 29th May, 1942, is deemed to be an independent question of law arising out of the order of the Tribunal and if that has not been referred to this Court, he would not be entitled to urge it. But he argued firstly that it was a subsidiary question of law and secondly that the terms of the reference for decision were so wide that it would include this question of law. We find it impossible to agree with him that this question of law is a subsidiary question of law. In fact learned counsel himself conceded that if the Tribunal had held in his favour on that question, he would have succeeded and it would have been unnecessary to go into any other question. It is equally true that the finding in his favour on the other question, namely, the necessity for an operative deed of partnership would also be sufficient to dispose of the matter. Nevertheless, the Tribunal did give its decision on both the questions. In so far as the answer to one of the questions was against the department, the department has made an application for reference, but the assessee has not chosen to apply for a reference as regards the question decided against him. The terms of the reference may no doubt appear to be wide. The routine clause " on the facts and in the circumstances of this case " may be stretched to take in anything. But we consider that in construing this clause with reference to a particular case, due regard must be had to any findings of fact by the Tribunal and to findings of law which have not been sought to be questioned by either the assessee or the Commissioner by an application for reference. One of the facts in this case is that the Tribunal held that the deed of partnership was not operative after the 29th May, 1942, and there was no application for a reference on the question as to the correctness of that finding. We do not therefore think that there is anything in

the frame of the question which compels this Court to deal with the question of law with reference to which there has been no application to refer to this Court. We therefore hold that the assessee is not entitled to be heard on the question whether the finding of the Tribunal that the deed of partnership ceased to be in force after the expiry of the period of three years is right or wrong.

The answer to the question will be in the negative. Because the assessee has failed, he will pay the costs of this reference, Rs. 250.

K. S. ——— *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice*, AND MR. JUSTICE YAHYA ALI.

R. A. Coodzer & Company, Madras .. *Applicant**

v.

The Commissioner of Excess Profits Tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922 *as amended in* 1939), *section* 10 (4) (b)—*Scope—Commission paid by assessee firm to partners—If deductible as expense incurred for earning profits.*

The assessee was a firm composed of *L*, *B* and *G*. *L* and *B* were also the respective proprietors of commission agency businesses known as *L & Co.*, and *B & Co.*, respectively. Certain sums were paid by way of commission by the assessee firm to *L & Co.*, and *B & Co.*, who were canvassing for and selling other goods also. The assessee firm claimed deduction of the said sums paid as commission as expenses incurred for earning profits.

Held : Looking at section 10 (4)(*b*) of the Income-tax Act introduced by the amending Act of 1939, it is clear that there is no distinction made between payments by way of interest, commission, salary or remuneration made to a partner and payments made to him in a different character. Accordingly such payments cannot be deducted in computing the taxable profits of the assessee firm.

Decisions under the English Statute and under the Indian law as it stood before the introduction of section 10 (4) (*b*) *distinguished.*

Case Referred to the High Court by the Income-tax Appellate Tribunal, Madras Bench, under section 66 (1) of the Indian Income-tax Act (XI of 1922), as amended by section 92 of the Income-tax (Amendment Act 1939) (VII of 1939) in 66 R.A. No. 219 (Madras) of 1946-47 on its file.

M. Subbaraya Aiyar for Applicant.

C. S. Rama Rao Sahib for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—The question for decision is " whether under the circumstances of the case the commissions paid to Luckman & Company, and Bhatta & Company are " interest, salary, commission or remuneration" paid by a firm to a partner within the meaning of section 10 (4) (*b*) of the Income-tax Act."

The assessee is a firm composed of three partners, Lakshmana Iyer, Bhatt and Ganapati Iyer. The firm was constituted by a deed of partnership dated 10th March, 1942. It was the Manufacturers' Representative of Kiwi Polish, etc. Of the three partners, Lakshmana Iyer and Bhatt are also the respective proprietors of commission agency businesses known as Luckman & Company and Bhatt & Company respectively. Even before the constitution of the partnership in question, they were doing commission agency business as well as canvassing business in the said names and their business included also canvassing and selling other goods.

The question for decision relates to two sums of Rs. 2,642 and 3,037 paid by way of commission to Luckman & Co., and Bhatt & Co., respectively. The applicant firm claimed deduction of these two sums as expenses incurred for earning the profit. But their claim was rejected by the Excess Profits Tax Officer and the Appellate Authorities on the ground that these payments were not permissible deductions because of the provision in section 10 (4) (*b*) of the Act, the material part of which runs thus :

* Case Referred No. 24 of 1947. 12th August, 1948.

"Nothing in . . . . . . clause (*xii*) of sub-section (2) shall be deemed to authorise . . . .

(*b*) any allowance in respect of any payment by way of interest, salary, commission or remuneration made by a firm to any partner of the firm."

Clause (*xii*) relates to any expenditure (not being in the nature of capital expenditure or personal expenses of the assessee) paid out or expended wholly and exclusively for the purpose of such business, profession or vocation.

It is contended by Mr. Subbaraya Aiyar, learned counsel for the assessee, that the said two amounts paid by way of commission to Luckman & Co., and Bhatt & Co., of which the sole proprietors were the two partners, Lakshmana Aiyar and Bhatt respectively, will not be payments by way of commission made by the firm to a partner of the firm, because payments were made to them not as partners of the firm but as the pripriètors of two independent concerns. If these payments had been made to individuals or firms not in any way connected with the appellant firm, then certainly the payments would have been admissible deductions. So, he argued, the fact that the proprietors of the two firms in question happened to be partners of the firm would not make a difference. In short, his argument amounted to adding the words "as a partner of the firm" after the words "any partner of the firm." In support of his contention, he relied upon cases decided under the English Income-Tax Statutes. This case appears to be eminently one to which the following observations of their Lordships of the Judicial Committee in *Commissioner of Income-tax, Bengal* v. *Shaw Wallace & Company*[1], apply, in the matter of relying on cases decided under the English Statutes for construing provisions in an Indian enactment :—

"Again their Lordships would discard altogether the case law which has been so painfully evolved in the construction of the English Income-tax, statutes—both the cases upon which the High Court relied and the flood of other decisions which has been let loose in this Board. The Indian Act is not in *pari materia* ; it is less elaborate in many ways, subject to fewer refinements, and in arrangement and language. it differs greatly from the provisions with which the Courts in this country have had to deal. Under such conditions their Lordships think that little can be gained by attempting to reason from one to the other . . . . ."

Undoubtedly, there is great difference in the language of the provisions of the English Statute and the Indian Statute as regards the point which falls for decision in this case. Not only are the decisions on English Statutes of little help, but as we shall presently point out, even decisions of Courts in India before the insertion of the provision in question, namely, section 10 (4) (*b*), will not be very helpful in enabling us to arrive at a proper construction of the present provision. The decision in *Heastie* v. *Veitch & Company*[2], dealt with a claim to deduct the rent paid for the use and occupation of business premises to one of the partners. In that case, one of the terms of the partnership deed provided for the payment to the partner of the rent which actually was in excess of the net Schedule A assessment in respect of the premises. It was decided by the Court of Appeal that in computing the profits or gains of the partnership for the purpose of assessment to income-tax under Schedule D of the Income-tax Act, 1918, the rent was properly allowed as a deduction, having regard to rule 3 (*c*) of the Rules applicable to cases I and II. No doubt, there are observations of the learned Master of the Rolls at page 544 which are general in nature. Lord Hanworth, M.R. says :

"There is no doubt—and the Attorney-General does not contend otherwise—that if these premises had belonged to some entirely independent owner, the partnership would have been entitled to pay that owner £1,250 and that sum would have been deductible as a proper outgoing in ascertaining the profits and gains, in accordance with the indication that is given in rule 3 (*c*) of the Rules applicable to cases I and II of Schedule D."

But these general observations were made in the absence of any provision in the statute prohibiting such a deduction being made. In fact, even under the Indian Act, rent for the business premises paid to a partner would be an allowable deduction. *Jones* v. *Wright*[3], dealt with the charges of a solicitor and does not carry the matter any further. Nor the case in *Henry Richardson* v. *Inland Revenue Commis-*

1. (1932) 63 M.L.J. 124 : L.R. 59 I.A. 206 : I.L.R. 59 Cal. 1343 (P.C.).
2. (1934) 1 K.B. 535.
3. (1927) 13 T.C. 221.

sioners[1], in which it was held that the salary of a secretary was not part of her remuneration as a director, because "directors' remuneration" was remuneration received for service as a director and would not include the remuneration of any director who was required to devote substantially the whole of his time to the service of the company in a managerial or technical capacity. No assistance can be derived from any of these decisions which either turn on the language of the English Finance Act or the English Income-tax Act. As already pointed out, there is no provision corresponding to section 10 (4) (*b*) of the Indian Act in any of the English taxing Statutes.

Section 10 (4) (*b*) became part of the Income-tax Act only by the Amendment Act of 1939. Before the introduction of this provision, Courts in India were called upon to decide whether particular payments alleged to have been made by the firm to its partners either by way of salary or interest on borrowings from them, remuneration or commission, were allowable deductions in computing the profits of the firm. In *Commissioner of Income-tax* v. *B. S. Mines Company*[2], a Full Bench of this Court ruled that the salaries paid to the partners of a firm are not admissible as deductions in the commutation of the profits of the firm for income-tax purposes, and they were treated as part of the profits. But in *Ramakrishna Ramnath* v. *Commissioner of Income-tax, C.P.*[3], a distinction was pointed out between remuneration paid to a partner doing business in his individual capacity for services rendered to the firm which was a legitimate deduction from the assessable income of the firm and amouns paid to a partner for carrying on the business of the firm, whether styled as remuneration or commission or by any other name. In dealing with this point, the following observations were made :—

> "The question is really a question of fact. No doubt the partner in question is a legal personality apart from that of the firm. He might conceivably do business in his individual capacity and in that capacity might render services to the firm in consideration of which the firm might pay him remuneration which would be a legitimate deduction from the assessable income of the firm. But obviously considering the opportunities for fraud that any alleged arrangement would offer, very strict proof would reasonably be required of the existence of such an arrangement."

In *The Electric and Dental Stores* v. *Commissioner of Income-tax, Punjab and N.W.F. Provinces*[4], payments made to working partners in a firm as salary for services rendered by them were held to be admissible deduction in the computation of the profits of the firm. The learned Judges of the Lahore High Court adopted the statement in Sundaram's Law of Income Tax in India that the dual capacity of a partner *cum* employee, though suspect, was possible and to the extent that the person is in truth an employee, salary is deductible from the profits of the partnership. They point out that the Commissioner should see whether as a fact the particular partners were true employees or whether the payment of salaries to them was a device to escape income-tax. In *Commissioner of Income-tax, Madras* v. *Subramanian Chettiar*[5], a Full Bench of five Judges of this Court had to decide the question whether interest paid to a partner in respect of a loan advanced by him to the partnership was a legitimate item of business expenditure within the meaning of section 10 (2) (*iii*) of the Indian Income-tax Act. It was held that where a partner as partner genuinely lends money, beyond the initial capital, to the partnership at an agreed reasonable rate of interest and the money is used for capital expenditure, the interest paid by the partnership to him in the year of assessment must be deducted in computing the profits or accounts of the partnership. Here again, the question would ultimately turn on whether the lending is genuine or not.

It is clear from these decisions that the state of law on the subject was far from satisfactory because the decision in each particular case in respect of payment made by way of interest, salary, commission or remuneration by a firm to a partner turned upon determining as a fact whether the payment was made to a partner as a partner or in a different character and whether the payment was real and *bona fide* or only intended to serve as a device to escape taxation. Presumably with the

1. (1947) 1 All.E.R. 275.
2. (1922) 1 I.T.C. 176 (S.B.).
3. (1929) 4 I.T.C. 171.
4. (1931) 5 I.T.C. 254.
5. (1928) 55 M.L.J. 416 : I.L.R. 51 Mad. 787 (F.B.).

object of obviating such uncertainty in the determination of the nature of such payments, section 10 (4) (*b*) was introduced by the Amendment Act of 1939.

The language of that provision is clear, and according to well established canons of construction it is not open to read into the enactment words which are not there or to disregard words which are actually to be found in it. Rowlatt, J., observed in *The Cape Brandy Syndicates* v. *The Commissioner of Inland Revenue*[1] thus :

> " Now, of course it is said . . . . . that in a taxing Act clear words are necessary to tax the subject. But it is often endeavoured to give to that maxim a wide and fanciful construction. It does not mean that words are to be unduly restricted against the Crown or that there is to be any discrimination against the Crown in such Acts. It means this, I think ; It means that in taxation you have to look simply at what is clearly said. There is no room for any intendment ; there is no equity about a taxation ; there is no presumption as to a tax ; you read nothing in ; you imply nothing, but you look fairly at what is said and at what is said clearly and that is the tax."

Looking, then, fairly at what has been said, it is clear that there is no distinction made between payments by way of interest, commission, salary or remuneration made to a partner as a partner and made to him in a different character. There is nothing to indicate that some categories of interest, salary, commission, or remuneration, though paid by the firm to a partnr, were to fall outside the scope of that provision. It is not for us to speculate on the object of the enactment, though it might very well be to have a general and certain rule for computation of profits and to exclude payments which may be doubtful in character.

The construction which we have placed on section 10 (4) (*b*) of the Act appears to have been also placed by a Division Bench of the Patna High Court consisting of Fazl Ali, C.J., and Maonhar Lall, J., in *Commissioner of Income-tax* v. *Jainarain Jagannath*[2]. In that case, the amounts paid to individual members of a Hindu undivided family by way of remuneration for services rendered to the business of the family were held to be legitimate deductions in computing the profits of the business, provided they were *bona fide* payments to *bona fide* employees for services actually rendered and were not a device to escape the income-tax. For the Department, it was contended that section 10 (4) (*b*) would apply even to the case of payment by the joint family to individual members and would therefore not be permissible deductions. The learned Judges did not accept the contention but in doing so, Fazl Ali, C.J., observed, after dealing with the earlier cases before the amendment and the introduction of this provision, as follows :—

> " These decisions, in my opinion, lay down the general principle in correct terms though they are now more or less of an academic interest only in so far as partnerships governed by the Partnership Act are concerned inasmuch as a provision has been inserted in the present Act disallowing ' any allowance in respect of any payment by way of interest, salary, commission, or remuneration made by a firm to any partner of the firm '—No distinct provision has yet been made about Hindu Joint family trading firms to which the Partnership Act does not apply and in my judgment, the principles under lying the decisions to which I have referred are still applicable to them."

In this case, there can be no doubt that the payments of these two sums were made to the partners by way of commission and the answer to the question must be in the affirmative. The applicant will pay the costs of the reference, Rs. 250, to the respondent.

K.S. ——— *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice*, AND MR. JUSTICE YAHYA ALI.

The Commissioner of Income-tax, Madras .. *Applicant**

v.

Sri A.SP. S. KR. Karuppan Chettiar *alias* Swaminthan Chettiar, Nattarasankottai .. *Respondent.*

Income-tax Act (XI of 1922, as amended in 1946), section 10 (2) (xv)—Litigation expenses to avoid liability for a pre-partition debt—If deductible

1. (1921) 12 T.C. 358 at 366.
2. (1945) I.L.R. 24 Pat. 634.

*Case Referred No. 31 of 1947. 16th August, 1948.

The assessee and his father who were members of an undivided Hindu family carrying on money lending business in Rangoon and Tantapin became divided in 1926 and the money lending business at Rangoon fell to the share of the father while that at Tantapin fell to the assessee's share. In 1932 a person who had made a deposit with the joint family firm at Rangoon before the date of partition filed a suit against the father as well as the assessee for the amount due to him in respect of that deposit. The assessee incurred expenses for the defence of that suit to contest his liability. On a question whether such expenditure is allowable under section 10 (2) (*xv*) of the Income-tax Act,

Held: That the debt which was the subject-matter of the litigation was not a debt due by the Tantapin firm which fell to the share of the assessee and hence the assessee's defence was not to prevent depletion of the stock-in-trade of the firm at Tantapin and hence the expenses in connection with such a litigation cannot be allowed as a deduction under section 10 (2) (*xv*) of the Income-tax Act.

Case referred to the High Court by the Income-tax Appellate Tribunal under section 66 (2) of the Indian Income-tax Act, 1922 (XI of 1922), as amended by section 25-B of the Income-tax (Amendment) Act of 1939 (VII of 1939), in R.A. No. 309-A of 1946-47 (R.A.A. No. 134 (Madras) 1943-44 on its file).

C. S. Rama Rao Sahib for Applicant.

S. *Krishnamachari* for Respondent.

The judgment of the Court was delivered by

The Chief Justice.—In accordance with the order of this Court dated 10th January, 1947, in C.M.P. No. 3199 of 1946 the Appellate Tribunal has stated a case and referred the following question for our decision :

"Whether on the facts and in the circumstances of this case the sum of Rs. 9,831 is expenditure allowable under section 10 (2) (*xii*) of the Indian Income-tax Act."

By the date of this order, under the provisions of the amending Act VIII of 1946, section 10 (2) (*xii*) was renumbered as 10 (2) (*xv*) and the question will be answered with reference to clause (*xv*) of the Act as it stands now.

The facts which appear from the statement of the case are that the assessee Karuppan Chettiar and his father were members of an undivided Hindu family carrying on money lending business in Rangoon and Tantapin. In 1926 there was a partition between them and the money lending business at Rangoon fell to the share of the father while that at Tantapin fell to the assessee's share. In 1932 a person who had made a deposit with the joint family firm at Rangoon before the date of partition filed a suit for recovery of the amount due to him in respect of the deposit against the father as well as against the assessee and his son, apparently on the ground that the debt in question was a pre-partition debt for which the assessee would be liable under the Hindu Law. The assessee contested the claim on the ground that there had been a separation in 1926 and the Rangoon business had fallen to the share of the father at the partition. His contention was upheld in the trial Court, but on appeal that decision was reversed by the High Court, and it appears that there is an appeal to the Privy Council pending.. The assessee incurred expenses for the defence of the suit which amounted to Rs. 12,933. Out of this a sum of Rs. 3,102 was claimed for the assessment year 1940-41 and was allowed by the Income-tax department. The balance of Rs. 9,831 was claimed for the succeeding assessment year, the year under reference. The Income-tax Officer did not allow the deduction but on appeal the Appellate Assistant Commissioner and the Appellate Tribunal have allowed the deduction following the decision of the Tribunal in respect of Rs. 3,102 relating to the preceding year.

As the Tribunal in the present instance has merely followed their decision in the prior year, it is necessary to refer to the ground on which the deduction was allowed in the previous order. The reasoning may be stated in their own words :

"The assets which came to the appellant after the disruption are undoubtedly his stock-in-trade. The whole object of the appellant's defence was to prevent depletion of his stock-in-trade. Income from the debtors which came to the share of the appellant has always been returned as his income and assessed to tax. In these circumstances we are of opinion that the litigation was undoubtedly connected with the debts which came to the assessee and are his stock-in-trade."

It is true that the money which a banker or money lender employs in his business while it is in one sense capital is also his stock-in-trade—Vide *Commissioner of*

Income-tax v. *Kameshwar Singh of Dharbanga*[1]. Likewise the debts due to the Tantapin firm which fell to the share of the assessee may be deemed to be his stock-in-trade. If the litigation in question had related to any of these debts, then undoubtedly the expenses incurred for carrying on that litigation would be a legitimate deduction because the object of the litigation was to prevent depletion of his stock-in-trade. But the debt which was the subject-matter of the litigation was not a debt due by the Tantapin firm. It was a debt due by the Rangoon firm which fell to the share of the father. The assessee's defence was therefore not to prevent depletion of the stock-in-trade of the firm at Tantapin. What apparently the Tribunal overlooked was that the ground on which the assessee was sought to be made liable in the suit on the deposit was his liability under his personal law, *i.e.*, the Hindu Law, to discharge the debts incurred by his family before the division. This liability, if it really existed, would not only attach to the Tantapin business which fell to the assessee's share at the partition; it would also extend to any other property which belonged to the joint family and which came to the share of the assessee. Further the assets of the business at Tantapin belonging to the assessee after the partition might have been proceeded against also for the enforcement of a liability of the family quite independent of either of the two businesses at Rangoon or Tantapin. It was therefore incorrect to speak of the litigation relating to the deposit in the Rangoon firm as relating to the stock-in-trade of the assessee's firm at Tantapin. It follows that the defence of the appellant was not to prevent depletion of such stock-in-trade. As this is the only ground on which the Tribunal came to a conclusion in favour of the assessee, we must hold that they were wrong in allowing the litigation expenses as a deduction under section 10 (2) (*xv*).

The answer to the question must be in the negative. The respondent will pay to the Commissioner of Income-tax the costs of this reference, Rs. 250.

V.S. ———— *Reference answered.*

[PRIVY COUNCIL].

(On appeal from the decisions of the High Court of Judicature at Patna).

PRESENT :—LORD UTHWATT, LORD MORTON OF HENRYTON, LORD MACDERMOTT, SIR MADHAVAN NAIR AND SIR JOHN BEAUMONT.

Commissioner of Income-tax, Bihar and Orissa .. *Appellant**

v.

Kamakhaya Narayan Singh (*Raja Bahadur*) .. *Respondent.*

Income-tax Act (XI of 1922), sections 2 (1) and 4 (3) (viii)—Income by way of interest payable by statute on rent in arrear in respect of agricultural land—Not agricultural income exempt from income-tax.

Income received as interest which is payable by virtue of various statutes which prescribed that interest should be payable on rent in arrears in respect of agricultural land is not agricultural income and as such is not exempt from income-tax.

Such interest clearly is not rent. It is not part of the rent, nor is it an accretion to it, though it is received in respect of it.

Though the interest on rent is revenue, it is not revenue derived from land.

J. M. Tucker, K.C. and *R. K. Handoo* for the Appellant.

D. N. Pritt, K.C., Sir Ronald Burrows, K.C., Dr. C.J. Colombos and Prem Lall for the Respondents in the 1st, 3rd and 4th appeals.

B. Sen for the Respondent in the 2nd appeal.

The judgment of the Court was delivered by

LORD UTHWATT.—These four appeals are brought from judgments of the High Court of Judicature at Patna whereby four separate References made to that Court under section 66 (1) of the Indian Income-tax Act, 1922, as amended, were answered in favour of the assessees the respondents to the several appeals.

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1. (1940) I.T.R. 52 at 66.

* P.C. Appeal No. 26 of 1947. 6th July, 1948.

All appeals raise the question whether interest on arrears of rent payable in respect of land used for agricultural purposes is exempt from income-tax as being agricultural income within the definition of that phrase contained in section 2 (1) of the Indian Income-tax Act. In the second appeal a further question is raised to which their Lordships will refer later.

Under section 4 (3) (*viii*) of the Indian Income-tax Act, 1922, agricultural income is exempt from assessment to income-tax. Agricultural income is defined in section 2 of the Act as follows :—

(1) " agricultural income " means—

" (*a*) any rent or revenue derived from land which is used for agricultural purposes and is either assessed to land revenue in British India or subject to a local rate assessed and collected by officers of the Crown as such.

It is not necessary to state in detail the facts bearing on this first question. In each case there was included in the assessment of income made upon the assessee interest in respect of arrears of rent payable for land which was used for agricultural purposes and was either assessed to land revenue or subject to a local rate. That interest had been paid. The interest was, their Lordships understand, payable in all cases by virtue of various statutes which prescribed that interest should be payable on rent in arrears. The point put baldly is therefore " is such interest, rent or revenue derived from land ?"

There is a diversity of judicial opinion as to the correct answer to this question. The High Court of Calcutta (*cf. In re Manager, Radhika Mohan Roy Ward's Estate*[1]) and the High Court of Madras (*cf. Pethaperumal Chettiar* v. *Commissioner of Income-tax*[2]) have answered this question in the negative.

The High Court of Allahabad (*cf. Sarju Bai* v. *Commissioner of Income-tax*[3]) and the High Court of Patna (*cf. Maharajadhiraja Kumari Srimathi Lakshmi Daiji* v. *Commissioner of Income-tax*[4] and the cases here under review) have answered it in the affirmative.

This difference of opinion is not surprising for as Braund, J., truly points out in *Sarju Bai* v. *Commissioner of Income-tax*[3] the matter is almost one of first impression.

The observation of Braund, J., has as its background the fact that none of the other provisions of the Income-tax Act throws any light on the construction or meaning of the definition. The point therefore lies within a very small compass.

The conflicting points of view are put with clarity in the judgment of Braund, J., in *Sarju Bai* v. *Commissioner of Income-tax*[3], at pp. 144-145, where he expresses himself as follows :—

" The argument on the one hand is that interest payable (whether by statute or not) on arrears of rent which have already become a debt due is not referable in any way to the agricultural relationship of landlord and tenant, but is attributable solely to their character as creditor and debtor. It is said that interest is in its nature merely that commercial compensation which either the accepted practice of business or in some cases the legislature has adopted to see that a creditor does not suffer from the default of his debtor. That, it is said, has nothing whatever to do with the relationship of landlord and tenant and, therefore, is not in any way derived from the agricultural land which is the subject-matter of the tenancy. That is one way of putting it. The other way of putting it is that interest on arrears of rent is something which in this case has been introduced by the United Provinces Tenancy Act as a condition of the relationship between landlord and tenant. Arguing from that, it is said that, whether or not such interest can be strictly classified as rent, it certainly can be classified as coming within the larger expression ' revenue ' which forms part of the definition of agricultural income. It will be remembered that the definition speaks of ' any rent or revenue derived from land.' Those who put it in this way say that such interest, when received, has its origin in the tenancy, because, if there had been no tenancy, there would have been no arrears of rent and if there had been no arrears of rent, there would have been no statutory interest. Following this sequence of causes, they say that it is obvious that interest in circumstances such as these must be classified as ' revenue derived from land."

1. A.I.R. 1941 Cal. 443.
2. I.L.R. (1944) Mad. 322.
3. (1947) 15 I.T.R. 137.
4. (1944) 12 I.T.R. 309.

The interest clearly is not rent. Rent is a technical conception, its leading characteristic being that it is a payment in money or in kind by one person to another in respect of the grant of a right to use land. Interest payable by statute on rent in arrear is not such a payment. It is not part of the rent, nor is it an accretion to it, though it is received in respect of it.

Equally clearly the interest on rent is revenue, but in their Lordships' opinion it is not revenue derived from land. It is no doubt true that without the obligation to pay rent—and rent is obviously derived from land—there could be no arrears of rent and without arrears of rent there would be no interest. But the affirmative proposition that interest is derived from land does not emerge from this series of facts. All that emerges is that as regards the interest, land rent and non-payment of rent stand together as *causae sine quibus non.* The source from which the interest is derived has not thereby been ascertained.

The word "derived" is not a term of art. Its use in the definition indeed demands an enquiry into the genealogy of the product. But the enquiry should stop as soon as the effective source is discovered. In the genealogical tree of the interest land indeed appears in the second degree, but the immediate and effective source is rent, which has suffered the accident of non-payment. And rent is not land within the meaning of the definition.

There is no commercial connection between the interest and the rented land and an effective source—not land—has become apparent.

These considerations supply a negative answer to the question posed, subject to an entirely different point taken by the respondents.

It was stated—and the statement was not disputed—that for a considerable period income-tax authorities had not treated interest on rent in arrears as taxable, and that in their Manuals published from time to time this view was openly stated. In their view such interest fell within the definition of agricultural income. The Income-tax Act, 1922, had in that period been amended from time to time without a change in the definition of agricultural income. Their Lordships were asked to make the inference that the definition had thereby obtained the meaning attributed to it by the Income-tax Authorities and that the Legislature must be taken to have adopted the definition in the sense in which the Income-tax Authorities had understood and applied it. The observations of Lord Macnaghten in *Pemsel's case*[1] and of their Lordships in *Burah's case*[2] were relied on.

Their Lordships are unable to accept this contention, for the reason that they are unable to draw from the facts brought to their attention the inference that the Legislature had by the repetition of the debated phrase adopted the meaning attributed to it by the Taxing Authorities. There is indeed no evidence that the Legislature was aware of the practice, and their Lordships are not prepared to make the assumption that a practice purporting to give effect to a definition has resulted in the creation of such a generally received meaning embodying that practice as would justify the inference that the attributed meaning has been silently adopted by the Legislature.

The further question raised by the second appeal may be shortly disposed of. It appears that the holder of the patni rights under the Khagra Estate was unable to pay the patni rent due to the estate for several years till the rent and interest amounted to Rs. 86,918-7-0, the interest on arrears of rent amounting to Rs. 21,545. The holder of the rights thereupon executed a usufructuary bond in favour of the assessees under which they were put in possession of certain agricultural property for the purpose of realising the sum due to them. The question referred by the Income-tax Tribunal was as follows :—

"Assuming that interest on arrears of rent is taxable, whether a usufructuary mortgage bond executed by the debtor in favour of the assessee in satisfaction of such interest on arrears of rent due to him is taxable."

The question is put in general terms but their Lordships are interested only in the particular bond which was given.

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1. (1891) A. C. 531 at 591.
2. (1877) I.L.R. 3 Cal 63 (F.B.).

They have considered the terms of the Bond and hold the view, which they understand to be also the view of the High Court of Patna, that upon its true construction the continuance of the personal liability for the debt was recognised and affirmed. They agree therefore with the High Court that on this basis the point at issue is governed by the decision of their Lordships in *Raja Raghunandan Prasad Singh* v. *Commissioner of Income-tax*[1].

Their Lordships will accordingly advise His Majesty that these appeals be allowed and that the questions raised in appeals 1, 3 and 4 and the first question raised in appeal No. 2 be answered in the negative and that the several respondents pay the costs of the appellant in the High Court of Patna. The negative answer of the High Court to the second question raised in the second appeal will remain undisturbed. The respondents will pay the costs of the appeal to their Lordships.

Solicitors for Appellants : *Solicitor, High Commissioner for India.*

Solicitors for Respondents : *Hy. S. L. Polak & Co.*

V.S. ——— *Appeal allowed.*

[PRIVY COUNCIL].

(On appeal from the High Court of Judicature at Bombay.)

PRESENT :—LORD UTHWATT, LORD MACDERMOTT AND SIR JOHN BEAUMONT.

Gurunatharudhaswami Guru Shidharudhaswami .. *Appellant**

v.

Bhimappa Gangadharappa Divate and another .. *Respondents.*

Civil Procedure Code (V of 1908), section 92—Framing of scheme—Power of Court to remove person nominated as head of Math by will by his predecessor in office—Trust for a public purpose—Test.

In settling a scheme for the administration of a charitable trust involving the appointment of trustees or managers, the Court is bound to secure persons whom it regards as suitable. Hence it cannot be contended that the Court has no jurisdiction to remove a person nominated as the head of a Math by will by his predecessor when it is found as a fact that that person has by his conduct shown himself unfit for such position.

Where the evidence establishes beyond doubt that certain properties were either originally given, or were dedicated by a Swami to the purposes of a Math, which is a charitable or religious institution to which anybody was at liberty to go at any time to worship the Swami and take food there, the trust is plainly one for public purposes.

S. C. Isaacs and *Lady G. M. Chatterjee* for Appellant.

K. R. Bangari for Respondents.

Their Lordships' Judgment was delivered by

SIR JOHN BEAUMONT.—This is an appeal from a judgment and decree of the High Court of Judicature at Bombay, dated 31st August, 1939, affirming a judgment and decree of the District Judge, Dharwar, dated 5th August, 1937.

The appeal arises out of a suit filed by the respondent and three others under Section 92 of the Code of Civil Procedure for a declaration that a certain institution known as Shri Sidha Arudha Swami Math was a public trust of a religious or charitable nature, for the framing of a scheme in connection with the institution, and for the removal of the appellant from his position as the head of the institution on the ground that he is unfit to occupy that position, and for consequential relief. The Shri Sidha Arudha Swami Math would be more accurately described as a Temple than as a Math, but it has been referred to as a Math throughout the proceedings, and will in this judgment be called "the Math."

The facts relating to the foundation of the Math and the acquisition of the properties belonging thereto are not in dispute. The appellant at Exhibit 194

1. (1933) 64 M.L.J. 544 : L.R. 60 I.A. 133: I.L.R. 12 Pat. 305 (P.C.).

*P.C. Appeal No. 56 of 1946. 26th May, 1948.

accepted as correct the statements contained in the first fourteen paragraphs of the deposition of the fourth plaintiff which contained a full history of the matter. The contention of the appellant is that the Courts in India have drawn wrong inferences from the facts.

The learned trial Judge discussed in detail and with much care the documentary and oral evidence, particularly in relation to the circumstances, in which the various properties used in connection with the Math had been acquired. In appeal the High Court again discussed the evidence in considerable detail, and both Courts reached the conclusions that the institution, whether it be called a Math or a Temple, was founded by the public for a public charitable and religious purpose, *viz.*, the worship of the Swami during his lifetime and of his Samadhi (tomb) after his death, and for the purpose of the various festivals which had been started in connection with the institution, and that the offerings made to the Swami, the properties purchased out of those offerings and those acquired by gifts after 1912 (when the Swami assumed control of the Math), must all be regarded as accretions to the original foundation, and that all the properties in suit form part of a trust created for purposes of a charitable or religious nature. Counsel for the appellant has referred their Lordships to all the relevant evidence and no useful purpose would be served by a further discussion of it in detail. Their Lordships can state shortly and in general terms their reasons for agreeing with the conclusions of the Courts in India.

The Swami came first to Hubli about the year 1877 as a mendicant, possessing no property. In the course of time he began to give discourses on the shastras and claimed to be an incarnation of the God Mahadeo, and as such to be worthy of worship. He collected a large body of disciples and before his death property of very substantial value had been acquired for the purposes of the Math. The Swami himself took no interest in material matters, being concerned mainly with the religious side of the activities of the Math, and it is on the face of it improbable that members of the public would have given property of substantial value to the Swami for his own personal use. The evidence shows that in some cases lands were acquired by panchas at Hubli ; in other cases lands or ornaments were given, direct to the Swami or on his behalf to Shiddappa, the father of the appellant, who had been appointed Mukhtya to the Swami about the year 1920. The buildings on the land used for the purposes of the Math were erected out of offering made to the Swami. No dispute in connection with the Math seems to have arisen until the year 1924 when the Swami made a will, giving the whole of his property to the appellant. The property comprised in the will included the moveable and immoveable properties used or held in connection with the Màth, and the right of the Swami to dispose of this property was challenged in Suit No. 97 of 1927 in the Court of the first class Subordinate Judge at Dharwar, and the matter went in appeal to the High Court of Bombay. It has not been contended before the Board that this suit has any relevance to the present appeal, and it need not be discussed.

The only question in this appeal is whether the suit properties used for the purposes of the Math belonged to the Swami at the time of his death, or appertained to the Math and were subject to an express or constructive trust created for public purposes of a charitable or religious nature within the meaning of section 92 of the Code of Civil Procedure. Except in regard to one small property, which will be presently mentioned, their Lordships have no doubt that the Courts in India were right in answering this question against the appellant. The evidence establishes beyond doubt, in their Lordships' view, that the properties in suit were either originally given, or were dedicated by the Swami, to the purposes of the Math which was a charitable or religious institution. It has been argued by Counsel for the appellant that even if this be so the trust was not for public, but for private, purposes. But this is clearly not so. It is common ground that anybody was at liberty to go at any time to the Math to worship the Swami and take food there. The trust was plainly one for public purposes.

The only property in suit which in their Lordships' view the respondents have failed to show belonged to the Math is that comprised in Exhibit D-127 by which a piece of land expressed to be of the value of Rs. 400 situate in Mouji Harti in Taluka Gadag was conveyed to the Swami, the motive expressed being the spiritual good of the donor. There is nothing in the conveyance to suggest that the land was given to the Swami for the purpose of the Màth. There is no evidence that this land, which is situate, their Lordships are told, some 40 miles from Hubli was ever used, or that its rents or profits were applied, for the benefit of the Math. The fact that the Swami received many gifts of property for charitable purposes does not disqualify him from receiving gifts for his own personal benefit, and their Lordships think that this small piece of land must be excluded from the decree in the present suit.

By the decree which the learned trial Judge passed it was declared that the properties in suit were properties belonging to a public trust of a religious and charitable character ; and that it was necessary to settle a scheme for the administration of the trust. The decree gave general directions as to the scheme to be prepared for carrying out the terms of the judgment and settled an interim scheme. It was directed that the appellant be removed from the position which he occupied as the head of the Math and that his worship must stop. It has been argued on behalf of the appellant that the Court had no jurisdiction to remove him from his position as head of the Math to which he had been appointed by the will of the Swami. This contention is quite untenable. In settling a scheme for the administration of a charitable trust involving the appointment of trustees or managers the Court is bound to secure persons whom it regards as suitable. The fact that the Swami desired that the appellant should succeed him does not fetter the discretion of the Court, or preclude consideration of the conduct of the appellant, both before and since the death of the Swami. Both Courts in India have held that by his conduct the appellant has shown himself unfit for the position which he occupies, and their Lordships accept such finding.

With regard to costs, both Courts in India directed the costs of all parties to come out of the estate. This, their Lordships think, was right, but there was no justification for a further appeal to His Majesty in Council, and their Lordships are not prepared to direct that the costs of such appeal should come out of the estate.

For these reasons their Lordships will humbly advise His Majesty that the decree of the trial Judge dated 5th August, 1937, be modified by excluding from such decree the piece of land comprised in exhibit D-127 and that subject thereto this appeal be dismissed. The appellant must pay the costs of the appeal.

Solicitors for Appellant : *T. L. Wilson & Co.*

Solicitors for Respondents : *Casavetti Coustas & Co.*

V.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDARAJACHARI AND MR. JUSTICE MACK.

Periyaswami Asari, *In re.* .. *Appellant.**

Madras Borstal Schools Act (V of 1926), section 10-A—Recommendation for special treatment—Justifying circumstances.

Where in a case in which the accused, an young man of 19, was convicted of the murder of his mother, though there had been no sudden provocation but long and sustained provocation which resulted in a complete break down of control and the accused had been the victim of an abnormal and unnatural environment bereft of maternal affection,

Held, that it was not a fit case in which he should serve a long term of life imprisonment in an ordinary jail. The mitigating circumstances were sufficiently cogent to justify a recommendation to Government to give the accused special treatment under section 10-A of the Madras Borstal Schools Act, and in exercise of their prerogative under section 401, Criminal Procedure Code, to remit a portion of his ordinary punishment.

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*Cr.App. No. 402 of 1948. 12th August, 1948.

Appeal against the sentence passed by the Court of Session of the South Arcot Division on 3rd July, 1948, in Case No. 24 of the Calendar for 1948.

Appellant not represented.

The Judgment of the Court was delivered by

Mack, J.—This is a tragic case. The appellant in this jail appeal has been convicted under section 302, Indian Penal Code, of the murder of his own mother and sentenced to transportation for life. The facts are these :

The appellant's father died about 15 years ago. His mother then lived in concubinage with one Krishna Pillai for the past 15 years. The appellant is only 19 years old. On the morning of 19th February, 1948, at about 8 A.M., the appellant appeared with a blood stained knife before the village Munsiff and made a statement to the effect that he had stabbed his mother half an hour before with a knife in her chest. In a confession statement he made to the taluk Magistrate a few days later he explained that his mother settled all her property on Krishna Pillai, that he had been asking her for a long time for his share and his brother's share in her property and also asking her to arrange for his marriage. He complained that far from agreeing she would not even cook for him and that about four days prior to this tragedy his mother and Krishna Pillai went to another village and came back. When she refused to cook for him that morning he stabbed her in front of his house. Krishna Pillai's father-in-law, P. W. 8, deposed that that very morning the appellant asked him to prevail on his mother to give him money for his marriage but his mother despite his representations put the matter off. There can be no doubt, whatsoever, that the appellant did stab his mother that morning with murderous intention and that he has been correctly convicted of murder. The learned Sessions Judge found many mitigating circumstances in the provocations given to the appellant by his mother in order to pass on the appellant the lesser sentence. We think that the mitigating circumstances are sufficiently cogent in this very difficult case of criminal psychology to justify a recommendation to Government to give this appellant special treatment under section 10-A of the Madras Borstal Schools Act (V of 1926) and in exercise of their prerogative under section 401 of the Code of Criminal Procedure to remit a portion of his ordinary punishment. There has been no sudden provocation in the present case but long and sustained provocation which resulted in a complete break down of control. The appellant has been the victim of an abnormal and unnatural environment, bereft of maternal affection and we do not think that this is a fit case in which he should serve a long term of life imprisonment in an ordinary jail. I was a party to the recent decision reported in *Krishnaswami* alias *Kittan*[1], where Horwill, J., and I recommended rather a similar case for treatment in a Borstal institution under section 10-A of the Borstal Schools Act. Subject to this recommendation this appeal is summarily dismissed.

V.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDARAJACHARI.

Molla Madina Saheb .. *Petitioner**

v.

Bhano Bi Bi Saheba and others .. *Respondents.*

Specific Relief Act (I of 1877), section 9 and Civil Procedure Code (V of 1908), section 115—Revision against decree in suit under section 9 of the Specific Relief Act—New point as to maintainability of suit—Cannot be allowed to be raised in revision.

In a revision against a decree in a suit under section 9 of the Specific Relief Act, the petitioner will not be allowed to raise a new point that the suit was not maintainable as he was a co-owner having a half share in the suit property, because he has a remedy by way of suit for the establishment of his title and for partition on the basis of that title, if he establishes it.

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1. (1948) 2 M.L.J. 115.

*C.R.P. No. 521 of 1946. 5th September, 1947.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the District Munsiff of Razole, dated 10th January, 1946, in O. S. No. 131 of 1944.

K. Krishnamurthi for Petitioner.

V. Parthasarathy for Respondent.

The Court delivered the following

JUDGMENT.—This is a revision petition filed by the first defendant in O. S. No. 131 of 1944, on the file of the District Munsiff's Court, Razole, which was a suit under section 9 of the Specific Relief Act. The material facts are the following: One Sheik Sahib had two sons, Khasim Sahib and Imam Sahib. Khasim Sahib had a son, Peda Dada Sahib, whose sons are alleged to have sold their half share in three items of property to the first defendant. The first plaintiff is the wife of China Dada Sahib and claims that her husband conveyed to her those items under documents dated 6th December, 1943, and 8th May, 1918, respectively. The plaint allegations are that the first plaintiff's husband and latterly the first plaintiff were in exclusive possession of the three items till 12th May, 1944, when the first defendant and his tenant the second defendant trespassed on half of each of the said items. The suit was filed on 17th June, 1944. The first defendant claims that he is entitled to a half share of these three items and that he was in fact in possession of his half share from 10th January, 1944, the date of his sale deed, Ex. D-1. The lower Court has recorded a finding that the defendants' allegation with regard to possession is not true and that as a matter of fact the first plaintiff was in exclusive possession of the property till the trespass complained of. The suit was accordingly decreed. Mr. Krishnamurthi, advocate for the petitioner, admits that the finding recorded by the lower Court is a finding of fact but argues that as his client, the first defendant, is a co-owner having a half share in the suit properties, a suit under section 9 of the Specific Relief Act will not be maintainable. It is doubtful whether this position is correct. There is at least the judgment of a single Judge of the Nagpur High Court in *Abdul Aziz* v. *Sheik Amir*[1], that a suit under section 9 of the Specific Relief Act is maintainable by a co-owner alleging to be in exclusive possession of the property and that another co-owner cannot resist such a suit and that the only remedy open to the latter is to sue for partition. Mr. Krishnamurthi relies on a decision of Patanjali Sastri, J., in *Veeraraghava Rao* v. *Gopala Rao*[2], where it was held that one co-owner cannot maintain a suit for trespass against another co-owner. This was approved in the decision in *Ramayya* v. *Achamma*[3]. But it does not seem that either decision had any reference to or meant to deal with a suit under section 9 of the Specific Relief Act.

Be that as it may, I should not permit this point to be raised at this stage as it admittedly was not raised in the Court below. The first defendant has a remedy by way of suit for the establishment of his title and for partition on the basis of that title, if he establishes it. I am not, therefore, inclined to interfere in this revision petition by entertaining a point which was not previously taken. This civil revision petition is dismissed with costs.

V.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO.

Karamadai Naicken .. *Appellant**

v.

R. Raju Pillai and another .. *Respondents.*

Limitation Act (IX of 1908), *section* 19—*Statement by debtor in deed—Admission of liability coupled with plea of discharge —Effect—Saving of limitation.*

Where there is a statement in a document by the debtor that he was under a liability and at the same time it is coupled with a statement that he had discharged the debt, the intention of the executant must be gathered by reading the document as a whole and such a statement will not amount to an acknowledgment of a subsisting liability so as to save limitation under section 19 of the Limitation Act.

1. I.L.R. 1942 Nag. 322.
2. (1941) 2 M.L.J. 707.
3. I.L.R. 1945 Mad. 160.

*S.A. No. 78 of 1946. 6th August, 1948.

Appeal against the decree of the Court of the Subordinate Judge of Coimbatore, in A. S. No. 117 of 1945, presented against the decree of the Court of the District Munsiff of Coimbatore in O. S. No. 884 of 1943.

V. T. Rangaswami Aiyangar for Appellant.

G. R. Jagadisa Aiyar and *J. R. Alwar Naidu* for Respondents.

The Court delivered the following

JUDGMENT.—The second defendant is the appellant. The suit was instituted for recovery of a sum of Rs. 900 due under a mortgage, dated 9th March, 1922. The mortgage was executed by the first defendant in favour of one Mariyayi. Mariyayi died sometime in 1923 leaving behind her Chockalinga, her husband, and Kanakammal, a daughter and Ayyaswami Pillai, a son. Chockalinga died some time before 1931. The exact date of death is not known. The mortgagor intended to discharge the mortgage in 1931, and on the assumption that Ayyaswami, the son of the mortgagee, was entitled to the amount due under the mortgage, executed a deed of assignment of a usufructuary mortgage executed in his favour by a third party, in favour of Ayyaswami. This deed of assignment is Ex. P-2, dated 9th September, 1931. The mortgage debt due by that date was ascertained and was found to be Rs. 609. He executed a promissory note for a sum of Rs. 200 on that date. The consideration for the assignment by the usufructuary mortgage was taken to be Rs. 300 and a cash of Rs. 109 was paid to make up the total of Rs. 609 due under the mortgage in favour of Mariyayi. Thus the entire mortgage debt was discharged by this arrangement with the son of the mortgagee. The first defendant sold the property comprised in the mortgage to one Palanisami in July 1937 and from Palanisami the second defendant purchased the property on the 11th June, 1942. After all this, Kanakammal, the daughter of Mariyayi, executed in favour of the plaintiff a deed of assignment in respect of the mortgage debt due under the mortgage executed by the first defendant on the 9th March, 1922. On the basis of this assignment the assignee instituted the present suit to enforce the debt under the mortgage deed. The assignment by Kanakammal was on the footing that the mortgage debt was the stridhana property of Mariyayi, and that after her death it had devolved upon her as her heir.

In the suit the first defendant was *ex parte* as he had no interest in the property, and the second defendant was the main contesting defendant. The chief among the pleas raised by the defendant were that the mortgage debt was really the property of the family of Chockalinga and Ayyaswami, that Mariyayi was merely a name-lender, and that therefore the discharge of that debt by the arrangement evidenced by Ex. P-2 was valid ; and secondly that as the mortgage was dated 9th March, 1922, and the present suit was instituted only on the 6th September, 1943, the suit was barred by limitation. The plaintiff anticipated the plea of limitation and relied upon Ex. P-2 as containing an acknowledgment of the liability by the first defendant.

The trial Court upheld both the contentions of the defendant and dismissed the plaintiff's suit. On appeal the learned Subordinate Judge reversed the decision on both the points and decreed the plaintiff's suit.

The only question that was argued in second appeal was the question of limitation. Unless Ex. P-2 contains a valid acknowledgment within the meaning of section 19 of the Limitation Act, the plaintiff's suit would be barred by limitation. Under Ex. P-2 the first defendant admitted that the mortgage debt amounted to Rs. 609 but stated that it was discharged by the execution of the promissory note, by the assignment of the usufructuary mortgage and by payment of cash. The question therefore that arises for consideration is whether the statement of the first defendant in Ex. P-2 that there was a liability under a mortgage but that it was discharged amounts to an acknowledgment. In other words, is it an admission of a subsisting liability in respect of the mortgage debt and does it contain an acknowledgment of a subsisting jural relationship of debtor and creditor between

the mortgagor and the mortgagee? When the statement of liability is coupled with a statement that it is discharged it is difficult to see how a subsisting liability on that date could be inferred. The learned District Munsiff held that there was no subsisting liability in view of the clear language of the document. The learned Subordinate Judge however dissects the statement into two parts, the first part containing an admission of liability and the second part the mode in which it was discharged. Ignoring the second part he fastens himself to the first and concludes that there is a subsisting liability. In my opinion, this kind of dissection of the statement of the first defendant in Ex. P-2 is not permissible. The statement must be taken as a whole and the intention of the first defendant must be gathered by reading the document as a whole and not by confining attention to a particular portion of it. In my opinion, therefore, the process of interpreting the document adopted by the learned Subordinate Judge is wrong.

The learned advocate for the respondents drew my attention to some of the decisions in which in circumstances somewhat different the Courts have construed documents containing acknowledgments as acknowledgments of a subsisting liability; but the more relevant decision in my opinion is the decision reported in *Rangaswami Chetty* v. *Thangavelu Chetty*[1]. In that case as in the present, the statement by the debtor that he was under a liability was coupled with a statement that he had discharged the debt and it was held that such a statement did not amount to an acknowledgment of any subsisting liability. This decision, so far as I am aware, was never dissented, and on the other hand was cited with approval by this and other High Courts. The decision on which strong reliance was placed by the learned advocate for the respondents is the decision of Varadachariar, J., in *Ramasami Mestriar* v. *Velayutham Pillai*[2]. In that case the mortgage which was put in suit was dated 15th November, 1913. By a later sale deed of 11th November, 1921, the debtor made an arrangement for discharging the mortgage by sale of certain properties. Subsequently as there was a sub-mortgage on the property the sale deed became inoperative, and the debt could not be discharged in the manner contemplated by the parties. The mortgagee relied upon the recitals in the sale deed as constituting acknowledgment, when he was obliged to fall back on the mortgage and to enforce his rights under it. The learned Judge having regard to the nature of the document and having regard to the fact that the mode of discharge contemplated by the parties became ineffective held that there was a valid acknowledgment of a subsisting liability in the sale deed. The learned Judge cited by way of illustration cases where a mortgage debt was intended to be discharged by the parties by execution of a sale deed, which however remained at the stage of contract without a sale deed in writing and registered and the contract for some reason or other became unenforceable. In such a case where the contract was merely executory the learned Judge asks:

> "Can there be any doubt that the statement in the document will be available as an acknowledgment of liability? I do not see why the position should be different when the contemplated discharge proved ineffective because the mortgagee to whom the conveyance was made had by that time become incompetent in law to give a discharge by reason of the anterior sub-mortgage."

The situation therefore which the learned Judge was dealing was one where the parties substituted one arrangement for another, and for some reason or other the later arrangement became frustrated, and the parties were relegated to the old arrangement; and in such circumstances when the old arrangement was sought to be enforced it was possible to rely upon the statements in the later arrangement evidenced by a document as establishing a valid acknowledgment of a subsisting liability. The position in the present case is entirely different. The arrangement evidenced by Ex. P-2 did not become ineffective between the parties to the transaction. The plaintiff who is a stranger to the arrangement wants to repudiate the arrangement as not binding on him, as he became the true owner of the mortgage debt, and any discharge given by Ayyasami would not bind him. In such a case the principle of the decision in *Ramasami Mestriar* v. *Velayutham Pillai*[2] has no application.

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1. (1919) I.L.R. 42 Mad. 637.
2. (1938) 1 M.L.J. 450.

In *Kondamma* v. *Venkatarayudu*[1], Madhavan Nair, J., had to deal with a case where a promissory note was renewed, and at the time of the renewal an endorsement was made on the earlier note to the effect that a fresh promissory note was executed on that day for the amount due under the previous note and that therefore the earlier note became void. Later by reason of some defect in the stamp the later promissory note became unenforceable. The payee under the note was obliged therefore to fall back on the earlier note and rely upon the endorsement on it as constituting a valid acknowledgment. The question here also in my opinion is somewhat analogous to the position considered by Varadachariar, J., in *Ramasami Mestriar* v. *Velayutham Pillai*[2]. The second promissory note does not stand on the same footing as a payment or a complete transfer of property in discharge of a debt. It was merely a conditional payment. If that payment becomes ineffective it is open to the parties to fall back upon the earlier document, and the statement in the endorsement in the circumstances amounts to an acknowledgment of a subsisting liability or the existence of a jural relationship of debtor and creditor. The decision of Venkataramana Rao, J., in *Kuppuswami Aiyar* v. *Sabapathi Pathan*[3], does not help the respondents. In that case there was merely a direction by the mortgagors to a third person in whose favour they had executed a usufructuary mortgage, to pay the mortgage debt, and this arrangement was repeated by the mortgagors in their reply notice to a demand made by the mortgagee for payment of the debt. It is obviously a case where there was a clear acknowledgment of a subsisting liability.

I do not think it is necessary to refer to the other decisions on the point, but two decisions which have been referred to in the judgment of Varadachariar, J., in *Ramasami Mestriar* v. *Velayutham Pillai*[2], throw some light on the question now at issue. In *Dajji Mehar* v. *Mahadeo Kumbi*[4], the Nagpur Judicial Commissioners' Court considered the decision in *Rangaswami Chetty* v. *Thangavelu Chetty*[5] and it was distinguished on the ground that the document referred to therein recited that the judgment-debtor owed a debt, and that he had discharged it. Such a statement taken as a whole does not amount to an acknowledgment of a liability which is subsisting. There the admission of liability was coupled with an assertion that it was discharged. Of course if the admission was an unqualified one and not coupled with any further conditions or any other indications leading to the inference that the debt was discharged the position would be different. The other decision is that of the Patna High Court in *Chhaterdhari Mehto* v. *Nasip Singh*[6]. It was there held that a statement that there was a debt but that it had been discharged would not amount to an acknowledgment. *Rangaswami Chetty* v. *Thangavelu CCetty*[5] was referred to and cited with approval. These cases, in my opinion, bring out the distinction between cases where there was a mere statement that a debt was due and a statement that it was due but with the qualification added that it was discharged.

In these circumstances, in my opinion, the judgment of the learned Subordinate Judge holding that Ex. P-2 contained a valid acknowledgment of a subsisting liability and that the suit was not barred by limitation is erroneous.

The second appeal is therefore allowed, the decision of the learned Subordinate Judge is set aside and that of the learned District Munsiff restored with costs here and in the Courts below. No leave.

B.V.V. *Appeal allowed.*

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1. (1938) 2 M.L.J. 846.
2. (1938) 1 M.L.J. 450.
3. (1937) 2 M.L.J. 24.
4. (1924) 79 I.C. 66.
5. (1919) I.L.R. 42 Mad. 637.
6. (1923) 78 I.C. 919.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

K. Murugappa Mudaliar and others .. *Petitioners**

v.

Kuppuswami Mudaliar and others .. *Respondents.*

Criminal Procedure Code (V of 1898), section 144—Performance of festival in the public road before a temple—Rival claims by parties—Danger to public peace—Interference by authorities—Exercise of rights under a Civil Court decree—Whether can be restrained.

It is not the duty of the authorities who are responsible for the preservation of the public peace to enforce a Civil Court decree or carry out the observations of the Court in all circumstances and at all costs. The preservation of the public peace is the function of the authorities and the magistracy and in the performance of that function it may be necessary for them to override temporarily private rights and where there is conflict between the public interest and a private right the former must prevail. The authorities are the proper Judges on the question whether civil rights can be allowed to be exercised without danger to public place. This rule is applicable equally to cases where there are competing and rival claims by two parties to the exercise of a right such as the performance of a festival in the public road before a temple.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order of the Court of the Stationary Second Class Magistrate of Conjeeveram in M. C. No. 8 of 1947, dated 9th October, 1947.

K. V. Ramachandra Aiyar for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

A. Viswanatha Aiyar and *D. C. Krishnamurthy* for Respondents.

The Court made the following

ORDER.—This is an application to revise an order under section 144, Criminal Procedure Code, made by the Stationary Sub-Magistrate, Conjeeveram in respect of the performance of Soorasamharam festival before the Mohambariamman Temple in Ayyampet, a suburb of Conjeeveram. The festival comes off on the 18th of this month and in view of the fact that the petitioners had been restrained by similar orders in the preceding years from performing the festival, they applied sufficiently early with a view to get orders from the Magistrate and if the orders went against them to obtain remedy by way of revision from this Court. The application was disposed of by the Magistrate on 9th October, 1947. He found on the basis of a report from the Circle Inspector of Police that if the petitioners are permitted to perform the festival first before the counter-petitioners, there may be breach of the peace. Consequently, the Magistrate passed orders under section 144, Criminal Procedure Code, fixing two different periods of time on 18th November, 1947, when either party should perform the festival at that place. The counter-petitioners' party was to perform it first between 5-30 P.M. and 7 P.M. on that day and during that time the petitioners' party was restrained from interfering with the celebration of the festival by the counter-petitioners. Likewise the petitioners were permitted to hold the festival between 7-15 P.M. and 9 P.M. and during that time the counter-petitioners were to be restrained by interfering with the performance of the ceremony by the petitioners.

It would appear that the petitioners are interested in Kandappan temple situated in Kadapparkoil Street where the deity Subramaniam is worshipped. The idol seems to have been installed and worshipped in that temple from time immemorial. In Mohambariamman temple which is situate in Palli Street there was no Subramania idol. Hence Soorasamharam festival used to be performed by the petitioners bringing their idol from Kandappan temple near Mohambariamman temple and performing Soorasamharam there. In or about 1906 the counter-petitioners installed Sri Balasubramaniaswami in the Mohambariamman temple and consecrated it. Thereafter, they commenced to perform Soorasamharam festival themselves. Disputes started between the two parties as to who was entitled

*Cr.R.C. No. 1107 of 1947. (Cr.R.P. No. 995 of 1947.) 12th November, 1947.

to prior performance of the festival. For some time, the performance of the festival by either party was stopped by the authorities with the result the petitioners filed O. S. No. 290 of 1930 in the District Munsiff's Court, Maduranthakam for a declaration of their right and for an injunction restraining the counter-petitioners from interfering with the exercise of those rights. That suit was decided by the District Munsiff on 4th February, 1931. The learned District Munsiff found that the petitioners were entitled to perform Soorasamharam festival for their idol on the public road near Mohambariamman temple although they were not entitled to do so within the counter-petitioners' temple or in the vacant site in front thereof. As regards the right that was specifically claimed in that suit by the petitioners to have their Soorasamharam festival performed prior to that of the counter-petitioners, the learned District Munsiff made this observation :

"It appears to me, considering the fact that the plaint idol has been having the utsavam for a much longer time than that of the defendants' idol and that the defendants' idol came into existence only very recently, the preference ought to have been given to the plaintiffs' idol to have the Surasamharam done first. But no such right can be declared and it is for the Magistracy and the police who will have to regulate the performance of the festival to pass suitable orders. Their right to regulate these is undisputed."

Following upon these findings, the declaration was granted in these terms :

"That the plaintiffs are entitled to perform their Surasamharam festival for their idol in the public highway in front of Mohambariamman temple and that the defendants be restrained by a permanent injunction interfering with the plaintiffs' performing the utsavam."

It has to be noted that though a declaration and injunction were asked for in respect of the prior or preferential right of the petitioners, no declaration whatever was made in that behalf in the operative part of the judgment or decree. It is on the other hand clear from the extracts from the judgment quoted above and from the effect of section 11 of the Code of Civil Procedure that that claim was definitely negatived by the trial Court. Against this judgment, the defendants appealed and the plaintiffs (petitioners herein) also filed a memorandum of cross-objections. The Subordinate Judge who heard the appeal allowed it in an erroneous view of the law. Dealing with the memorandum of cross-objections which related to the question of the plaintiffs' right to first performance of the festival at that place, the learned Subordinate Judge dismissed the memorandum of objections also in the view that he had taken on the main question. But all that is material to observe is that the petitioners themselves understood the decree of the District Munsiff to amount to negativing their claim that they were entitled to first performance of the festival in preference to the counter-petitioners. It is in that view that the memorandum of cross-objections was filed. Against this judgment, there was an appeal brought to this Court by the petitioners. In the memorandum of second appeal, *inter alia* the following ground was taken :

"17. The Court below having held that the plaintiffs were entitled to perform their festival in priority to the defendants ought to have granted the declaration and injunction on that footing."

Lakshmana Rao, J., who heard the second appeal set aside the judgment and decree of the Subordinate Judge finding that :

"there is a right to conduct a religious procession with its appropriate observances through a public street so that it does not interfere with the ordinary use of the street and subject to lawful directions by the Magistrate."

He held that a religious festival does not stand on a different footing and discountenanced the view of the Subordinate Judge that such a right is not recognised by law. There is, however, one observation in the judgment on which considerable reliance is placed by Mr. K. V. Ramachandra Aiyar for the petitioners which runs thus :

"The right is of course subject to the directions of the Magistrate to regular the order and manner of performance of the festival though it is found by the Courts below that the festival of Subramaniaswami of Kandappar Koil used to be celebrated before the festival of Balasubramaniaswami of the temple of the defendants."

Following this observation, however, the learned Judge did not deem it necessary or proper in spite of Ground No. 17 taken by the appellants to modify the decree of the first Court by inserting therein a declaration as to the preferential right

of the petitioners to hold the Soorasamharam festival in front of Mohambariamman temple. On the contrary, the learned Judge restored the decree of the District Munsiff as it was with the only modification that the right of the petitioners to perform the festival will be subject to the directions of the Magistrate and the rights of the public. The grievance, as it appears now in the revision petition filed by the petitioners here, is that the decree of the Civil Court was flouted by the Magistrate in passing the orders under revision and that under the guise of regulating the festival, the Magistrate has no right to pass orders directly contrary to the decree. As shown above, there is no decree either of the first Court or of this Court recognising the right of the petitioners to perform the Soorasamharam festival in front of Mohambariamman Temple prior to its performance by the counter-petitioners. The observations referred to above by the learned District Munsiff and Lakshmana Rao, J., do not amount to a declaration granted in their favour in the decree of the Civil Court since expressly the first Court whose decree was restored by this Court (with the modification already mentioned) refused to make any declaration with regard to this matter and this Court refused to incorporate it in the judgment in spite of a specific ground having been taken in that behalf.

The next question is whether the observations of the trial Court and this Court with regard to the performance of the festival by the two parties, even if they do not amount to a decree, should not be respected and enforced by the Magistracy and the police. I have no doubt that in exercising their powers, the authorities will pay due respect to those observations, but in doing so, there can be no question that the paramount consideration should be that of maintenance of law and order. What has been said about decrees in the numerous decisions in regard to these matters applies *a fortiori* with regard to *obiter dicta* of this kind. In *Manzur Hasan* v. *Muhammad Zaman*[1], the Privy Council, while laying down that in India there is a right to conduct a religious procession with its appropriate observances through a public street so that it does not interfere with the ordinary use of the street by the public and subject to lawful directions by the Magistrate and that a civil suit for a declaration lies against those who interfere with a religious procession or its appropriate observances, considered it necessary to direct that a declaration of that right will be subject to the orders of the local authorities regulating the traffic, the Magistrates' directions and the rights of the public. The question arose before a Full Bench of five Judges of this Court *Viswanadha Rao, In re*[2] with reference to the scope and extent of orders under section 144, Criminal Procedure Code. It was then conceded that it is not the duty of the authorities who are responsible for the preservation of the public peace to enforce a Civil Court decree in all circumstances and at all costs. It was also pointed out that the preservation of the public peace is the function of the authorities and the magistracy and in the performance of that function it may be necessary for them to override temporarily private rights and that where there is a conflict between the public interest and a private right, the former must prevail. The authorities are the proper judges on the question whether civil rights can be allowed to be exercised without danger to public peace. I may also refer in this connection to a decision of the Allahabad High Court in *Md. Jalil Khan* v. *Ram Nath Katua*[3] where the Privy Council case referred to above was considered. It was clearly pointed out by Sulaiman, J., in that case that Civil Courts have no concern with the power of a Magistrate to issue whatever orders he considers necessary even if it restricts the ordinary right of using a public thoroughfare, when he apprehends a danger and that the right of way over a public road must always be subject to such orders of the Magistrate.

Mr. Ramachandra Aiyar has raised a further contention that while all the cases bearing on the question as to the right to take out processions on the public highway arose on the assertion of that right by one party and its denial by another party, there was no case where the competing and rival claims of two parties to the

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1. (1924) 48 M.L.J. 23 : L. R. 52 I.A. 61 : I.L.R. 47 All. 151 (P.C.).
2. (1928) 55 M.L.J. 442 : I.L.R. 51 Mad. 1006 (F.B.).
3. (1930) I.L.R. 53 All. 484.

exercise of that right at the identical place and at the same time were considered and that adjudication of such competing claims with reference to a highway vesting in the State is outside the province of the Civil Courts, at all events when the State is not impleaded as a party to the suit. This aspect of the matter was not raised in any of the three Courts before whom the civil rights were agitated by the petitioners and it is too late in the day to raise any distinction on that basis. The real effect of this contention would be to affect the maintainability of the plaintiffs' own suit and the validity of the decree passed therein which they require the magistrates or police to enforce against the defendants.

Finally Mr. Ramachandra Aiyar complains that continuously since 1939' the petitioners have been prevented from holding the festival prior to the others on the ground that there would be apprehension of breach of peace without a *bona fide* attempt being made by the authorities to take the necessary steps to guard against it.' That, as I have already stated, is a matter for the authorities to consider or decide on each occasion in the light of the findings of the Civil Court and the conditions that may prevail in the locality. I decline to interfere and the petition is dismissed.

B.V.V. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

Rachapudi Ranga Rao .. *Appellant**

v.

Balabhadrapatruni Subba Rao and others .. *Respondents.*

Limitation Act (IX of 1908), *Article* 182 (5) *and Civil Procedure Code (V of* 1908), *section* 48—*Execution petition on the last day by assignee decree-holder to a Court before his assignment was recognised and the decree was transferred to it for execution—If a proper application made to a proper Court.*

In respect of a decree obtained on 9th July, 1930, in the District Munsiff's Court at Bapatla an execution application was filed in that Court on 14th June, 1942, for recognizing the assignment of the decree in favour of the applicant and for transfer of the decree together with the certificate to the District Munsiff's Court at Tenali for execution. But this was finally ordered only on 12th August, 1942, and the decree was transferred as prayed for, by which time twelve years had elapsed from the date of the decree. Meanwhile on 9th July, 1942, the assignee decree-holder filed an execution petition in the District Munsiff's Court at Tenali mentioning the fact of the assignment of the decree to him and requesting that Court to execute it by attachment and sale of immoveable property. On a question whether the application to the District Munsiff's Court at Tenali was made to the proper Court,

Held, as until a Court has received the decree transferred to it for execution has no jurisdiction to entertain an application for its execution, the Tenali Court had no jurisdiction to entertain the application of 9th July, 1942, when it was filed or had the applicant any *locus standi* on that date to make the same since he was recognised as the assignee decree-holder only on 12th August, 1942, by which time execution had became barred. Hence that application was not one made to the proper Court within the time allowed by law.

Appeal against the order of the Court of the Subordinate Judge of Tenali, in A. S. No. 178 of 1944, preferred against the order of the Court of the District Munsiff of Tenali in E. P. No. 306 of 1942 in O. S. No. 177 of 1930.

K. Krishnamurthy for Appellant.

V. Subramanyam for Respondents.

The Court delivered the following

JUDGMENT.—The appellant is a transferee decree-holder and the second appeal arises out of the dismissal by the lower appellate Court of his application (E. P. No. 306 of 1942) to execute the decree in O. S. No. 177 of 1930, District Munsiff's Court, Bapatla.

O. S. No. 177 of 1930 was a decree for a sum of money passed against the respondents on the 9th of July, 1930. Applications in the nature of steps-in-aid

*A.A.A.O. No. 286 of 1945. 22nd August, 1947.

of execution had been made on five prior occasions by the original decree-holders and finally the execution petition out of which this civil miscellaneous second appeal arises was filed on 9th July, 1942, by the present appellant in the District Munsiff's Court of Tenali, wherein he stated that the decree has been assigned to him and the Court was requested to execute it by attachment and sale of immoveable property. In the meanwhile on 14th June, 1942, the appellant had filed E. A. No. 756 of 1942, in the District Munsiff's Court, Bapatla, for recognising the assignment in his favour and for transmitting the decree together with the certificate to the District Munsiff's Court, Tenali, for the purpose of execution. The service of notices of this application was a procrastinated one and finally on 12th August, 1942, the Court which passed the decree (District Munsiff's Court, Bapatla) ordered its transmission to the District Munsiff's Court, Tenali, wherein the records were received on 17th August, 1942. By this time 12 years had elapsed from the date of the decree. That Court allowed the execution to proceed on the ground that the judgment-debtor had committed fraud and therefore the decree-holder was entitled to an extension of the time lost by him on account of the fraud played by the judgment-debtor. On appeal, the learned Subordinate Judge found that there was no fraud committed by the judgment-debtor and hence the decree cannot be executed after the lapse of 12 years.

The question for determination is whether the application for execution dated 9th July, 1942, made to the District Munsiff's Court, Tenali, was one made to the proper Court and within the time allowed, so that the assignee decree-holder may proceed with the execution. Mr. K. Krishnamurthi, the learned Counsel for the appellant contends that on the authority of *Venkatraju* v. *Gangaraju*[1] the execution of the decree is not barred. Cornish, J., in that case did not go to the length of holding that an application made to a Court at a time when it had no jurisdiction to receive the same can be availed of by the applicant to save the period of limitation if he had already filed a transmission petition within time to the Court which passed the decree. This case is only authority for the proposition that if an execution petition is filed within 12 years of the date of decree, but notice to the judgment-debtor was served only after the period of 12 years, it cannot be held that the execution is itself barred or that an application made within 12 years' limit cannot be proceeded with after the lapse of that time. As this second appeal is not against the execution petition filed on 14th June, 1942, before the District Munsiff's Court, Bapatla, the decision of Cornish, J., is distinguishable. At that time E. P. No. 306 of 1942 was filed before the District Munsiff's Court, Tenali, that Court had no jurisdiction to entertain the application or had the applicant (the present appellant) any *locus standi* to make the same since he was recognised as an assignee decree-holder only on 12th August, 1942. There is authority for the position in a decision of Jackson, J., in *Nanjunda Chettiar* v. *Nallakaruppan Chettiar*[2] that until a Court has received the decree transferred to it for execution it has no jurisdiction to entertain an application for execution. Following this decision it has to be held that when E. P. No. 306 of 1942 was filed in the District Munsiff's Court, Tenali, that Court had no jurisdiction to entertain the same even though the decree was transmitted to it later on and therefore it was not an application made to a proper Court as provided by law.

Mr. K. Krishnamurthi further contends that when once the Bapatla Court made the order dated 12th August, 1942, recognising the transfer in favour of the appellant and directing the transmission to the District Munsiff's Court, Tenali, the latter Court is entitled to proceed with the application made to it on 9th July, 1942, as if a proper application had been in existence before the 12 years' period had expired. I find it impossible to accede to this contention. E. A. No. 756 of 1942, dated 14th June, 1942, was merely an application for recognising the assignment and for transmission. There was no prayer as to the mode in which the decree has to be executed. The transmission application cannot therefore be deemed to be a petition on which the decree can be executed.

1. (1936) 71 M.L.J. 808. 2. (1928) 55 M.L.J. 120.

The lower appellate Court has found that the respondent has not committed any fraud in order that section 18 of the Limitation Act can be invoked. Mr. Krishnamurthi concedes that he cannot successfully attack this finding of the learned Subordinate Judge. The second appeal is dismissed with costs.

Leave refused.

V.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDARAJACHARI.

Govinda Nair .. *Appellant**

v.

Srinivasa Pattar .. *Respondent.*

Madras Agriculturists' Relief Act (IV of 1938), *sections* 8, 9 *and* 10—*Mortgage debt—Assignment by registered deed of partition—Continuance of identity of debt, debtor and creditor—Scaling down of debt—Single debt—Usufructuary mortgage over certain items and hypothecation over others—Debt if severable.*

The appellant who had a kanom over certain jenm properties borrowed a certain amount from and executed a promissory note in favour of one *A* who was the manager of a joint Hindu family. Subsequently he executed a deed of simple mortgage hypothecating eighteen items of property to *A* to cover the amount due under the promissory note and a further cash advance. Then there was a partition in *A's* family and the same was evidenced by a registered deed of partition which allotted the mortgage to the share of the respondent. Later on a fresh document of mortgage was executed by the appellant in favour of the respondent covering all the items, but out of them only fifteen items were placed in the possession of the mortgagee while the remaining three continued in the possession of the mortgagor. The jenmi gave a melcharth over the properties covered by the appellant's kanom to a third person who filed a suit for redemption of the kanom impleading the appellant and the respondent. A decree was passed in favour of the plaintiff directing possession to be delivered on paying the value of the improvements. There was also a direction that the respondent should be paid the amount due to him out of the sum to be deposited by the melcharthdar. The appellant who was an agriculturist having contended that the debt due to the respondent should be scaled down under Madras Act IV of 1938,

Held, that under the circumstances of the case there was an assignment of the debt under the deed of partition, that the identity of the debt, the creditor and the debtor continued notwithstanding the subsequent cash advance and that the debt was consequently liable to be scaled down.

Held further, that the debt was one and indivisible notwithstanding the fact that in relation thereto there was a usufructuary mortgage over certain items and a hypothecation over certain other items.

Decisions in C. R. P. No. 348 of 1939 and C. R. P. No. 971 of 1942, followed.

Appeal against the order of the Court of the Subordinate Judge of South Malabar at Palghat, dated 2nd July, 1946, in A. S. Nos. 179 and 180 of 1945, preferred against the order of the Court of the District Munsiff, Alattur, in E.A. Nos. 645 and 1086 of 1944 in O. S. No. 508 of 1938.

V. Balakrishna Eradi for Appellant.

C. S. Swaminathan for Respondent.

The Court delivered the following

JUDGMENT.—The facts necessary for the disposal of this case may be shortly stated. The appellant had a kanom over certain properties which belonged in jenm to the Kuthiravattath tarwad.

On 6th September, 1923, the appellant borrowed Rs. 600 from and executed a promissory note in favour of one Appu Pattar who was the manager of a joint Hindu family. On 9th August, 1924, the appellant executed a deed of simple mortgage, Ex. P-1, hypothecating 18 items of property to Appu Pattar to cover the amount due under the promissory note of 1923 and a further cash advance. Ex. P-1 was for Rs. 1,000.

There was a partition in Appu Pattar's family in 1930. It is common ground that this was evidenced by a registered deed of partition. It is also common ground that at that partition the mortgage evidenced by Ex. P-1 fell to the share of the

* A. A. A. O. No. 319 of 1946. 22nd July, 1948.

Appu Pattar's brother, Srinivasa Pattar, who is the respondent in the present appeal.

On 9th August, 1935, a fresh document of mortgage, Ex. P-2 was executed by the appellant in favour of the respondent. This covered the same 18 items, but 15 out of these items were put in the possession of the mortgagee while the remaining three continued in the possession of the mortgagor. It is not in dispute that Ex. P-2 was executed in renewal of Ex. P-1, the amount due as per Ex. P-2 being Rs. 1,910.

It is necessary to state a few more facts to show how the present litigation has arisen.

The jenmi gave a melcharth over the properties covered by the appellant's kanom to one Parvathi. She filed a suit to redeem the kanom in favour of the appellant impleading the appellant as the first defendant and the respondent as the second defendant. A decree was passed in her favour, directing possession of the properties to be given to her on her paying the value of the improvements which was ascertained. There was a direction also that out of the amount deposited, the respondent should be paid the amount due to him under Ex. P-2. As the appellant and the respondent were not agreed as to what amount was due, the ascertainment of the amount payable under Ex. P-2 was reserved to the execution stage.

The melcharthdar deposited the amount in due course. The respondent then applied for a cheque for what he claimed to be due to him, his contention being that the debt under Ex. P-2 is not liable to be scaled down at all under the provisions of Madras Act IV of 1938. The contention of the appellant, on the other hand, was that the debt is liable to be scaled down. It is not in dispute that the appellant is an agriculturist within the meaning of Madras Act IV of 1938. The District Munsiff of Alattur, in whose Court the application for payment out was made by the respondent, held that the debt was liable to be scaled down and fixed the amount payable to the respondent in respect of Ex. P-2 at Rs. 950, and directed some deductions to be made out of it. On appeal, the Subordinate Judge of South Malabar at Palghat reversed the decree of the District Munsiff and held that the respondent was entitled to be paid the entire amount due under Ex. P-2 without any scaling down.

On behalf of the appellant, Mr. V. Balakrishna Eradi argues that the debt should have been scaled down and that the process of scaling down must be carried back to the promissory note of 1923.

It is well settled that in order to take back the process of scaling down, it is necessary that the identity of the creditor, the identity of the debtor and the identity of the debt must all be established. There is no dispute here that the debtor is the same throughout the relevant period; nor is there any question that the debt is the same. The debt is the same notwithstanding that there was, as already pointed out, a cash advance in 1924 when the original promissory note merged in the deed of simple mortgage, Ex. P-1.

The discussion before me centred round the question whether it could be said that the creditor was the same throughout. "Creditor" has been defined in section 3 (5) of Madras Act IV of 1938 as follows: "Creditor" includes his heirs, legal representatives and assigns. Mr. Balakrishna Eradi's argument is that the respondent is an assignee within the meaning of that definition from the original creditor under Ex. P-1, namely, the joint family represented by Appu Pattar. It is common ground that Appu Pattar took the promissory note and obtained the mortgage Ex. P-1 as the manager of a joint Hindu family consisting of himself and the respondent.

In dealing with the provisions of the Madras Agriculturists' Relief Act with particular reference to the definition of "creditor" it has been repeatedly held that an assignment within the meaning of the definition must be a legal assignment

and not a mere equitable assignment or an informal assignment. Proceeding on this line of reasoning, it has been held that where a debt belongs to a joint Hindu family at one time but belongs after partition to one branch or one or more members of that family, there is, subject to the exception, to which I shall presently refer, no assignment within the meaning of the Act. That exception arises where there is a document of partition, setting out the terms of the partition and allotting a particular item to the share of one member or one branch of the family. It is somewhat curious that there is no reported judgment dealing with what I have characterised as the exception. Mr. Balakrishna Eradi, however, took great pains and has been able to show me some unreported judgments of Wadsworth and Patanjali Sastri, JJ., which place the matter beyond all doubt. In C. R. P. No. 348 of 1939, Wadsworth and Patanjali Sastri, JJ., held following the decisions in *Venkatadri* v. *Lakshminarasimha*[1] and *Muthar Sahib* v. *Kadir Sahib*[2], that if there was a writing at the time of the partition evidencing the allotment of a promissory note debt to a person, that would be a legal assignment giving him the position of a creditor under the note and that if he was the assignee of the former creditor, the definition of " creditor " in Madras Act IV of 1938 would make him the " same creditor." In C. R. P. No. 971 of 1942, the principle was applied to a case where the partition was evidenced by a partition decree. If the debt is a mortgage debt, for the purpose of a legal assignment, a registered document would undoubtedly be necessary, but that requirement is satisfied in this case as admittedly the deed of partition executed by Appu Pattar and Srinivasa Pattar was registered.

However the position might have stood if there had been no registered deed of partition, it cannot, in the light of the above decisions, be denied that there was a legal assignment of the mortgage to the respondent by a registered deed of partition executed in his family in 1930. This position is well established for the purpose of Madras Act IV of 1938. It is therefore unnecessary to inquire whether and to what extent a partition can be regarded as an assignment for the purpose of other statutes or where questions other than those which arise under Madras Act IV of 1938 fall to be considered. That is why I have refrained from discussing the several decisions which have been quoted by the learned advocate for the appellant and by Mr. Swaminatha Aiyar the learned advocate for the respondent—decisions which have analysed the character of a partition transaction for the purposes of several statutory enactments.

The only point that arises in this civil miscellaneous second appeal being one under Madras Act IV of 1938, I am bound by the decisions already quoted, to hold that the appellant has succeeded in establishing that there is an identity of the creditor, so that he can claim the benefit of the scaling down of the debt, tracing back its history to the promissory note of 1923. The learned counsel agree that on this basis the correct amount is what was fixed by the learned District Munsiff.

I should notice one further argument raised by Mr. Swaminatha Aiyar on behalf of the respondent. Adverting to the fact that 15 out of the 18 items of property were usufructuarily mortgaged to the respondent under Ex. P-2, Mr. Swaminatha Aiyar argued that his client was entitled to the benefit of section 10 (2) (*i*) of the Act, which provides that nothing contained in sections 8 and 9 shall affect any mortgage by virtue of which the mortgagee is in possession of the property mortgaged, where no rate of interest is stipulated as due to the mortgagee. This contention did not find acceptance with either of the Courts below. I too am unable to accept it. On a reading of Ex. P-2 it is clear that there is a single debt of Rs. 1,910. The security for the debt consists of 18 items of property. As already stated, 15 out of them were put in the possession of the mortgagee while the other 3 items continued to be in the possession of the mortgagor. It would not therefore be correct to describe the transaction as a mortgage, by virtue of which the mortgagee is in possession of the property mortgaged as admittedly the mortgagee is

1. (1910) 21 M.L.J. 80.
2. (1905) 15 M.L.J. 384: I.L.R. 28 Mad. 544.

in possession only of a portion of the property mortgaged. Having regard to the terms of Ex. P-2 it is not also possible to read it as embodying two transactions; one a usufructuary mortgage in regard to certain items for one amount and the other a deed of hypothecation in respect of other items for another amount. There is, as already stated, a single amount for which all the properties are given as security and the debt is not split up as between,—if I may so describe it—the usufructuarily mortgaged portion of it and the hypothecated part of it. In this view, the respondent is not entitled to the benefit of section 10 (2) (*i*) of the Act.

The result is that the decree of the lower appellate Court must be set aside and the decree of the first Court must be restored with costs here and in the lower appellate Court.

No leave.

B.V.V. — *Appeal allowed.*

[PRIVY COUNCIL].

(On appeal from the High Court of Judicature at Bombay.)

PRESENT :—LORD SIMONDS, LORD OAKSEY AND SIR JOHN BEAUMONT.

The Premier Construction Co., Ltd. .. *Appellant**

v.

The Commissioner of Income-tax, Bombay City .. *Respondent.*

Income-tax Act (XI of 1922), *sections* 2 (1) *and* 4 (3) (viii)—*Income under managing agency agreement with a company part of whose income was agricultural income—Proportionate part of the managing agent's remuneration, if also agricultural income exempt from income-tax.*

Where an assessee receives income, not itself of a character to fall within the definition of agricultural income contained in the Act, such income does not assume the character of agricultural income by reason of the source from which it is derived, or the method by which it is calculated. But if the income received falls within the definition of agricultural income it earns exemption, in whatever character the assessee receives it.

The assessee, a firm, was the managing agents of a company part of whose income was agricultural income as defined in the Income-tax Act. The assessee claimed that as its remuneration was calculated with reference to the income of the principal company, part of which was agricultural income, such part of its remuneration as was proportionate to the agricultural income of the principal company, was itself agricultural income and as such exempt from income-tax.

Held, the assessee received no agricultural income as defined by the Act; it received remuneration under a contract for personal service calculated on the amount of profits earned by the employer company without regard to the source from which those profits are derived and payable, not *in specie* out of any item of such profits, but out of any moneys of the employer company available for the purpose. The remuneration therefore is not agricultural income and is not exempt from tax.

Sir Cyril Radcliffe, K.C. and *R. P. Hills* for Appellant.

J. M. Tucker, K.C. and *R. K. Handoo* for Respondent.

Their Lordships' Judgment was delivered by

SIR JOHN BEAUMONT.—This is an appeal from a judgment of the High Court of Judicature at Bombay, dated 27th March, 1945, given upon the reference of a question of law made to the Court under section 66 (1) of the Indian Income-tax Act by the Appellate Tribunal.

The question referred to the High Court was in the following terms:

"Whether, in the circumstances of this case, that portion of the income received by the assessee from the principal company of Marsland Price and Company, Limited, which is proportionate to the 'agricultural income' earned by the principal company, is 'agricultural income' within the meaning of section 2 (1) of the Indian Income-tax Act, 1922, and exempt from assessment under the provisions of section 4 (3) (*viii*) of the Act."

The High Court answered this question in the negative, taking the same view of the law as had been taken by the Income-tax Officer, the Appellate Assistant Commissioner of Income-tax, Bombay, and the Income-tax Appellate Tribunal.

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* P. C. Appeal No. 41 of 1947. 28th June, 1948.

Their Lordships have no doubt that the view unanimously held by the Tribunals in India is correct.

The assessee, at all material times, was the Managing Agent of Marsland Price and Company, Limited (hereinafter called "the principal company"), under an agreement, dated 1st February, 1926, and made between the principal company of the one part and the assessee (by its then name of the Tata Construction Company, Limited) of the other part. The remuneration of the assessee was regulated by clause 2 of the agreement and under sub-clause (*b*) the assessee was entitled to:

"A commission at the rate of ten per cent. per annum on the annual nett profits of the principal company after making all proper allowances and deductions from revenue for working expenses chargeable against profits but without making any deduction for depreciation or in respect of any amount carried to reserve or sinking fund or any payment on account of super tax or any deduction for expenditure on capital account provided that such commission shall not in any year amount to a less sum than rupees ten thousand".

The year of assessment was the year 1942-1943. In that year the assessee received as remuneration under the Managing Agency Agreement a commission at the rate of ten per cent. of the nett profits of the principal company, that sum being in excess of the minimum salary secured by the agreement. The whole of this remuneration, less certain deductions which are not in question, was assessed to income-tax by the Income-tax Officer.

One of the sources of income of the principal company is the manufacture of sugar from cane grown on its own farms and from other cane bought from outside, and it is not disputed that in so far as its income is derived from sugar manufactured from its own cane such income is agricultural income and as such is exempt from income-tax. The assessee claimed that as its remuneration was calculated with reference to the income of the principal company, part of which was agricultural income, such part of the remuneration as was proportionate to the agricultural income of the principal company, was itself agricultural income and as such exempt from income-tax. As already indicated, this claim was rejected by the Income-tax Officer, and in appeal by the Assistant Commissioner of Income-tax and the Appellate Tribunal. At the request of the assessee the Appellate Tribunal referred to the High Court the question already mentioned.

"Agricultural income" is rendered exempt from income-tax by section 4 (3) (*viii*) of the Indian Income-tax Act. "Agricultural income" is defined by section (2) (1) of the Act, so far as relevant, as:

(*a*) Any rent or revenue derived from land which is used for agricultural purposes. . . . . . .

(*b*) Any income, derived from such land:

(*i*) Agriculture, or

(*ii*) The performance of certain specified acts which may be paraphrased as acts necessary to render agricultural produce fit for market and sale.

Nothing turns on the exact words of this sub-section.

In the opinion of their Lordships the effect of the Managing Agency Agreement is that the assessee is entitled, in consideration of services rendered, to a minimum annual salary of Rs. 10,000 which is payable irrespective of whether or not the principal company has made any profit. If, in any year, ten per cent. of the profits made by the principal company exceeds Rs. 10,000, then the agent gets remuneration calculated as a percentage upon the profits of the principal company, without regard to the sources from which those profits are derived.

In determining the question at issue some previous decision of this Board must be noticed. In *Gopal Saran Narain Singh* v. *Commissioner of Income-tax, Bihar and*

Orissa[1], the assessee was entitled to an annuity under a contract, the annuity being made a charge upon agricultural land. The Board held that the annuity was not rent or revenue derived from land; it was money payable under a contract imposing personal liability on the covenantor, the discharge of which was secured by a charge on land. In *Commissioner of Income-tax, Bihar and Orissa* v. *Maharajadhiraj of Darbhanga*[2], the assessee carried on business as a money-lender. As security for a debt due to him in respect of his business he was put into possession of agricultural land as a mortgagee. It was held that the rents received by the assessee from the agricultural land were agricultural income and exempt from income-tax, and that the exemption was not affected by the circumstance that the rents were received as part of the money-lending business of the assessee, the exemption depending on the kind of income received and not on the character of the recipient. In *Nawab Habibulla* v. *Commissioner of Income-tax, Bengal*[3], the assessee as the Mutavalli of a Wakf received as remuneration for his services a monthly salary. It was held by the Board that the fact that the income of the Wakf was derived from agricultural land did not make the remuneration paid to the Mutawalli " agricultural income " since the remuneration did not depend either on the nature of the properties which constituted the Wakf Estate, or on the amount of income derived therefrom by the Estate. With this case may be compared *Muhammad Isa* v. *Commissioner of Income-tax, Central and United Provices*[4], where the High Court of Allahabad held that the assessee as Mutawalli of a Wakf was entitled, by way of remuneration for his services, to retain as a beneficiary the agricultural income of the Wakf Estate and that such remuneration was therefore free from income-tax.

In their Lordships' view the principle to be derived from a consideration of the terms of the Income-tax Act and the authorities referred to is that where an assessee receives income, not itself of a character to fall, within the definition of agricultural income contained in the Act, such income does not assume the character of agricultural income by reason of the source from which it is derived, or the method by which it is calculated. But if the income received falls within the definition of agricultural income it earns exemption, in whatever character the assessee receives it. In the present case the assessee received no agricultural income as defined by the Act ; it received remuneration under a contract for personal service calculated on the amount of profits earned by the employer, payable, not *in specie* out of any item of such profits, but out of any moneys of the employer available for the purpose. The remuneration therefore is not agricultural income and is not exempt from tax.

For these reasons their Lordships will humbly advise His Majesty that this appeal be dismissed. The appellant must pay the costs.

Solicitors for Appellant : *Sanderson Lee & Co.*

Solicitor for Respondent : *Solicitor, High Commissioner for India.*

V.S. *Appeal dismissed.*

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Madras.)

PRESENT :—LORD NORMAND, LORD OAKSEY AND SIR JOHN BEAUMONT.

Muthuswami Thevar .. *Appellant**

v.

Chidambara Thevar .. *Respondent.*

Hindu Law—Adoption—Who can give—Burden of proving an adoption—Madras school—Sudras—Adoption of married man—Validity.

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1. (1935) 69 M.L.J. 190 : L.R. 62 I.A. 207 : I.L.R. 14 Pat. 552 (P.C.).
2. (1935) 69 M.L.J. 474 : L.R. 62 I.A. 215 : I.L.R. 14 Pat. 623 (P.C.).
3. (1943) 1 M.L.J. 494 : L.R. 70 I.A. 14 : I.L.R. (1943) 1 Cal. 367 (P.C.).
4. I.L.R. (1942) All. 425.

* P. C. Appeal No. 61 of 1947. 19th July, 1948.

Under Hindu Law the only persons who can give a son in adoption are the father and the mother, and in the lifetime of the father, the mother cannot act without his permission.

The burden of proving an adoption rests on him who asserts it, and the burden is a heavy one.

According to the Dattaka Chandrika, which is regarded as authoritative in the Province of Madras, marriage concludes the period within which a Sudra may be adopted.

Sir Herbert Cunliffe, K.C. and *P. V. Subba Row* for Appellant.

H. J. Umrigar and *Miss K. Tyabji* for Respondent.

Their Lordships' Judgment was delivered by

SIR JOHN BEAUMONT.—This is an appeal from a judgment and decree of the High Court of Judicature at Madras, dated 12th January, 1945, reversing a judgment and decree of the Subordinate Judge of Ramnad dated 11th August, 1943.

By an Order in Council, dated 19th February, 1946, the appellant was granted special leave to appeal to His Majesty in Council, leave to appeal having been refused by the High Court on the ground that the case did not fulfil the requirements of the Code of Civil Procedure as to value. On the hearing of this appeal the respondent took the preliminary objection that the value of the subject-matter in dispute on appeal did not amount to Rs. 10,000 and that leave to appeal should not have been given. The respondent had appeared on the petition for leave to appeal when the question of value was fully debated. The Order in Council did not reserve liberty to the respondent to raise this matter again at the hearing and in their Lordships' opinion the preliminary objection is not now open.

The substantive question raised in the appeal is whether the respondent was validly adopted by one Chinnamadappa. The matter involves two questions. The first whether there was an adoption in fact, and the second, if there was an adoption, whether it was rendered invalid by the circumstances, alleged by the appellant but denied by the respondent, that the respondent at the time of the adoption was a married man. The Subordinate Judge answered these questions in favour of the appellant; the High Court answered them in favour of the respondent.

The material facts are these :—

Chinnamadappa and his elder brother Muthirulappa, and the appellant, who is the only son of Muthirulappa were members of a Joint Hindu family. Chinnamadappa had a daughter, the second defendant in this suit, who has since died, but no son. The respondent is the son of Arunachala who had married a sister of Chinnamadappa. The parties are Sudras. It is alleged by the respondent, but denied by the appellant, that on 19th October, 1934, a ceremony took place at which the respondent was validly adopted by Chinnamadappa. At this time the respondent was a grown up man; he himself put his age at about twenty-three or twenty-four, and the learned Subordinate Judge thought that he was somewhat older. On 3rd November, 1934, Chinnamadappa executed a deed of adoption (Ex. D. 1) before the Sub-Registrar. The deed recites that the respondent, the younger son of Arunachala was taken in adoption by Chinnamadappa on 19th October, 1934, with the consent of Chellamuthu the elder uterine brother of the respondent according to law and according to Shastras. The deed was signed by Chinnamadappa, and there were six witnesses, including Muthirulappa and Chellamuthu, but not including Arunachala. The deed was duly registered on 6th November, 1934. Chinnamadappa died in December, 1934.

On 20th July, 1936, the respondent presented a petition to the Tahsildar of Kamudhi alleging his adoption by Chinnamadappa, and that he and Muthirulappa were enjoying the family properties as a joint family, and praying that the name of the petitioner might be included as a joint pattadar of the properties mentioned and that the patta might be issued in his name and the name of Muthirulappa. In answer to this petition Arunachala made a statement [Ex. P. 7 (*c*)] before the Tahsildar in which he said that he had not given the respondent in adoption to

Chinnamadappa, that the respondent and Chellamuthu were living in his family alone, that he did not know anything about the adoption deed, and that he and his two sons were living together though separated, and that the respondent was then thirty-five years old.

On 18th April, 1938, Arunachala filed two petitions [Exs. P. 3 and P. 3 (*a*),] one before the Tahsildar of Kamudhi, Ramnad Estate, and the other before the Revenue Officer, Southern Circle, Ramnad Estate. In both the petitions, which are in similar terms, Arunachala stated that he did not give the respondent in adoption to anybody ; that the respondent would be bound to do the funeral ceremony to himself and that the respondent had been residing on the petitioner's property since childhood up to that date. On 11th July, 1938, the Estate Manager of Ramnad passed an order to the effect that a joint patta would be issued unless a suit was filed for adjudication of the dispute as to the adoption by a Civil Court. On 19th September, 1938, the appellant brought the suit from which this appeal arises in the Court of the Subordinate Judge of Ramnad for a declaration that the alleged adoption of the respondent by Chinnamadappa never in fact took place, and that if it did, it was invalid. Arunachala had died before the hearing of the suit, but his statements [Exs. P. 7 (*c*), P. 3 and P. 3 (*a*)], which were against his pecuniary and proprietary interest were proved.

It is well settled under Hindu Law that the only persons who can give a son in adoption are the father and the mother, and in the lifetime of the father the mother cannot act without his permission. The main question in this appeal is whether a valid adoption of the respondent is proved in view of the denial by the father that he ever gave the respondent in adoption. The burden of proving an adoption rests on him who asserts it, and the burden is a heavy one. In *Dal Bahadur Singh* v. *Bijai Bahadur Singh*[1], Lord Buckmaster in delivering the opinion of their Lordships referred to the very grave and serious onus that rests upon any person who seeks to displace the natural succession of property by alleging an adoption.

The direct evidence as to the holding of the alleged adoption ceremony consists of six witnesses called by the appellant who say that no such ceremony took place, and that if there had been such a ceremony they themselves would have been invited to it ; and five witnesses called by the respondent who say that they were present at the ceremony and that Arunachala gave the respondent in adoption. All the witnesses seem to have been friends or relations of the parties and there is no corroboration of their testimony such as is often found in cases of disputed adoption. No priest or local official who might be regarded as disinterested was called ; no cards of invitation to the ceremony were produced, and there was no photograph of the ceremony. The direct evidence in support of the ceremony was therefore weak and it is not surprising that it did not impress the trial Judge. Mr. Justice King, who delivered the judgment of the High Court based his view that the adoption was proved mainly on the adoption deed, but the judgment is to a large extent vitiated by the Court having placed the burden of proof on the wrong shoulders. Towards the close of his judgment Mr. Justice King said,

> "We are of the opinion that the plaintiff in this suit has entirely failed to prove that the adoption of the first defendant which has been solemnly recited in a registered deed, never took place."

There is no doubt force in the argument that it is unlikely that Chinnamadappa would have executed a formal deed of adoption before the Sub-Registrar, if he knew that no adoption had in fact taken place. This argument however does not carry the respondent far enough. It may be that a ceremony did take place as alleged, and that Chinnamadappa believed the adoption to be valid. He may have been told that Arunachala approved the adoption, as would be natural, since it was to the benefit of himself and his family, and that he had asked his eldest son Chellamuthu to deputise for him in the physical act of handing the respondent over in adoption. But the fact that Cihnnamadappa supposed

1. (1929) 58 M.L.J. 446 : L.R. 57 I.A. 14 at 19 : I.L.R. 52 All. 1 (P.C.).

the adoption to be valid would not help, if in fact Arunachala did not consent to it. The statement of Arunachala that he did not give the respondent in adoption is corroborated by the terms of the adoption deed which refers only to the consent of the respondent's brother, whilst his statement that he knew nothing about the adoption deed is corroborated by the omission of his name as an attesting witness. The reason given in evidence for this omission was that Arunachala was unable to write, but as the learned Subordinate Judge observed he could have affixed his thumb impression.

Other matters on which the Judges of the High Court relied as indirect evidence in support of the adoption can be disposed of shortly. Great importance was attached to the fact that Muthirulappa had agreed to the adoption although it introduced a new member into his family, and reduced his share in the family property. The appellant says that his father was hostile to him and that this explains his support of the adoption. But apart from this, a Hindu in relation to adoption, has to consider matters other than financial benefit, and Muthirulappa may have thought it was proper that his brother who had no son, should be encouraged to adopt a nephew, and so derive spiritual benefit. The High Court further considered that the documents produced in evidence showed that both the appellant and the respondent had taken part in the management of this estate, whilst it was conceded that all the most important documents belonging to the family, including more than sixty title deeds, were in the possession of the respondent. But as the discussion of the evidence by the learned Subordinate Judge shows that the muchilikas relating to the estate were executed after the death of Chinnamadappa by Muthirulappa, and after his death by the appellant and not by the respondent; and the bulk of the receipts for dues paid to the estate were in the name of the appellant. The respondent produced two such receipts D.8 and D.8 (*a*) which were for small sums and given on the same day and their Lordships think no great sigficance can be attached to them. The possession by the respondent of family document can be explained on the footing that he received them from Muthirulappa who always supported the adoption. In the result their Lordships see no reason for rejecting the statement of Arunachala and agree with the learned Subordinate Judge in thinking that a valid adoption of the respondent by Chinnamadappa has not been proved.

On this view of the matter the question whether the respondent was married, and if so what effect that had on the validity of the adoption, does not arise. As, however, the question led to a difference of opinion in the Courts in India, their Lordships would observe that they think the evidence establishes that the respondent was married some years ago. There is evidence that he had divorced his wife before the date of the adoption ceremony, but according to the Dattaka Chandrika, which is regarded as authoritative in the Province of Madras, marriage concludes the period within which a Sudra may be adopted (*Vythilinga* v. *Vijayathammal*[1], and *Lingayya Chetti* v. *Chengalammal*)[2]. If their Lordships had thought the fact of adoption proved, they would have held the adoption invalid on the ground of the marriage of the respondent.

For these reasons their Lordships will humbly advise His Majesty that this appeal be allowed, that the decree of the High Court of Madras dated 12th January, 1945, be set aside and that the decree dated 11th August, 1943, of the Subordinate Judge of Ramnad be restored. The respondent must pay the costs of the appeal to the High Court and of this appeal.

Solicitors for the Appellant: *T. L. Wilson & Co.*

Solicitors for the Respondent: *Douglas Grant & Dold.*

V.S *Appeal allowed.*

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1. (1882) I.L.R. 6 Mad. 43.
2. (1924) 47 M.L.J. 776: I.L.R. 48 Mad. 407

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Madras.)

PRESENT :—LORD SIMONDS, LORD MACDERMOTT AND SIR JOHN BEAUMONT.

Balasubramania Raghunatha Rangaswami Singapuliar .. *Appellant**

v.

S. T. Nagappa Chettiar *alias* Chockalinga Chettiar (since deceased) now represented by S. T. Muthiah Chettiar and others .. *Respondents.*

Privy Council—Practice—Matters relating to accounts.

In matters relating to accounts the Board will determine any question of principle involved but will not consider mere items of account.

Practice Note, L.R. 69 I.A. 172 (P.C.), relied on.

C. S. Rewcastle, K.C. and *B. Sen* for Appellant.

J. M. Pringle, K.C. and *P. V. Subba Row* for Respondents.

Their Lordships' Judgment was delivered by

SIR JOHN BEAUMONT.—This is an appeal from a judgment and order of the High Court of Judicature at Madras, dated 22nd March, 1945, which varied a judgment and order of the Court of the Subordinate Judge of Tanjore dated 15th December, 1942.

The only matter for consideration in the appeal is the correctness or otherwise of the accounts of a receiver as a preliminary to his discharge following upon the final determination of the dispute between the parties to the litigation.

It is well established that in matters relating to accounts the Board will determine any question of principle involved but will not consider mere items of account. See Practice Note in L.R. 69 I.A., page 172. The present appeal appears to involve no question of principle.

The original first respondent S. T. Nagappa Chettiar (hereafter referred to as "the receiver"), who has died pending the hearing of this appeal, was originally appointed receiver in the year 1924. The suit in which he was so appointed raised the question of the validity of a sale of 14 villages made by the predecessor in title of the appellant to the receiver in his private capacity. The suit resulted in its being held that the sale was invalid, but that the receiver was entitled to retain possession of the 14 villages until he had been paid a sum of Rs. 85,000 with simple interest at 9 per cent. per annum, a sum which now amounts to over Rs. 3 lakhs.

In order to work out the final order in the suit it was necessary to take accounts of the receiver. Various orders were made directing him to deliver accounts and on two occasions certain of the accounts were audited. Eventually the Subordinate Judge to whom the suit had been transferred, appointed a commissioner to examine certain accounts of the receiver. The commissioner made a report to which both parties carried in exceptions.

At the hearing the Subordinate Judge came to the conclusion that the accounts delivered by the receiver were so unsatisfactory as to make it impracticable to act upon them, and he held that the receiver should be charged with a net income of Rs. 9,000 per annum received from the 14 villages during a period of 18 years making a sum of Rs. 1,62,000. Debiting that amount to the receiver the Subordinate Judge found the balance due to him at Rs. 1,48,228. The learned Judge however discussed an alternative method of fixing the amount due to the receiver, based as far as practicable on his accounts, and considered the allowances which it would be proper to make to the receiver on that basis.

In appeal the learned Judges of the High Court expressed the view that the Subordinate Judge was not justified in discarding the accounts altogether, and it is

* P. C. Appeal No. 47 of 1947. 19th July, 1948.

argued by the appellant that the learned Judges therein were wrong in principle. But the Judges of the High Court did not hold that the accounts should be treated as conclusive, nor do they seem to have acted upon them to any great extent. Obviously they were entitled to accept so much of the accounts as they thought reliable. The method which the learned Judges of the High Court adopted for working, out of the liability of the receiver was to take his gross receipt at Rs. 2,72,986, a figure which they say was not in dispute, although the learned Subordinate Judge had considered that that figure should be reduced to Rs. 2,28,049, and they then considered the allowances which should be made to the receiver, this being the alternative method which had been adopted by the Subordinate Judge. The two major points upon which the Judges of the High Court differed from the view of the Subordinate Judge were, first, that whereas the Subordinate Judge had expressed the view that 10 per cent. might be allowed for rents irrecoverable, the Judges of the High Court thought, for reason which commend themselves to their Lordships, that 30 per cent. would be a fair allowance. The second point of difference related to establishment charges upon which the Judges of the High Court took a view more generous to the receiver than that which appealed to the Subordinate Judge, but the claim put forward by the receiver under this head was not accepted in full.

Having determined the basis on which the accounts should be taken the High Court remanded the case to the lower Court to draw up an account in the light of the judgment. The case came on remand before a Subordinate Judge other than the Trial Judge, who drew up an account on the basis of the judgment of the High Court and found the amount due to the receiver at Rs. 2,06,821. No objection has been taken to the judgment on remand if the judgment of the High Court was right.

As already indicated in the view of their Lordships there is no ground for suggesting that the High Court acted upon any wrong principle, and their Lordships may add that they see no ground for thinking that the High Court erred in respect of any of the items dealt with.

For these reasons their Lordships will humbly advise His Majesty that this appeal be dismissed with costs.

Solicitors for Appellant :—*Hy. S. L. Polak & Co.*

Solicitors for Respondents :—*Lambert and White.*

V.S. *Appeal dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Maramreddi Ramireddi, minor by guardian and natural mother Nagabhushanamma .. *Appellant**

v.

Vallapareddi Ramakrishnareddi and another .. *Respondents.*

Civil Procedure Code (*V of* 1908), *Order XXII, rule* 3—*Application to be brought on record as legal representative—Dismissal—Appeal held to have abated—Proper remedy.*

Where pending the disposal of an appeal, the appellant dies and a person claiming to be the legal representative of the appellant, applies to the Court to be brought on record, but his application is dismissed on the ground that he was not the legal representative and consequently the appeal is held to have abated his only remedy is to appeal against the order of abatement as it is equivalent to a decree, and not to seek to revise or appeal against the order of dismissal of his application.

Case law discussed.

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*A.A.O. No. 619 of 1946 and C.R.P. No. 1418 of 1946. 5th August, 1948.

Appeal against the order of the District Court, Nellore, dated 13th March, 1946, in I.A. 118 of 1946 in A.S. No. 434 of 1945, etc.

V. Vedantachari and *T. Rangaswami Aiyangar* for Appellant.

K. Umamaheswaram and *M. S. Ramachandra Rao* for Respondents.

The Court delivered the following

JUDGMENT.—Kamamma filed a suit for a declaration that she was the owner of certain property and for an injunction restraining the defendants from interfering with her possession.

The husband of Kamamma entered into an agreement with his brother whereby he was to enjoy the suit land for his lifetime, after which it was to pass to his brother absolutely. The widow claimed that that agreement was not binding on the estate, which she represented, and that in any event she had become the owner of the property by adverse possession. Her suit was dismissed. She in due course filed an appeal (A.S. No. 434 of 1945) ; but before she did so she had adopted the present appellant. He, however, was not made a party to the appeal ; and some time after the appeal had been filed the widow died. The appellant then sought to be brought on record as her legal representative. Thereupon, two applications were filed ; I.A. No. 773 of 1945 under Order 22, rule 3, for the appellant to be brought on record as the legal representative, and again on the date of hearing, I.A. No. 118 of 1946 under Order 22, rule 10 of the Civil Procedure Code, and Order 1, rule 10 of the Civil Procedure were filed. These petitions were dismissed on the ground that the appellant was not the legal representative of the widow and that as her interest had not devolved upon him he could not be added as a party under Order 1, rule 10 of the Civil Procedure Code. Upon his applications being dismissed, the appeal was held to have abated.

Against the order on the petition filed under Order 22, rule 3 of the Civil Procedure Code, C.R.P. No. 1418 of 1946 has been filed ; and against the order in I. A. No. 118 of 1946, C.M.A. No. 619 of 1946 has been filed.

The main question discussed in this appeal and civil revision petition is whether the appellant has any remedy by way of an appeal against the order that the appeal has abated. When a similar question was considered in *Subramania Iyer* v. *Venkataramier*[1], the learned Judges said,

> "We think that an order of the Court declaring that a suit has abated owing to the cause of action not surviving is a decree, as it determines that the right of the plaintiff ceased to exist on his death and, therefore, it falls within the definition of a decree, there being no appeal provided for in the Code from that order."

They therefore held that the only remedy of a person whose application to be brought on record as a legal representative has been dismissed is to appeal against the order of abatement. It has been argued that this decision cannot be right and that later decisions of this Court have thrown some doubt on its correctness. It is argued that since the person seeking to be brought on record as a legal representative is not a party to the appeal, his application to be made a party having been dismissed, he is not a party to the order of abatement and would therefore have no right of appeal. Although he is not *eo nomine* a party to the order of abatement, yet, in essence, every person who could possibly claim any interest through the late widow can be said to be affected by the order, because the order is in effect a finding that there is no person entitled to continue the suit after the death of the appellant. *Subramania Iyer* v. *Venkataramier*[1], was followed in *Suppa Naicken* v. *Perumal Chetti*[2], where the question was discussed at much greater length. *Subramania Iyer* v. *Venkataramier*[1], did not discuss the earlier decisions of this Court ; but in *Suppa Naicken* v. *Perumal Chetti*[2], *Bhikaji Ramachandra* v. *Purushottam*[3], *Subbayya* v. *Saminatha Aiyar*[4], *Meenatchi Achi* v. *Anantanarayana Iyer*[5], as well as *Subramania Iyer* v. *Venkataramier*[1], were followed and other decisions of this High Court and of

1. (1914) 31 I.C. 4.
2. (1916) 30 M.L.J. 486.
3. (1885) I.L.R. 10 Bom. 220.
4. (1895) 5 M.L.J. 63 : I.L.R. 18 Mad. 496
5. (1902) 12 M.L.J. 380 : I.L.R. 26 Mad. 224.

other High Courts considered. It is true that in the particular case under consideration in *Suppa Naicken* v. *Perumal Chetti*[1], the person claiming to be the legal representative had been added as a party and the question was raised in the form of an issue; but that does not mean that this decision was an *obiter dictum*; for the learned Judges thought it necessary for the disposal of the matter before them to give a finding on the question whether an order of abatement was a decree, and for the purpose of giving a decision considered the authorities above referred to. In *Ayya Mudali Velan* v. *Veerayyee*[2], Oldfield and Seshagiri Aiyar, JJ., held that an order refusing to bring a party on record was itself a decree and therefore appealable as such; but that decision was expressly overruled in *Venkatakrishna Reddi* v. *Krishna Reddi*[3], in which, however, the question whether an appeal lay against an order of abatement was expressly left open. That decision did not, therefore, weaken the effect of the decisions in *Subramania Aiyar* v. *Venkataramier*[4], and *Suppa Naicken* v. *Perumal Chetti*[1], and the cases that preceded them. As recently as in *Gopalakrishna* v. *Lakshmikantham*[5], Happell, J., held that *Suppa Naicken* v. *Perumal Chetti*[1], is still good law and that a person claiming to be a legal representative and whose application to be brought on record is dismissed has no other remedy except to appeal against the order of abatement.

As far as C.M.A. No. 619 of 1946 is concerned, Order 22, rule 10, would not apply, since that rule applies only to cases not covered by the rules preceding it; so that cases covered by Order 22, rule 3, could not be brought within the ambit of Order 22, rule 10. No appeal therefore lies.

Even if we assume that the petitioner might have been brought on record as the legal representative of his mother, on the grounds that she had acquired title by adverse possession and that he was her heir and that technically there is no bar to the institution of a civil revision petition, this Court would not ordinarily entertain a revision petition when an alternative remedy by way of an appeal against the order of abatement lies.

I have been requested to convert the civil revision petition into an appeal; but that cannot be done, because the order to be appealed against is not the order against which the civil revision petition has been preferred. It is true that the order of abatement may have been passed immediately after the order dismissing the interlocutory applications, but that would make it nonetheless a distinct order.

The civil revision petition and the civil miscellaneous appeal are therefore dismissed with costs, one set for both proceedings. All the printing charges may be included in the costs.

V.P.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Alla Annapurnamma .. *Appellant**

v.

P. L. Swami .. *Respondent.*

Registration Act (*XVI of* 1908), *section* 17 (2) (vi)—*Applicability—Compromise decree in suit in which immoveable property was also the subject-matter—Registration—Necessity.*

In a suit for a settlement of the accounts of the profits, income and expenditure of a certain talkie concern in which the plaintiff claimed a three-annas share, the defendant pleaded in defence a compromise decree in a prior suit between the same parties according to which the plaintiff's right in the suit property in the later suit became extinguished. On a question whether the compromise required registration,

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1. (1916) 30 M.L.J. 486.
2. (1920) 39 M.L.J. 218: I.L.R. 43 Mad. 812.
3. (1925) 50 M.L.J. 485: I.L.R. 49 Mad. 450 (F.B.).
4. (1914) 31 I.C. 4.
5. (1943) 2 M.L.J. 17.

*A.A.O. No. 11 of 1947. 12th August, 1948.

Held: That though the plaint in the earlier suit had asked only for a charge, immoveable property which was the subject of the compromise decree was also the subject-matter of the suit and so section 17 (2) (*vi*) of the Registration Act, had a direct application to the facts of the case and registration was not necessary.

Appeal against the order of the Court of the Subordinate Judge of Guntur, dated 29th July, 1946, in A. S. No. 23 of 1946 (O. S. No. 274 of 1945, District Munsiff's Court of Guntur).

V. Rangachari for Appellant.

K. Venkataramani for Respondent.

The Court delivered the following

JUDGMENT.—The respondent sued the appellant for a settlement of the accounts of the profits, income and expenditure of the Sri Krishna Talkies, Guntur, in which he claimed a three-annas share. The defendant's answer to the plaintiff's claim was that the plaintiff had owed her a sum of Rs. 750, for which and interest she had filed a suit for Rs. 929-8-0, asking for a charge on the three-annas share of the plaintiff for the suit amount. The suit resulted in a compromise, according to which the defendant was to be given a charge on the three-annas share until the 31st July, 1940. If, by that date the plaintiff had paid Rs. 600, it would be accepted in full satisfaction of the decree against him. If he did not, then the plaintiff's three-annas share in the suit property would become extinguished and the defendant in full satisfaction of the suit claim would take the three-annas share. The learned District Munsiff held that since the plaintiff had not paid the Rs. 600 within the stipulated date in accordance with the terms of the decree, the defendant was entitled to the suit property, the plaintiff's right in the suit property having become extinguished. He therefore dismissed the suit on the ground that there was no subsisting cause of action.

It was objected by the plaintiff that since the compromise had not been registered, the defendant had obtained no right under the decree. Relying on *Seetharamacharyulu* v. *Venkata Subbamma*[1], the learned District Munsiff held that under sub-section (2), clause (*vi*) of section 17 of the Registration Act, registration was not necessary, since the property concerned in the compromise had been the subject-matter of the suit. The learned Subordinate Judge on appeal did not discuss the effect of clause (*vi*) of sub-clause (2) of section 17 of the Registration Act, but said :

> "That under the terms of the compromise the charge becomes a transfer of immoveable property which requires registration under section 17 of the Act and therefore the decree becomes inadmissible under section 49 of the Registration Act. The rights under the decree can only be implemented through a Court of law or by virtue of a private arrangement. . . . . It must be recognised by a proper application within three months from the date thereof. . . . We do not know whether this concern was run together or separately or whether there is any show or not or whether any amounts were collected and profits have to be paid. So all these things have to be considered by the learned District Munsiff having regard to the observations above and the law on the subject. If necessary the issues will have to be recast. The parties may be given opportunity to adduce oral and documentary evidence. . . . . . "

The learned Subordinate Judge thereupon remanded the suit for fresh disposal.

The appeal was improperly disposed of. The judgment of the learned Subordinate Judge was a reversing one ; and he should have discussed fully various points raised by the learned District Munsiff. He did not, as already stated, refer at all to sub-section (2), clause (*vi*) of section 17 ; and if the learned District Munsiff's interpretation of that clause was correct, then there was no need to consider all the other matters referred to in the above quoted passage.

It is true that the plaint in the suit is not available ; but the preamble to the decree shows that the suit was one in which a charge on the property was prayed for ; and during the course of the proceedings in the trial Court the parties admitted that that was so. Under the decree the whole of the plaintiff's interest in the

1. A.I.R. 1940 Mad. 824.

business became extinguished and passed to the defendant if Rs. 600 was not paid within the specified period, whereas only a charge was asked for in the plaint; but the immoveable property which was the subject-matter of the compromise decree was also the subject-matter of the suit.; and so section 17, sub-clause (2), clause (*vi*) has a direct application to the facts of this case. The learned District Munsiff was therefore right in holding that the plaintiff's interest in the property had become extinguished and that no suit lay.

The appeal is allowed with costs in this Court and in the lower appellate Court and the decree of the District Munsiff restored.

V.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction.)

PRESENT :—MR. JUSTICE SUBBA RAO.

Vimala & Co. .. *Applicants** (*Plaintiffs*)

v.

Sivam & Co., by partners (1) N.K.M.S.P. Valliyappa Chettiar, (2) M.S. Chockalingam Chettiar and (3) K.RM.T.T.V. Vedachalam Chettiar .. *Respondents* (*Defendants*).

Civil Procedure Code (*V of* 1908), *Order* 30, *rules* 1, 3 *and* 6—*Suit against firm represented by three named partners—Summons served on one partner—Appearance and written statement filed by such partner as second defendant—Validity—Written statement to be treated as that of firm.*

The plaintiffs filed the suit against a firm represented by three named partners. The summons was taken out to the firm represented by the three partners and the notice was served on one of the three partners who entered appearance and filed a written statement. A perusal of the written statement showed that it was really on behalf of the firm, but the partner stated that it was the written statement of himself as second defendant. The plaintiffs took out an application for striking out the defence and contended that either the partner who had filed the written statement should amend the vakalat and the statement so as to enter appearance and contest on behalf of the firm, or that the vakalat and the written statement should be rejected.

Held, that in view of Order 30, Civil Procedure Code, the plaintiffs were within their legal rights in suing the partnership in the name of the firm alone, and that the service of summons having been effected on one of the partners as provided in Order 30, rule 6, the subsequent proceedings should continue in the name of the firm, although the partner who was served was also entitled to appear individually.

Held further, that the partner who entered appearance was not entitled to describe himself as the second defendant, and that the written statement should be taken to have been filed on behalf of the firm and not on behalf of the second defendant.

Appeal from the Master's order on an application by the plaintiffs to have the vakalat and the written statement filed by the 2nd defendant struck out.

B. V. Viswanatha Aiyar for Applicants (Plaintiffs).

S. Tyagaraja Iyer for Respondent (2nd Defendant).

The Court made the following

ORDER.—This is an appeal against the order of the learned Master dismissing the application filed by the plaintiffs in C.S. No. 194 of 1947 for striking out the written statement and vakalat of the second defendant. The facts that led up to the application may be briefly stated. The plaintiffs are stock and share brokers carrying on business in the name of Vimala & Co. The defendants Messrs. Sivam & Co. are a partnership firm registered under the Indian Partnership Act. There are three partners in the firm: (1) N.K.M.S.P. Valliyappa Chettiar, (2) M. S. Chockalingam Chettiar and (3) K.RM.T.T.V. Vedachalam Chettiar. The plaintiffs filed C.S. No. 194 of 1947 on the file of this Court for the recovery of

*Appeal No. 3260 of 1947 in Application No. 2701 of 1947 in C.S. No. 194 of 1947. 22nd April, 1948.

Rs. 13,312-1-3 with interest from the defendants, the balance due in regard to the dealings they had in shares. In the plaint the defendant was described as Sivam & Co. by the aforesaid three partners. The records show that summons was taken out on Messrs. Sivam & Co. represented by the three partners. Notice was served only on the second partner M.S. Chockalingam Chettiar. He entered appearance and filed a written statement. In his written statement he stated that it was the written statement of M.S. Chockalingam Chettiar the second defendant herein. He also signed the written statement as the second defendant and in the verification he has described himself as second defendant. A perusal of the written statement shows that it was really filed on behalf of the firm. He has stated that the firm was dissolved and that under an arrangement between the partners the first partner, *i.e.*, Valliyappa Chettiar, was the sole person liable to pay all claims against the partnership including the suit claim.

The present application is filed by the plaintiff for striking out the defence. In the affidavit filed in support of the application it is alleged that Mr. M.S. Chockalingam Chettiar entered appearance in the High Court and that he chose to describe himself as the second defendant and was defending the suit in his personal capacity and not on behalf of the firm. The petitioner further stated that either the said Chockalingam Chettiar should amend the vakalat and the written statement so as to enter appearance and contest on behalf of Sivam & Co., or in the alternative the said vakalat and the written statement should be rejected. In the counter-affidavit filed by the respondent he persisted in his attitude and he states,

> " I as the second defendant in the suit entered appearance only on behalf of myself and in my individual capacity. I am not now a partner in the defendant company. Apart from my individual interest I have no other interest in the suit. The written statement filed by me is only to safeguard my personal right."

The learned Master in an elaborate judgment held that the written statement filed by the second defendant should be regarded as that of the firm.

The petitioner prefers this appeal against the order of the Master. Order 30, Civil Procedure Code, prescribes the procedure to be followed in the case of suits by or against firms and persons carrying on business in names other than their own. Under Order 30, rule 1 any two or more persons claiming or being liable as partners may be sued in the name of the firm of which such persons were partners at the time of the accruing of the cause of action. Order 30, rule 3 prescribes the mode of service. It says that the summons shall be served upon any one or more of the partners or at the principal place of business. Rule 6 says that the partners so served shall appear individually in their own names, but all subsequent proceedings shall nevertheless continue in the name of the firm. Anantakrishna Aiyar, J., in a Full Bench decision in *Mahomed Yusuf* v. *Badsha Sahib*[1] describes the procedure under Order 30, Civil Procedure Code, in the following terms :

> " Thus an alternative procedure was prescribed, of which parties could, in their option, take advantage. In suits against firms, if the plaintiff be so minded, he could sue any two or more persons claiming or being liable as partners and carrying on business in British India, in the name of the firm of which such persons were partners at the time of the accruing of the cause of action. The plaintiff in such cases is not bound to disclose the names of the partners in the plaint."

In this case the procedure prescribed under Order 30 has been adopted and therefore the plaintiff is within his legal rights in suing the partnership in the name of the firm alone.

The firm was also served in the prescribed manner, that is by serving the notice upon the respondent who is one of the partners. Under Order 30, rule 6, though the defendant is entitled to appear individually, the subsequent proceedings in the suit shall continue in the name of the firm.

It is therefore clear that the procedure adopted by the respondent is irregular and does not comply with the provisions of Order 30, Civil Procedure Code. He was not entitled to describe himself as second defendant when the plaintiff had

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1. (1929) 57 M.L.J. 344 : I.L.R. 52 Mad. 885 (F.B.).

adopted the alternative procedure in instituting the suit against the firm and he was also wrong in filing the written statement on behalf of the second defendant. He should have filed the written statement on behalf of the firm.

It is not necessary to consider the various decisions cited by the learned Master as Mr. Viswanatha Aiyar did not question the correctness of the conclusion arrived at by him. The Master correctly states the law on the point when he stated that the respondent the second named partner would in his capacity as a partner be entitled to file a written statement and that the only consequence of his not being impleaded in his individual capacity was that his written statement would be regarded as a written statement filed on behalf of the firm. In another place in his judgment the Master pointed out that in the written statement he did not deny that he was a partner at the time the transactions covered by the suit were entered into and that he also sought to raise defences generally on behalf of the firm. In my view the Master's view of the law and also his interpretation of the pleadings is correct. As I said before, Mr. Viswanatha Aiyar learned counsel for the applicant does not question the same but he wants that position to be made clear so that further complications may not arise in future and the defendant may not persist in his attitude. I think that his request is reasonable, and the respondent may not have any grievance if the position is made clear. I therefore direct that the description of the respondent as defendant may be deleted and that the written statement filed by him should be treated as one filed on behalf of the firm. With these directions the appeal is dismissed, in the circumstances, without costs. The costs before the Master will be borne by the parties.

B.V.V. — *Order made.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction.)

PRESENT :—MR. JUSTICE SUBBA RAO.

M. S. Chockalingam Chettiar .. *Applicant** (*Defendant*)

v.

Vimala & Co. .. *Respondents* (*Plaintiffs*).

Madras High Court Original Side Rules, Order V-A, rule 8—Third party notice—Suit against firm—One partner filing written statement—Claim for indemnity against other partner under deed of dissolution—Application for third party notice against other partner—Maintainability.

The suit was filed against a firm represented by three partners. One of the partners who entered appearance and filed a written statement took out an application for issuing a third party notice to another partner. The applicant alleged that that the partners had agreed to dissolve the firm and that the major partner, against whom the notice was sought, had agreed to take over the entire business and carry it on his own account and also to keep the applicant freed and indemnified against all claims in respect of the said partnership business.

Held, that for the purpose of applying Order V-A, rule 8 of the Madras High Court Original Side Rules the partners might be treated as defendants to the suit, and that as the applicant put forward a claim for indemnity against the other partner he was entitled to a third party notice against the latter.

Application for third party notice.

S. Tyagaraja Iyer for Applicant (Defendant).

B. V. Viswanatha Aiyar for Respondents (Plaintiffs).

The Court made the following

ORDER.—This is an application for issuing a third party notice to N. K. M. S. P. Valliyappa Chettiar. C. S. No. 194 of 1947 was filed on the file of the Court by Vimala & Co., against Sivam & Co., by three partners (1) N. K. M. S. P. Valliyappa Chettiar, (2) M. S. Chockalingam Chettiar and (3) K. RM. T. T. V. Vedachalam Chettiar. The suit notice was served on M. S. Chockalingam Chettiar and he filed a written statement. In the connected appeal I held that the written statement filed by him must be treated as one filed on behalf of the firm.

* Application No. 1683 of 1947 in C.S. No. 194 of 1947. 22nd April, 1948.

This application is filed for issuing a third party notice to N. K. M. S. P. Valliyappa Chettiar under rule 8 of Order V-A of the Original Side Rules. In the affidavit in support of the application it is alleged that the three partners agreed to dissolve the partnership and the major partner Valliyappa Chettiar agreed to take over the entire business and carry it on his own account on the terms and conditions set out in the agreement of dissolution dated the 31st January, 1946. It is alleged that as per the terms of the agreement the petitioner should be freed and indemnified against all the claims in respect of the said partnership. The respondents mainly contends that this application is not maintainable as the applicant is not a defendant to the suit and secondly that he is not entitled to contribution or indemnity against the first partner within the meaning of the said rule.

It is settled law that though Order 30 prescribes a procedure enabling the plaintiff to sue all the partners in the name of the firm, in law all the partners shall be deemed to be in the array of defendants in the capacity as partners. In *Ram Prosad Chimonlal* v. *Anundji & Co.*[1] this legal position was enunciated in clear terms. At page 527 the following observations are made :

> " It is settled law that the effect of the provisions with regard to suing partners in their firm name is merely to give a compendious mode of describing in the writ the partners who compose the firm and that the plaintiff who sues partners in the name of their firm in truth sues them individually, just as much as if he had set out all their names. . . . . . . The firm name is a mere expression, not a legal entity, and for convenience it may be used for the sake of suing and being sued."

This principle was accepted and followed in the later decisions in *Sital Prasad* v. *Peary Lal*[2], *Parshotam Lal Jaitly* v. *Henley's Telegraph Works*[3] and *Ramdas* v. *Ram Babu*[4]. It is really a facility given by the Legislature in order to avoid mentioning a large number of names either in the category of plaintiffs or in the category of defendants. Therefore for the purpose of applying Order V-A, rule 8 the partners may be treated as defendants to the suit.

Order V-A, rule 8, Original Side Rules, says : that the Court may issue a third party notice to the other defendant if one of the defendants claims to be entitled to contribution and indemnity against him. In the affidavit filed by him the petitioner claims that under an arrangement entered into between the partners N. K. M. S. P. Valliyappa Chettiar is bound to indemnify him against all the claims in respect of the said partnership firm. At this stage I am not called upon to decide the validity or the existence of such claim for indemnity against the first partner. I direct issue of notice under the said order returnable within two months. The costs of this application will be costs in the cause.

B.V.V. — *Order made.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AIYAR.

Muhammad Ibrahim Sahib .. *Petitioner**

v.

Krishna Rao and others .. *Respondents.*

Court-fee—Private purchaser from party to suit—Obstruction to delivery of possession—Dismissal of application under Order 21, rule 97, Civil Procedure Code—Suit for recovery of possession—Court-fee payable—Court-Fees Act (VII of 1870), Schedule II, Article 17 (1).

A private purchaser from a party in whose favour delivery of possession of properties was ordered in a preliminary decree on condition of his depositing certain moneys in Court by a certain date but who failed to satisfy the condition and get an unconditional order of delivery of possession of the properties was afterwards obstructed by persons not parties to the suit. He thereupon put in a petition under Order 21, rule 97, Civil Procedure Code, for delivery free from their obstruction. The petition was however summarily rejected without investigation and he was directed to file a separate suit against the obstructors in the usual course for possession of the properties. The purchaser having filed a suit against the obstructors to obtain possession,

1. (1921) I.L.R. 49 Cal. 524.
2. (1930) I.L.R. 52 All. 951.
3. (1933) I.L.R. 55 All. 719.
4. A.I.R. 1936 Pat. 194.

*C.R.P. No. 813 of 1947. 9th September, 1948.

Held, that the plaint was leviable to court-fee as in an ordinary suit for possession on the market value of the property, and that Article 17 (1) of Schedule II of the Court-Fees Act had no application.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Coimbatore, dated 8th April, 1947, and made in O. S. No. 33 of 1947.

R. Desikan for Petitioner.

The Government Pleader (*K. Kuttikrishna Menon*), *V. S. Rangaswami Aiyangar* and *P. R. Vasudeva Aiyar* for Respondents.

The Court delivered the following

JUDGMENT.—The only point for determination in this petition is whether a private purchaser from a party in whose favour delivery of possession of properties was ordered in a preliminary decree on condition of his depositing certain moneys in Court by a certain date but who failed to satisfy the condition and get an unconditional order of delivery of possession of the properties, and who is afterwards obstructed by persons not parties to the suit, and filed a petition under Order 21, rule 97, Civil Procedure Code, for delivery free from their obstruction, which petition was dismissed summarily without investigating into the question and he was directed to file a separate suit against the obstructors in the usual course for possession of the properties, can claim to pay a court-fee of Rs. 15 for such reliefs, under Article 17, clause 1 of Schedule II of the Court-Fees Act, or has to pay court-fee on the admitted market value of the properties, namely, on Rs. 10,000. The lower Court has held, agreeing with the Court-fee Examiner, that he should pay court-fee on the market value of Rs. 10,000 for this relief.

The learned counsel for the petitioner contends that this is a wrong order, and that the proper court-fee payable is only Rs. 15 under Article 17, clause 1 of Schedule II. The learned Government Pleader supports the order of the lower Court on both the grounds, namely, that there was no unconditional decree for delivery of properties in favour of the petitioner or his predecessor in title (the petitioner was not a Court auction-purchaser) and that the order dismissing the application under Order 21, rule 97, Civil Procedure Code, was *not one passed after investigation*, or one made under rule 98, 99 or 101 of Order 21. I agree.

There is, in my opinion, a fundamental difference between a *conditional* order of delivery in a preliminary decree, which becomes frustrated by the condition not being satisfied and an *unconditional* order of delivery. There is also a fundamental difference between an order passed in an application under Order 21, rule 97, Civil Procedure Code, *after investigation*, and under rule 98, 99 or 101, and an order passed summarily *without investigation*, because the applicant's remedy is, in the latter case, simply to file a separate suit in the usual course, and under the usual conditions, including the normal court-fee calculated on the market value.

I cannot agree with the contention of the learned counsel for the petitioner that there is no difference between a suit filed against an order passed under Order 21, rule 63, Civil Procedure Code, and a suit filed against an order passed under Order 21, rule 103, Civil Procedure Code. The first case is a simple one not hedged in with any conditions, after the recent amendment, whereas Order 21, rule 103 still contains the conditions and clauses limiting the reliefs which were taken away in the case of Order 21, rule 63, Civil Procedure Code, by the amendment. The Legislature must certainly have intended some distinction by proceeding in this different fashion. Both Mulla and Rustomjee are agreed that the distinction intended was that a party could file a suit under Order 21, rule 103, Civil Procedure Code, only in cases where an application under Order 21, rule 97, Civil Procedure Code, has been dismissed *after investigation.*

Of course, as already stated, even apart from that, a petition under Order 21, rule 97, Civil Procedure Code, would not have lain in this case at all, as the applicant had no unconditional decree in his favour for delivery of the suit properties, but only a conditional decree for delivery which became nullified by the condition

not being satisfied. The petitioner was a mere private purchaser, and he claims to have been obstructed by what he calls " private trespassers." He must resort to the usual remedy and file a suit, paying the full court-fee calculated on the market value. The lower Court's order is confirmed, and the petition is dismissed with costs. Costs two sets, as the contesting defendants and the Government Pleader have been given notices and have entered their appearances.

B.V.V. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE YAHYA ALI.

W. L. Knopp .. *Applicant**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922), section 2 (4)—Ventures in the nature of trade—Sufficiency of evidence to justify such a finding.

The assessee who was a partner in a firm of stockbrokers sold shares in various companies on 12 occasions during the year of accounting—1st February, 1942 to 31st January, 1943—and as a result made substantial profits and the Income-tax Officer included it in the assessment for the year on the ground that it represented profits arising from business. It was found that the assessee had been in the habit of buying and selling shares from 1936 onwards and in the accounting period had purchased 3,446 shares in 3 transactions and sold 1,031 shares in 12 transactions. On a question whether there was material to justify that the ventures in question were in the nature of trade,

Held, there was certainly enough material in the case for the Tribunal to hold that the assessee must have been purchasing these shares with a view to resale and the purchases and sales were transactions in the course of the carrying on of a business, and not in the nature of investment or change of investment.

Case referred to the High Court by the Income-tax Appellate Tribunal, Madras Bench, under section 66 (1) of the Indian Income-tax Act, 1922 (Act XI of 1922) as amended by section 92 of the Income-tax (Amendment) Act, 1939 (Act VII of 1939) in 66 R. A. 74 Madras of 1944-45 on its file.

O. T. G. Nambiar instructed by *King and Partridge* for Applicant.

C. S. Rama Rao Sahib for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—The question referred to us by the Income-tax Appellate Tribunal is :

" Whether in the circumstances of this case there is material to justify that the ventures in question were ventures in the nature of trade."

The assessee-applicant is a partner in a firm of stock brokers carrying on business in Madras. In the year of accounting—1st February, 1942 to 31st January, 1943 —he sold shares in various companies on 12 occasions and as a result of these sales he made substantial profits amounting to Rs. 6,887-12-0. The Income-tax Officer included this amount in the assessment for the year on the ground that it represented profits arising from business. This view was upheld by both the Appellate Assistant Commissioner and the Income-tax Appellate Tribunal.

The material facts which can be gathered from the several orders in the case are as follows : From 1936 onwards the assessee had been in the habit of purchasing and selling shares. Between the 1st February, 1936 and 31st January, 1937, he bought 1,382 shares in 7 transactions and sold 254 shares in 5 transactions. In the next year he purchased 346 shares in 11 transactions and sold 495 shares in 9 transactions. In the next year he purchased 452 shares and sold 415 shares in 5 transactions. In the next two years he purchased 616 and 105 shares, but did not sell any. During the period from 1st February, 1941 to 31st January, 1942, he purchased 426 shares in 7 transactions and sold 100 shares in one transaction, and in the

* Case Referred No. 20 of 1946. 10th August, 1948.

accounting period he purchased 3,446 shares in 3 transactions and sold 1,031 shares in 12 transactions. Taking the sales in the accounting period we find that some shares purchased on 26th November, 1941, were sold on 23rd October, 1942, and 1st December, 1942. There were other shares which were applied for on 23rd November, 1942, and sold away on 21st January, 1943.

This Court is not asked, and it is no part of the Court's duty, to determine whether on the evidence on record this Court itself would come to the conclusion whether the assessee was carrying on the business of purchasing and selling shares. The only duty of the Court is to find out if there is any evidence to support the finding of fact arrived at by the Tribunal. In this case we find it impossible to say that there is no material whatever on which the Tribunal could have come to the finding that the assessee was carrying on a trade. This is not a case in which the assessee purchased a large number of shares for investment and gradually or at a time disposed of such of the shares which he did not wish to retain. There is certainly enough material in this case for the Tribunal to hold that the assessee must have been purchasing these shares with a view to resale and the purchases and sales were transactions in the course of the carrying on of a business. In *Californian Copper Syndicate* (*Ltd. and Reduced*) v. *Harris*[1], Clark, L.J., lays down the criterion to be adopted in dealing with cases like the present thus :

> " It is quite a well-settled principle in dealing with questions of assessment of income-tax, that where the owner of an ordinary investment chooses to realise it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of Schedule D of the Income-tax Act of 1842 assessable to income-tax. But it is equally well established that enhanced values obtained from realisation or conversion of securities may be so assessable, where what is done is not merely a realisation or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business. The simplest case is that of a person or association of persons buying and selling lands or securities speculatively, in order to make gain, dealing in such investments as a business, and thereby seeking to make profits."

In the same case, Lord Trayner said :

> " This is not, in my opinion, the case of a company selling part of its property for a higher price than it paid for it, and keeping that price as part of its capital, nor a case of a company merely changing the investment of its capital to pecuniary advantage."

It cannot be said that there is no material in this case on which the Tribunal can rest its conclusion that the purchases by the assessee were not in the nature of investment or change of investment, but really in the nature of a business. The learned counsel for the assessee cited to us the decision of the Allahabad High Court in In re *Seth Ganga Sagar*[2]. But the decision in that case really does not help him as the learned Judges there do not lay down a rule different from that enunciated in *Californian Copper Syndicate* (*Ltd. and Reduced*) v. *Harris*[1].

The answer to the question must be in the affirmative. The applicant will pay the costs of the reference, Rs. 250.

V.S. *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE YAHYA ALI.

G. M. Madappa .. *Applicant**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922), section 2 (6-C)—Receipt of cash amounts, the source and nature of which the assessee has failed to prove positively—Income-tax Officer, if entitled to draw the inference that they are of an income nature—Such income not noticed in prior years by Income-tax Officer—Income-tax Officer, if bound to prove that it was of an income nature.

Where the assessee has failed to prove positively both the source and nature of certain amounts received in cash during the accounting year, the Income-tax Officer is entitled to draw the inference that such receipts are of an income nature.

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1. (1904) 5 Tax Cases 159.
2. A.I.R. 1934 All. 370.

* Case Referred No. 23 of 1947. 12th August, 1948.

The fact that in previous years, such unexplained cash receipts was not noticed by the Income-tax Officer in the course of the assessment proceedings of those years would not throw on the Income-tax Officer the burden of proving that they were of an income nature.

Case referred to the High Court by the Income-tax Appellate Tribunal, Bombay, under section 66 (2) of the Indian Income-tax Act, 1922 (Act XI of 1922) as amended by section 92 of the Income-tax (Amendment) Act, 1939 (Act VII of 1939) in Application 66 R. A. 262 Madras of 1946-47.

K. Krishnaswami Aiyangar and *N. C. Raghavachari* for Applicant.

C. S. Rama Rao Sahib for Respondent.

The Judgment of the Court was delivered by

Yahya Ali, J.—This is a reference made by the Income-tax Appellate Tribunal in pursuance of the order of this Court in C. M. P. No. 4484 of 1946. We shall set out the question at a later stage. The reference arises out of the assessment for 1942-43 relating to the accounting period commencing from 10th October, 1940, and ending on 29th September, 1941. During that period, two items of cash receipts were brought into the account, namely, a sum of Rs. 10,000 on 26th March, 1941, and a sum of Rs. 5,000 on 2nd April, 1941. The two cash credits were discovered in the personal account designated as the " cash chest account." The Income-tax Officer assessed the aggregate sum of Rs. 15,000, as part of the total income of the assessee earned during the accounting year. On appeal before the Appellate Assistant Commissioner, it was argued on behalf of the assessee that the " cash chest account " had been in existence since 1931, the previous credits had gone to make up the opening balance of Rs. 35,000 disclosed in the account, and that this account and the respective entries therein were noticed by the Income-tax Officer on previous occasions, when they were not questioned. The Appellate Assistant Commissioner called upon the assessee's advocate to furnish particulars as to the name of the ancestor, the date of bequest, the nature of the trust whose income was supposed to have been brought into the " cash chest account," the amount left originally, and the amount then in hand. The advocate expressed his inability to furnish those details, virtually refusing to supply any information regarding the source and nature of the two amounts in question. The Appellate Assistant Commissioner thereupon dismissed the appeal. An appeal was brought before the Tribunal, and there also the assessee was questioned about certain entries appearing in the " cash chest account " statement from 1933 onwards. But he was unable to show how such a large sum of cash happened to be in the cash chest in charge of the assessee. The appeal before the Tribunal was also dismissed. An application was made under section 66 (1) by the assessee formulating for reference to this Court as many as seven questions. The application was resisted by the Commissioner who, however, suggested in his reply that if at all any questions were to be referred relating to the unexplained cash credits, they were the two following questions :

" 1. Whether on the assessee's failure to prove positively the source and nature of amounts of cash received during the year the Income-tax Officer is entitled to draw the inference that the receipts are of an income nature.

2. Whether the burden of proving that such receipts are of an income nature would be on the Income-tax Officer, if the Income-tax Officer failed to notice similar unexplained cash receipts in the accounts of earlier years in the course of the assessment proceedings of those years."

This application was dismissed by the Tribunal as they were not satisfied with the explanation sought to be given on behalf of the applicant with regard to the cash credits of Rs. 15,000 in the relevant accounting year, and they were of the opinion that the said sum was rightly treated as the income of the appellant by Income-tax authorities. On an application made to this Court under section 66 (2) of the Act, it was brought to notice that the assessee was given to understand that the questions would be referred and was not called upon to state his arguments, that the Tribunal reserved its order and when a copy was served upon the petitioner he found that his application was dismissed on the ground that the questions of

law raised by him were covered by a reported decision of the Calcutta High Court. In his application to this Court, the assessee prayed that the Tribunal be directed to state a case on the two questions (extracted above) which had been suggested by the Commissioner in his reply statement in proceedings under section 66 (1) before the Tribunal. He also wanted a further question to be raised with reference to Order 47, rule 1 of the Civil Procedure Code, but subsequently the assessee's learned counsel gave it up, and was content with a reference on these two questions. It is thus clear that these two questions have been submitted to us by the Tribunal at the instance of the assessee.

The history of the matter had to be set out in order to show that the assessee can have no complaint whatever as regards the frame of the questions. As the questions are framed, it seems to us clear that they can be answered only in one way. The first question postulates that the assessee has failed to prove positively the source and nature of the amounts of cash received during the year, and upon that foundation of fact the question raised is whether the Income-tax Officer is in such a position entitled to draw the inference that the receipts are of an income nature. There cannot be the slightest conceivable doubt that when both the source and the nature of the cash receipts shown in the accounting year have not been proved, the Income-tax Officer cannot draw any other inference except that those two amounts are income receipts. He cannot come to the conclusion that they are capital receipts. If it were held that he should, the result would be that every assessee will be entitled to enter cash credits in his account and refuse to furnish the requisite particulars about its source and nature and insist that those entries should be automatically treated as capital receipts and not as income receipts. The answer to the first question has therefore necessarily to be in the affirmative.

It is significant with regard to the second question that it starts with referring to "such receipts," which can only mean the receipts adverted to in the first question, to wit, receipts whose source and nature the assessee has failed to prove positively. The second condition pre-supposed in the question is that the Income-tax Officer has failed to notice similar unexplained cash receipts in the accounts of earlier years in the course of the assessment proceedings of those years. The effect of the question, however, is that merely because the Income-tax Officer has failed to observe certain entries in previous years in spite of the assessee having failed to prove the source and nature of those amounts, the burden is upon the Income-tax Officer to prove that such receipts are of an income nature. Put in that form, the only possible answer can be that the burden in those circumstances is not upon the Income-tax Officer. Mr. K. Krishnaswami Aiyangar referred us to *Sankaralinga Nadar* v. *The Commissioner of Income-tax, Madras*[1] and contended that there was some sort of estoppel arising against the Income-tax Officer in such circumstances. But the question as framed is that the Income-tax Officer has failed to notice similar cash receipts and not that he went into the matter and came to any definite conclusion with regard to them. The other cases cited by him have no bearing whatever upon the matter under consideration.

We must, therefore, as indicated already, answer the first question in the affirmative and the second in the negative. The applicant should pay the costs of the reference, Rs. 250 to the respondent Commissioner.

V.S. *Reference answered.*

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1. (1929) 58 M.L.J. 260 : I.L.R. 53 Mad. 420 (S.B.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HAPPELL AND MR. JUSTICE PANCHAPAKESA SASTRI.

K.N. Adikesavalu Naidu .. *Appellant**

v.

Manni Munuswami Chetty .. *Respondent.*

Mortgage—Sale to prior mortgagee ignoring puisne mortgage—Sale of property in execution of decree obtained by intermediate mortgagee—First purchaser dispossessed—Suit on first mortgage—Limitation—Starting point—Transfer of Property Act (IV of 1882), section 101.

Where, the sale in favour of the plaintiff, a prior mortgagee, in satisfaction of his mortgage turned out to be invalid because he had ignored altogether the puisne mortgagee and his rights and purported to deal with the mortgagor as if there was no intermediate encumbrance and the puisne mortgagee obtained the properties in auction in execution of his own decree on the mortgage after getting the sale in favour of the plaintiff declared invalid and the plaintiff thereafter sued on his mortgage long after the expiry of twelve years from the date of his mortgage,

Held, that the plaintiff could not plead a fresh cause of action in his favour on the original mortgage when the sale was declared invalid or when he was compelled to restore back possession.

Held further, that the plaintiff in such a case could only enforce his rights on the original mortgage under section 101, Transfer of Property Act, within the time allowed by law for a suit on the mortgage.

Appeal against the judgment and decree of Rajamannar, J., dated 10th January, 1947, in S.A. No. 1871 of 1945 preferred against the decree of the Court of the Subordinate Judge, Chingleput, in A.S. No. 33 of 1945 (O.S. No. 4 of 1943, District Munsiff Court, Trivellore).

M. S. Venkatarama Aiyar and *V. Natesan* for Appellant.

R. Thirumalai Thathachariar for Respondent.

The Judgment of the Court was delivered by

Panchapakesa Sastri, J.—The respondent in this appeal filed the suit to enforce a mortgage, dated 9th October, 1918, executed in his favour by defendants 1 and 2 in the action. The appellant was impleaded as the third defendant because he had a second mortgage dated 20th November, 1918, in his favour. The present suit for sale was filed on the 24th December, 1942. The appellant had filed a suit of his own on his mortgage, O.S. No. 75 of 1930 on the file of the District Munsiff's Court, Trivellore, on 6th January, 1930, and obtained a preliminary decree. On 7th October, 1930, defendants 1 and 2 the mortgagors, sold a portion of the hypotheca to the present plaintiff for a sum of Rs. 300 in satisfaction of the mortgage amount due to him under his mortgage, dated 9th October, 1918. Possession of the properties sold was delivered over to the plaintiff who continued to enjoy the rents and profits thereof down to 1942. The appellant brought the properties to sale in execution of his own mortgage decree and purchased the same on 19th February, 1934. After some proceedings he ultimately succeeded in getting possession of the properties in 1943 in pursuance of the ultimate decree in his favour, dated 13th November, 1942, passed in S.A. No. 283 of 1941 arising out of O.S. No. 207 of 1936 (District Munsiff's Court, Trivellore) wherein it was held that the sale in respondent's favour was invalid and could not affect appellant's rights. The present suit had been filed in 1942 itself after the said decision and before the plaintiff was deprived of his possession by the appellant herein. The defence which was raised by the third defendant who is the only contesting defendant is that the suit is barred by limitation under Article 132 of the Indian Limitation Act. As the mortgage was dated 9th October, 1918, and no period for payment was fixed, the period of limitation would expire by 9th October, 1930. *Prima facie* the claim is barred by limitation.

For the plaintiff respondent, it is contended that the bar of limitation is got over by virtue of an acknowledgment made by the mortgagors which is contained in their sale deed, dated 7th October, 1930, and also by the fact that the rents

* Letters Patent Appeal No. 19 of 1947. 8th April, 1948.

and profits must be deemed to have been received during the period from 7th October, 1930 down to 1942. It is also contended that in any event, there is a fresh cause of action which accrues to the present plaintiff, when the sale in his favour was declared inoperative or at any rate when he was deprived of the possession of the properties in pursuance of the decree obtained by the appellant in S.A. No. 283 of 1941.

In second appeal, the learned Judge held that the acknowledgment by the mortgagors will not avail against the puisne mortgagee as the said acknowledgment was long subsequent to the said mortgage in favour of the appellant. This position is now accepted as correct by the respondent.

So far as the receipt of the rents and profits are claimed to amount to "payment" under section 20 of the Limitation Act, there is no evidence in the case that the said rents were ever received before the period of limitation had expired, that is, before 9th October, 1930, or even before 7th December, 1930, twelve years from the date of the registration of the mortgage deed sued on. In fact, there is no evidence as regards the date of the first receipt of rents. The respondent, therefore, cannot get over the bar of limitation under section 20 of the Limitation Act.

The real question that remains to be decided is whether there was a fresh cause of action in favour of the respondent by virtue of the proceedings referred to whereby the sale in his favour was found to be vitiated by *lis pendens* and a decree was given to the appellant in pursuance of which he got possession from the respondent in 1943. The learned Judge has held that in the circumstances a fresh cause of action is available to him on the principle of the rulings in *Muthuveerappa Chetti* v. *Adaikappa Chetti*[1] and the other decisions referred to therein. There it was held that where a debtor satisfied by payment his creditor's claim for balance of money due but later sued for and obtained an annulment of the satisfaction on the ground that satisfaction was obtained by coercion and got a decree for refund, the annulment gave the creditor a fresh cause of action against the debtor and time began to run from the date of annulment. This question has since been considered by a Bench of this Court in *Sooryanarayana Rao* v. *Sarupchand Rajaji*[2], where under circumstances similar to the present it was held that there was no fresh cause of action in favour of the first mortgagee who had to bring his own suit on the *original* mortgage which must be deemed to have been kept alive. That decision refers to the earlier decisions relied on by the learned Judge and points out that those cases really relate to cases where the satisfaction was subsequently got annulled at the instance of the party who gave the satisfaction and this operated to bring about a fresh cause of action against the particular debtor. So far as the puisne mortgagee in the present case is concerned he was not a party to the events which happened after his mortgage or to the transactions between the mortgagors and the plaintiff mortgagee. It was not at his instance that any satisfaction was made towards the plaint mortgage nor did he attempt to have it cancelled or set aside. The sale in plaintiff's favour turned out to be invalid because the plaintiff mortgagee ignored altogether the existence of the puisne mortgagee and his rights, and purported to deal with the mortgagors as if there was no intermediate encumbrance in favour of any other persons. The plaintiff took the risk of the sale turning out to be invalid as against persons like the present appellant whose rights he had ignored altogether. He could not therefore be in a position to say as against the appellant that there is a fresh cause of action in his favour on the original mortgage when he finds that his sale is declared invalid or when he is compelled to restore back possession to the appellant who obtained the properties in auction in execution of his own decree on the mortgage. All that the plaintiff is entitled to is to enforce his rights on the original mortgage again as against the puisne mortgagee, which right is reserved to him under section 101 of the Transfer of Property Act. It is in enforcement of that right that the present suit is filed. At the same time however

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1. (1920) 39 M.L.J. 312 : I.L.R. 43 Mad. 845.
2. (1947) 1 M.L.J. 373.

he cannot enforce it except within the time allowed by law for a suit on that mortgage. In the circumstances, there being no fresh cause of action, the suit can only be regarded as a suit to enforce the mortgage of 1918. If so, the present suit is obviously barred by limitation as it is filed long after the expiry of the period of twelve years under Article 132 of the Limitation Act. There are no grounds for extending the period of limitation. The suit must, therefore, be dismissed. We allow the Letters Patent Appeal and restore the decree of the Subordinate Judge. The appellant will get his costs of the second appeal and this Letters Patent Appeal also.

B.V.V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDARAJACHARI.

Chaturvedula Venkata Lakshminarasimham and another .. *Appellants**

v.

Sha Ven Vaktaji Gomaji & Co., Sait Vummaji Manrupchand Firm .. *Respondent.*

Limitation Act (IX of 1908), Article 182 (5)—Application to take a step-in-aid of execution—Starting point—Execution application returned but never re-presented—Effect—Continuation of prior execution application—Intervening applications different in character.

From the language Article 182 (5) of the Limitation Act it is clear that whether an execution application is one for execution of the decree or to take some setp-in-aid of execution of the decree, the starting point of limitation is the final order passed on such an application and not the date on which it was filed. The Article does not permit any differentiation between such applications.

An application for execution which is returned by the Court but never re-presented thereafter should be treated as if it had never been presented at all.

Where the intervening applications between the earliest and latest execution applications, are essentially different in character from the earliest one it is quite open to the Court to infer an abandonment of that application. In any event where the conbined effect of the intervening applications marks substantial departure from the previous original application it cannot be said that the later application should be treated as a continuation of the earlier one.

Appeals against the appellate order of the District Court, Kistna, dated 14th March, 1946, in A.S. Nos. 26 and 27 of 1945 preferred against the orders of the Court of the Subordinate Judge, Bezwada, in E.P. Nos. 95 and 74 of 1943 in O.S. Nos. 12 and 39 of 1933 respectively.

G. Venkatarama Sastry for Appellants.

K. Kameswara Rao for Respondent.

The Court delivered the following

JUDGMENT.—These civil miscellaneous second appeals arise out of proceedings in execution of two decrees. The decree-holders are different but the material judgment-debtors are the same. The facts in the two cases are so identical and the execution of the two decrees proceeded on lines so closely parallel that it is sufficient for the disposal of both the appeals to state the facts in one of them.

C.M.S.A. No. 15 of 1947 arises out of proceedings in execution of the decree in O.S. No. 12 of 1933 on the file of the Court of the Subordinate Judge of Bezwada. The first of the petitions to execute this decree was E.P. No. 67 of 1934 which was dismissed on 24th July, 1934. On 8th September, 1934, the decree-holder applied in E.P. No. 127 of 1934 for rateable distribution of the proceeds of a sale to be held in E.P. No. 29 of 1933 on the file of the Court of the Subordinate Judge of Bezwada and in case no such sale was held for attachment and sale of the immoveable property mentioned in the schedule attached. E.P. No. 127 of 1934 was dismissed on 16th July, 1935, with the endorsement,

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* A.A.A.O. Nos. 15 and 16 of 1947. 20th July, 1948.

"As E.P. No. 29 of 1933 was dismissed for want of bidders this petition does not lie. No sale. Dismissed."

On the 30th of October, 1937, the decree-holder filed an execution petition. It was returned several times for compliance with certain requisitions made by the office, and both the courts below have found that this execution petition was not finally re-presented. The correctness of this finding cannot now be questioned. It would appear that the execution petition was being returned firstly for producing the power of attorney which enabled the decree-holder's clerk to sign the execution petition and secondly, for the purpose of making a correct calculation of the interest due on the decree. I may observe in passing that the lower appellate Court has held that neither of these defects is such as to make the execution petition one not in accordance with law. The correctness of this conclusion has not been seriously challenged by Mr. Venkatarama Sastri, the learned advocate for the appellants-judgment-debtors.

On the 29th of April, 1940, still another execution petition was filed. The prayer was that certain moveables of the judgment-debtors should be attached and sold. The execution petition was not pressed and was rejected on the 6th of January, 1941, with an observation that,

"the question of limitation would be considered when the next execution petition is filed."

On the 26th of April, 1943, the decree-holder filed E.P. No. 95 of 1943 out of which C.M.S.A. No. 15 of 1947 arises. The prayer here also was that certain moveables should be attached and sold. During the pendency of this execution petition the decree-holder filed E.A. No. 195 of 1944 for treating the main petition E.P. No. 95 of 1943 as a continuation of E.P. No. 127 of 1934 and for permitting him to proceed with the latter. E.P. No. 95 of 1943 and E.A. No. 195 of 1944 were dismissed by the learned Subordinate Judge of Bezwada on the 18th of November, 1944, on the ground that E.P. No. 95 of 1943 was barred by limitation and that the prayer in E.A. No. 195 of 1944 could not be granted. There was no appeal against the order in E.A. No. 195 of 1944 but the order in E.P. No. 95 of 1943 was appealed against to the District Court of Kistna at Masulipatam in A.S. No. 26 of 1945. The learned District Judge of Kistna allowed this appeal as also the appeal in the connected case and held that the Execution Petitions of 1943 are not barred by limitation. His reasoning can be briefly summarised. Agreeing with the learned Subordinate Judge he held that the unnumbered execution petition of 1937 was never re-presented. He further held that that execution petition could not be regarded as an execution petition in which no final order was passed and which must therefore be treated as pending. He held however that it could be regarded as a step-in-aid of execution and so treating it, he thought that what is material is the date of the application itself and not the date of any order passed on it. Since the E.P. of 1937 was filed on 20th October, 1937, it gave according to the learned District Judge a further period of three years within which the decree-holder could file a fresh execution petition. As the execution petition of 1940 was admittedly filed on the 29th of April, 1940, it followed that that execution petition was in time as also the later execution petition of 1943 which was filed within three years of the dismissal of the execution petition of 1940. Mr. Venkatarama Sastri argued that the learned District Judge was not right in treating the date of the filing of the execution petition of 1937 as the starting point even if that execution petition is to be viewed as an application to take a step-in-aid of execution. Article 182, clause (5) provides a period of three years, the time from which the period begins to run being defined in the following words :

"5. Where the application next hereinafter mentioned has been made the date of the final order passed on an application made in accordance with law to the proper Court for execution, or to take some step-in-aid of execution of the decree or order."

From the language of the Article it is clear that whether the execution petition of 1937 is regarded as an application for execution or as an application to take some step-in-aid of execution of the decree, the starting point of limitation is the final order passed on such application. The Article does not permit any differentiation like what the learned District Judge has attempted.

In support of his decision, on this matter the learned District Judge relied on an observation of Leach, C.J., in *Ayi* v. *Solai*[1]. The question in that case was whether an application to take a step-in-aid of execution within the meaning of Article 182 (5) of the Indian Limitation Act should be made in a pending execution petition. This was answered in the negative. While referring to the change that had been made in Article 182 (5) in 1927 and to the provision which corresponded to Article 182 (5) in the previous Limitation Act, the learned Chief Justice pointed out that under Article 182 (5) as amended in 1927 the starting point is the final order, while previously it was the date of the application itself. Then occurs the following sentence :

" Nothing really turns on this, because for the purpose of answering the question referred it is immaterial whether the starting point is the date of the application or the date of the order passed thereon."

It is obvious that the question before the Full Bench in no way depended on whether the starting point was the one or the other. It is really surprising how the learned District Judge read this observation of the learned Chief Justice as supporting the inference that while the starting point is the date of the final order if the previous application was one for execution, it would be the date of the application itself if the previous application was one to take some step-in-aid of execution. In fact at page 475 after referring to *Kunhi* v. *Seshagiri*[2], the learned Chief Justice observed that,

" ....a fresh period of limitation starts from the date of the final order in an application to take a step-in-aid of execution as well as from the date of a final order in an application for execution."

Mr. Kameswara Rao, the learned advocate for the respondents-decree-holders, relied on the decision in *Satyanarayana* v. *Kajireddi*[3], where it was observed that the Full Bench which decided *Ayi* v. *Solai*[1] left open the question whether time began to run from the date of the application or the date of the order on it because it was unnecessary to decide it on the facts of that case. That only means that the question has now to be decided on the wording of Article 182 (5). Judging from the language of that Article I have no doubt whatever in holding that whether the previous application was one for execution or to take some step-in-aid of execution of the decree, the starting point is the date of the final order on it and not the date on which it was filed.

That an application for execution which is returned by the Court but never re-presented thereafter should be treated as if it had never been presented at all, has been held in a series of cases : *Chidambara* v. *Murugesam*[4], *Official Receiver, Ramnad* v. *Narayanasami Thevar*[5], *Khadir Sahib* v. *Viswanatha Aiyar*[6] and scarcely admits of any doubt. See also *Venkatappa* v. *Venkatappa*[7] and *Seshagirirao* v. *Subbarami Reddi*[8].

A distinction was attempted in *Khadir Sahib* v. *Viswanatha Aiyar*[6] between a case where an application for execution is returned for rectifying a defect by way of non-compliance with the provisions of Order 21, rules 11 to 14, and a case where the return is for complying with requisitions in respect of matters which cannot be described as defects falling under Order 21, rules 11 to 14. In the former class of cases the application for execution is not one in accordance with law while in the latter it is one in accordance with law. It was however held in *Khadir Sahib* v. *Viswanatha Aiyar*[6], that for the purpose of the present discussion there is no distinction between the two classes of cases. It was pointed out in that decision that the petition which was returned in *Official Receiver, Ramnad* v. *Narayanaswami Thevar*[5], was in conformity with the law, but that it still made no difference in the decision arrived at. The learned Judges in *Khadir Sahib* v. *Viswanatha Aiyar*[6], noticed that

1. (1945) 1 M.L.J. 47 : I.L.R. 1945 Mad. 468 at 472 (F.B.).
2. (1882) I.L.R. 5 Mad. 141.
3. (1945) 2 M.L.J. 427.
4. (1939) 2 M.L.J. 671 : I.L.R. 1940 Mad. 60.
5. (1941) 2 M.L.J. 1018.
6. (1942) 2 M.L.J. 768 : I.L.R. 1943 Mad. 357.
7. I.L.R. (1944) Mad. 266.
8. (1945) 1 M.L.J. 270 : I.L.R. 1945 Mad. 684 at 692 (F.B.).

Somayya, J., expressed a contrary opinion in *Sundarabalakadiresa Thevar* v. *Avudai Ammal*[1], but they disagreed with that judgment and followed the decision of the Bench in *Official Receiver, Ramnad* v. *Narayanasami Thevar*[2], and observed that an order of return, right or wrong, if made by a competent Court is not a mere nullity and cannot be ignored by the party affected. As already stated it may be assumed that in this case the application of 1937 was one in accordance with law. But that, in my opinion, makes no difference and since the application was admittedly not re-presented, the question of limitation must be decided as if there was no application made at all in 1937.

Mr. Kameswara Rao drew my attention to the decision in *Muthuvenkatasubba Reddiar* v. *Thangavelu Chetti*[3], in which there is an observation that the judgment in *Khadir Sahib* v. *Viswanatha Aiyar*[4], was with respect to the particular facts which arose therein and which, the learned Judges add " are not the same as in the present instance." I do not read this as expressing any disapproval of the judgment in *Khadir Sahib* v. *Viswanatha Aiyar*[4]. In *Muthuvenkatasubba Reddiar* v. *Thangavelu Chetti*[3], the facts were somewhat peculiar. An execution petition returned for re-presentation after compliance with certain requisitions was re-presented after the time given for the purpose by the Court. On the decree-holder mentioning to the Court that he was not pressing it the Court passed an order in the following terms : " This is not pressed and hence dismissed". This was held by the learned Judges in *Muthuvenkatarasubba Reddiar* v. *Thangavelu Chetti*[3], as amounting to an order excusing the delay in the re-presentation of the petition followed by an order of dismissal and the order of dismissal was held to be a final order within the meaning of Article 182 (5) of the Limitation Act. Having regard to the wording of the order the learned Judges were perhaps quite justified in inferring or implying an order excusing the delay in re-presentation, but that however bears in no way on the question whether the doctrine that has been developed in regard to execution petitions returned but not re-presented would not apply also to a case where the execution petition was one in accordance with law but is still returned for re-presentation after compliance with certain requisitions made by the Court.

The ground therefore on which the learned District Judge held that the application of 1937 saves limitation cannot be accepted.

Mr. Kameswara Rao however attempted to support the judgment of the lower appellate Court in several alternative ways. He first referred to the execution petition of 1934 in which there was, as already stated, a two-fold prayer. In an affidavit sworn to by the decree-holder on the 21st of March, 1944, it was stated that the dismissal order of the execution petition of 1934 was passed without issuing any notice to the parties or their pleaders and without hearing them, and that neither the decree-holder nor his vakil was aware that such an order of dismissal was passed and that as soon as it was known that the said execution petition was dismissed, another execution petition was filed on the 30th of October, 1937. Mr. Kameswara Rao argued that if this allegation is true the execution petition of 1934 has not been validly disposed of and must therefore be held to be pending, and that consequently it would be open to his client to remind the Court of the pendency of such an execution petition and ask for its continuance. In the first place, this allegation as to the circumstances in which the execution petition of 1934 was passed and the way it was dismissed seems to have been made for the first time in 1944. In the earlier execution petition of 1940 all that was said was that the execution petition of 1934 was dismissed meaning presumably that it was dismissed in the usual course. It is not known what allegation was made in the execution petition of 1937 regarding the manner of disposal of the earlier execution petition of 1934, but there is no reason to think that anything different from what was said in 1940 was said in 1937. I am not therefore prepared

1. (1942) 1 M.L.J. 542.
2. (1941) 2 M.L.J. 1018.
3. (1948) 1 M.L.J. 327.
4. (1942) 2 M.L.J. 768 : I.L.R. 1943 Mad. 357.

to accept the truth of the somewhat belated statement of the decree-holder in his affidavit of 1944.

Assuming for a moment that the allegation referred to above is true, the judgment-debtors have more than one answer. In the first place, the present execution petition No. 95 of 1943 is for attachment and sale of moveables. It is not easy to see how this application could be regarded as a continuation of the execution petition of 1934 which sought relief by way of attachment and sale of immoveable properties. It is also quite possible that having regard to the fact that the immoveable property which was sought to be proceeded against had already been attached at the instance of another creditor in E.P. No. 29 of 1933 and was being brought to sale, the decree-holder did not in his E.P. No. 127 of 1934 press for or take adequate steps in regard to the prayer in his execution petition for attachment and sale of the same immoveable property. Again as held in *Maharaj Bahadur Singh* v. *A. H. Forbes*[1], as the intervening applications are essentially different in character from the application of 1934, it is quite open to the Court to infer an abandonment of that application and "in any event," to borrow the language of the Privy Council in the decision just quoted, "the combined effect of the previous applications marks such substantial departure from the original application (of 1934) so as to make it impossible to hold that the application (of 1943) was a continuation of the application (of 1934)."

Mr. Kameswara Rao cited in this connection *Chalavadi Kotiah* v. *Pooloori Alimelammah*[2] and *Subbachariar* v. *Muthuveeran Pillai*[3]. In the former case, there was no intervening application while in the latter there was an intervening application; but its effect was not considered by the learned Judges. Having regard to the fact that the present application itself is for relief by way of process against moveables, that the application of 1940 also was for attachment and sale of moveables and that presumably the application of 1937 also was for the same purpose, it is impossible for the decree-holder to summon to his aid any doctrine of continuation of the application of 1934 in the application of 1943.

It was then said that by an amendment of the present execution petition the decree-holder alleged two other ways in which limitation in respect of the present execution petition was saved. One is by the application of S. 78 (2) of the Provincial Insolvency Act arising by reason of the insolvency of the father of the judgment-debtors-appellants. The other is said to arise by reason of certain acknowledgments of liability made by the father in respect of the decree debt. There is no doubt that these allegations were inserted in the execution petition by an amendment as per an order of Court. It is also true that Exs. P-5 to P-8 relate to the insolvency of the father of the appellants. No reference however is made in the judgment of the learned Subordinate Judge of Bezwada to either of these aspects and as already stated the learned Subordinate Judge held that the execution petitions are out of time. In the memorandum of appeal presented to the District Court of Kistna no complaint was made that these aspects ought to have been considered by the learned Subordinate Judge and the judgment of the learned District Judge which is no doubt in favour of the decree-holders does not suggest that there was any discussion before him in regard to either of these points.

It can therefore be safely presumed that the decree-holders were advised to give up and gave up these pleas even in the Court of first instance.

Moreover, there seems to be little substance in either of the pleas put forward. The affidavit in Ex. P-6 and the deposition Ex. P-7 which are both of 1940 are said to contain the relevant acknowledgments but having gone through both of them I find it difficult to say that there is any unequivocal admission that the decree debt was subsisting at the time of the alleged acknowledgment. The point as to section 78 (3) also seems to me to be not maintainable as admittedly the father of the appellants obtained an order of absolute discharge and his adjudication was

1. (1929) 57 M.L.J. 184 (P.C.).
2. (1908) 18 M.L.J. 46 : I.L.R. 31 Mad. 71.
3. (1912) 24 M.L.J. 545 : I.L.R. 36 Mad. 553.

not annulled. As held in *Nandlal* v. *Ramdatta*[1], S. 78 (2) of the Provincial Insolvency Act cannot apply where the order of adjudication is not annulled but the insolvent obtains an order of absolute discharge. Further it is difficult to see how there can be any extension of the period during which the insolvency of the appellants' father was subsisting in order to calculate limitation in regard to his sons who were admittedly not insolvents. I am therefore unable to accede to Mr. Kameswara Rao's request that the lower appellate Court should be called upon to submit its findings in regard to these two aspects. It is fairly clear to me that these were abandoned even before the learned Subordinate Judge of Bezwada, evidently because it was realised that there was no substance in them.

The result is that the execution application of 1940 as also the execution application of 1943 must be held to be barred by limitation. I therefore set aside the judgment of the learned District Judge of Kistna and restore that of the learned Subordinate Judge of Bezwada and dismiss both the execution petitions with costs throughout in both the cases.

Leave refused.

V.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE YAHYA ALI.

The Commissioner of Income-tax and Excess Profits Tax, Madras .. *Applicant**

v.

Sri R.S.A. Sankara Aiyar .. *Respondent.*

Income-tax Act (XI of 1922), *section* 10 (2) (xi)—*Assessee originally a partner—Dissolution of partnership—Decree due to partnership divided equally between partners—Assessee's share entered in the books of his separate business—Outstanding decree amount irrecoverable—Assessee's right to an allowance as a bad debt.*

The assessee was the manager of a Hindu undivided family and he carried on a money-lending business in partnership with one *K*. In 1931 the partnership was stopped though the firm was not dissolved but continued to realise its outstandings. In 1940, a decree was obtained by the firm against one *M* for one of its outstanding debts and in execution thereof realised certain sums. In 1942, the two partners decided to close the accounts and the then outstanding decree debt, among others, was divided equally between the partners and the assessee entered the sum representing his half share in the books of his own separate money-lending business. Subsequently, there were both receipts as well as expenditure in respect of this debt during the accounting period and the assessee after crediting his half share wrote off as irrecoverable the balance then due, and for the year 1944-45 claimed an allowance of it as a bad debt under section 10 (2) (*xi*) of the Act.

Held, that (*i*) there was enough material for holding that the bad debt claimed by the assessee, arose in respect of a loan made in the ordinary course of his money-lending business, within the meaning of section 10 (2) (*xi*) of the Act and (*ii*) the assessee's claim to write off the amount towards his share of the irrecoverable portion of the decree-debt in the assessment year is admissible under section 10 (2) (*xi*) of the Act.

Commissioner of Income-tax, Madras v. *Venkatasubbiah Chettiar*, (1946) I.T.R. 227. applied.

Case referred to the High Court by the Income-tax Appellate Tribunal, Madras Bench, under section 66 (1) of the Income-tax Act, 1922 (Act XI of 1922), as amended by section 92 of the Income-tax (Amendment) Act (VII of 1939) in R.A. Nos. 348 and 349 of 1946-47 (R.A.A. No. 400 Madras of 1945-46).

C. S. Rama Rao Sahib for Applicant.

M. Subbaraya Aiyar for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—This case arises out of the assessment of one R.S.A. Sankara Aiyar, Kallidaikurichi, and the relevant period of accounting is from 16th December, 1942 to 15th December, 1943. For a decision of the two questions referred to us, which will be set out later, the following facts have to be stated : The asessee is

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1. I.L.R. (1942) Nag. 306.

* Case Referred No. 40 of 1947. 17th August, 1948.

the manager of a Hindu undivided family. He carried on a money-lending business in partnership with one Kasi Aiyar. The business of this partnership was stopped in 1931, but the firm was not dissolved and continued to realise the outstandings due to it. A separate set of books was being maintained in respect of the realisations and outgoings of the firm. One of its outstanding debts was that due from one Kidar Pillai Maracair on a mortgage. There were some collections towards this debt, and finally a decree was obtained by the firm against the debtor sometime in 1940. In execution of the decree, certain lands of the debtor were sold. On 11th September, 1942, a sum of Rs. 16,395-14-10 was still due. On that date, the two partners decided to close the accounts of the partnership, and in pursuance of that decision, the assets of the partnership including this outstanding decree debt were divided equally between the two partners. The assessee entered a sum of Rs. 8,197 representing his half share of the balance due from this debtor, Kidar Pillai Maracair, in the books of his own separate money-lending business on 12th September, 1942. The ledger folio was opened in the name of the debtor in which he was debited with the said amount. No fresh undertaking or document was, however, taken from the debtor evidently because there was a decree obtained against him. Subsequently there were both receipts as well as expenditure in respect of this debt during the accounting period. The total realisation subsequent to the 12th September, 1942, was about Rs. 4,664, and the amount credited in the assessee's account as and for his share was Rs. 2,332. On 5th October, 1943, the balance then due in respect of this debt, namely, Rs. 5,880, was written off as irrecoverable. In the assessment for the year 1944-45 the assessee claimed an allowance of this sum of Rs. 5,880 as a bad debt under section 10 (2) (*xi*) of the Income-tax Act. The Income-tax Officer disallowed the claim on the ground that it had no connection with the business which the assessee was carrying on in the previous year and that it was really a loss of the defunct partnership. On appeal, the Appellate Assistant Commissioner allowed the assessee's claim on the ground that the debt had been taken over by the assessee as part of his money-lending business and the loss was sustained in the separate business carried on by him. On appeal, the Appellate Tribunal confirmed the decision of the Appellate Assistant Commissioner. Thereupon, the Commissioner made an application under section 66 (1) for a reference to this Court, and the Tribunal has referred the following two questions for our decision :—

" 1. Whether there is any material for the Tribunal's finding that the bad debt of Rs. 5,880 claimed by the assessee, arose in respect of a loan made in the ordinary course of his money-lending business, within the meaing of section 10 (2) (*xi*) of the Income-tax Act.

2. Whether, on the facts and in the circumstances of the case, the assessee's claim to write off the sum of Rs. 5,880 towards his share of the irrecoverable portion of the decree debt in the assessment year is admissible under section 10 (2) (*xi*) of the Income-tax Act ? "

Section 10 (2) (*xi*) of the Act provides that in the computation of the profits and gains of any business, in the case of an assessee carrying on a banking or money-lending busines, a legitimate allowance will be a sum in respect of a loan made in the ordinary course of such business as the Income-tax Officer may estimate to be irrecoverable but not exceeding the amount actually written off as irrecoverable in the books of the assessee. The question, therefore, is whether there is any material for the Tribunal's finding that the sum of Rs. 5,880 which was written off was in respect of a loan made in the ordinary course of the money-lending business of the assessee. The contention of Mr. Rama Rao Sahib for the department is that a mere entry of a debt due to the defunct firm in the account of the new money-lending business of the assessee is not sufficient to make that debt a loan made in the ordinary course in the latter business. He contends that there should be something in the nature of a novatio to which the debtor is also a consenting party before it could be held in law that the debt of the old firm became a loan made by the new firm. No direct authority was cited in support of this contention. Two decisions of the Calcutta High Court whch were cited to us, *Bissendyal Doyaram, In re*[1], and *Chimanlal Rameshwar Lal* v. *Commissioner of Income-tax, Bengal*[2], were long before

1. 6 I.T.R. 165. 2. (1940) I.T.R. 408.

the enactment of section 10 (2) (*xi*) of the Income-tax Act. It is, therefore, unnecessary to consider whether the propositions laid down in the two decisions are sound. On the other hand, there is a decision of a Bench of this Court in *Commissioner of Income-tax, Madras* v. *Venkatasubbiah Chettiar*[1] the *ratio decidendi* of which, we think, applies to the present case. In that case, the assessee was the manager of a Hindu joint family carrying on a money-lending business. In 1933, a separate money-lending business carried on in partnership by the family with another person was dissolved and the family received as part of its share certain promissory notes executed by persons to whom the partnership had lent money. These debts were entered in the books of the family relating to its own money-lending business and the promissory notes were renewed from time to time. The interest paid to the family by the debtors was included in the profits of the family and assessed to income-tax. In the year of account in that case, 1941-42, the assessee wrote off as irrecoverable three of such promissory note debts and claimed to deduct the amount from the assessable income under section 10 (2) (*xi*) of the Indian Income-tax Act. It was held by Sir Lionel Leach, C.J., and Patanjali Sastri, J., that the amount was allowable as a deduction under that provision. In dealing with the contention of the learned Counsel for the Commissioner that these promissory note debts were not loans made in the ordinary course of the family's money-lending business but were really made in the course of the defunct partnership business, the learned Chief Justice observed thus :

> "It is true that the money was actually lent by the partnership but the loans were allotted to the family on the dissolution of the partnership and they became part of the assets of the family's own business. The promissory notes which were actually written off as irrecoverable were not the original promissory notes but they were promissory notes which had been renewed by the borrowers in favour of the assessee."

Having regard to the fact that the Income-tax authorities had since the dissolution regarded those loans as part of the family's business and taxed the family on the interest paid in respect of them, the learned Chief Justice expressed his surprise that the Department should contend that clause (*xi*) did not apply. Though it is true that there were in that case certain facts the like of which are not to be found in the present case, we consider that the principle underlying the decision in that case applies equally to this case. Though in that case fresh promissory notes were executed by the borrowers in renewal of the original promissory notes presumably for purposes of limitation, we do not think that such renewals were necessary to serve as the basis of a finding that the old debts became part of the stock in trade of the new business. In the present case, the debt had ripened into a decree in favour of both the partners, and we fail to see what novation there could be after decree. There is no authority to support the contention on behalf of the Department that there should be a novation or an act by the debtor also, before it can be held that the old loans though treated as part of the stock in trade of the new business can be held to be loans made in the ordinary course of the new business. The observations of the Judicial Committee in *Arunachalam Chettiar* v. *Commissioner of Income-tax, Madras*,[2] must be read in the proper context and having regard to the facts of that case. In that case, there were two different businesses, one a cotton business and the other a money-lending business. The reference to the element of novation at page 183 of the report has nothing whatever to do with the contention now pressed before us by the learned Counsel for the Department.

It has not been suggested in this case that the entry made in the account of the assessee's money-lending business on the 12th September, 1942, was not a genuine entry or that it was an entry made *mala fide* for the purpose of claiming a deduction by way of an irrecoverable debt. Any such suggestion would not have been accepted by us in view of the fact that subsequent to the date of that entry there were substantial realisations. On these facts, it cannot be said that there is no material for the Tribunal's finding that the bad debt of Rs. 5,880 arose in respect

1. (1946) I.T.R. 227.
2. (1936) 71 M.L.J. 772 : (1936) I.T.R. 173 : L.R. 63 I.A. 238 : I.L.R. 59 Mad. 716 (P.C.).

of a loan made in the ordinary course of the assessee's money-lending business. The answer to the first question must be in the affirmative.

In our opinion the answer to the second question must also be in the affirmative. On the facts already narrated, it is clear that the debt became irrecoverable in the accounting period. It is not as if subsequent to the entry on 12th September, 1942, there was no attempt to make further realistions. As already mentioned, there were such further realisations. The fact that the mortgaged lands had been sold away need not necessarily mean that the assessee had at the time of making the entry no hope of realising any further amounts towards the debt. The finding of the Appellate Assistant Commissioner and the Tribunal that the debt became bad in the year of account is correct, and the assessee was, therefore, entitled to an allowance of the sum of Rs. 5,880 under section 10 (2) (*xi*) of the Income-tax Act.

The answers to both the questions will be in the affirmative. The Commissioner will pay the costs of this petition to the respondent, Rs. 250.

V.P.S. — *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction.)

PRESENT :—MR. JUSTICE YAHYA ALI.

Mrs. Sivagnanammal .. *Petitioner**

v.

Thirumagal Mills, Ltd., Gudiyatham and others .. *Respondents.*

Company—Bonus shares issued to shareholders in lieu of distributing the profits in cash—Is capital and not income—Life-tenant entitled to income of shares—Not entitled to bonus shares which will be property of remainderman.

When a company decides to capitalise its profits and issues fully paid-up bonus shares to the shareholders, the sums represented by those shares are in the nature of capital and cannot for any purpose be treated as income.

Accordingly a life-tenant entitled under a bequest only to the income (*varumanam*) of the ordinary shares has no right to such bonus shares (issued subsequently) which will virtually be the property of the remainderman.

A. Ramachandran for *Messrs. Row and Reddi* and *G. Gopalakrishnan* for Applicant (Petitioner).

C. Natarajan and *R. Desikan* for Respondents.

The Court delivered the following

JUDGMENT.—This is an application made under the Indian Companies Act for a direction to the first respondent company to rectify the company's register of members so as to include in it the name of the applicant Mrs. Sivagnanammal, as being a member of the respondent company holding in her sole name 50 bonus shares of the company. Sivagnanammal is the widow of one Parasurama Mudaliar who died on the 29th May, 1942. The said Parasurama Mudaliar and one Pithambara Mudaliar were partners of the firm S. R. Ponnuswamy Mudaliar and Brothers and as such held in the first respondent company 100 shares of the face value of Rs. 100 each. The shares were registered in the books of the company jointly in their names. During the life time of Parasurama Mudaliar, Pithambara Mudaliar died and the shares which stood jointly in the name of Parasurama Mudaliar and Pithambara Mudaliar were duly transferred in the names of Parasurama Mudaliar and Neelamega Mudaliar, the younger brother of Pithambara Mudaliar. Parasurama Mudaliar left a last will and testament made on 4th June, 1941, by which he bequeathed to his wife Sivagnanammal his interest in the shares in the first respondent company for her lifetime and he provided that she should enjoy only the income (*varumanam*) derived therefrom and that after her death the shares should become the property of his heir and brother's son K. Ratna Mudaliar who would be the owner of the corpus. On Parasurama's death in

* Application No. 77 of 1948. 6th July, 1948.

May, 1942, the registry of shares was transferred in the books of the Company in the name of Neelamega Mudaliar representing the interest of Pithambara Mudaliar, and Sivagnanammal and Ratnam representing the interest of Parasurama Mudaliar. This seems to have been effected with the consent of all the concerned parties. Ratnam died in 1946 leaving three undivided sons Dharmaraja and his two minor brothers. Dharmaraja is the 2nd respondent in this application and Neelamega was subsequently impleaded as 3rd respondent. No change in the registry was made after the death of Ratnam as no application was made by any of the concerned parties and the registry at present stands as it was prior to Ratnam's death. At an extraordinary meeting of the general body of the shareholders held on the 29th December, 1946, it was resolved *inter alia* to increase the capital of the company and since there was a large profit it was decided that instead of distributing it as dividends, fully paid-up bonus shares should be issued to shareholders registered in the registry of the company as on 28th November, 1946. The resolution is as follows :

> " A bonus of Rs. 100 per share for the ordinary shares of the company held by the shareholders registered in the registers of the company as on 28th November, 1946 and the bonus of every Rs. 100 that is to be given in this manner instead of being given in cash, shall be given as one fully paid-up ordinary share of this company and for giving bonus like this, the present Reserve Fund shall be used."

Sivagnanammal in her present application claims that she is entitled to an absolute right to 50 of these bonus shares in her sole name and that, since that claim was not countenanced by the company, she applies for a rectification of the register of shares for causing her name to be entered in the register of members as the sole holder of 50 bonus shares of Rs. 100 each.

This case raises an important question of Company Law which, as far as I am able to gather, is not covered by the decision of any Indian High Court. The question is whether when a company decides to capitalise its profits and issues fully paid-up bonus shares to the shareholders, the sums represented by those shares are in the nature of capital or can for any purpose be treated as income. If it is to be regarded as capital, then having regard to the provisions of the will they will be virtually the property of the remainderman and not of the life-tenant, as under the directions contained in the will the life-tenant is only entitled to the *varumanam* of the shares. If, however, it is to be regarded as income on the ground that its origin is traceable to the profits of the company then under the will, it will be exclusively the property of Sivagnanammal and she will be entitled to the separate registry of those shares in her name. Before dealing with this interesting question, I may dispose of one or two minor points that incidentally arise. The contention of the applicant is that for all practical purposes she was considered to be the owner of 50 original shares after her husband's death and that even during her husband's life time he was regarded as owner of 50 shares, although the registry of the entire stock of 100 shares was throughout in the names of the joint owners. This contention does not stand scrutiny. No doubt dividends have been distributed separately but the registry has throughout been joint. When Pithambara was alive it was in the names of Parasurama and Pithambara. After Pithambara's death it stood in the joint names of Neelamega and Parasurama and after Parasurama's death, it was changed into the joint names of Neelamega, the petitioner and Ratnam. The second objection is that the applicant had no notice of the meeting of the general body held on the 29th December, 1946, and that therefore the resolution of that date capitalising the profits and authorising the issue of bonus shares is not binding upon her. It seems to me that this contention shows that the petitioner is approbating and reprobating at the same time, because her present application is on the footing that bonus shares having been issued she must be registered exclusively as the owner of 50 bonus shares. Even otherwise, I find no substance in this objection. Article 16 of the Articles of Association of the company explicitly provides that if any share is held under joint ownership in partnership, the person whose name is entered first in the books shall be treated as the important person for all proceedings and notices, etc., shall be given to him only. In this case,

it is admitted that at the time when the meeting was called the name of Neelamega was entered first and it is also admitted that notice was duly served upon him.

Coming to the main question there can be no doubt that it is open to a company either to distribute its earned profits as dividends among its shareholders or to carry the whole or a portion thereof to the reserve fund. The shareholder individually has no right to claim that profits should necessarily be distributed as dividends and in fact the shareholder as such acquires no right in the profits of the company until the dividend is declared and distributed. If the Articles confer the necessary power upon the company, it may genuinely capitalise its undistributed profits and appropriate the same either by adding it to its capital or using it for the purpose of organising or expanding its business or for acquiring fresh assets. It usually does so by adding the profits either to its reserve fund or to its nominal capital. One of the recognised methods of capitalising undivided profits is to add to its capital issue in the shape of either bonus debentures or bonus shares. They may be either partly paid-up or fully paid-up. When fully paid-up bonus shares are issued to the shareholders what actually happens is that the profits are capitalised and the existing shareholders instead of receiving any moneys out of the undistributed profits only receive *pro rata* fresh shares out of the old shares converted as fully paid-up or out of the new issue. The present is the case of a new issue of shares. The significant circumstance is that in such a case the assets, *i.e.*, the profits, remain with the company as capital and what the shareholders receive is merely a paper certificate as evidence of their interest in the additional capital of the company. The new shares would confer a title to a larger proportion of the surplus assets of the company only if and when a general distribution of assets takes place as when the company is wound up or when the capital is duly reduced. Until then the company's shares issued in such circumstances retain the character of capital. This in my opinion is the legal position under the Company Law with reference to bonus shares issued out of capitalised profits. As I have already indicated there is no direct decision of any Indian Court bearing upon this question; but the principles have never been in doubt in the British Courts. I shall first refer to the two leading cases on the subject. In *Bouch* v. *Sproule*[1], a testator had bequeathed his residuary personal estate to his executor in trust for his wife for her life and after her death to a remainderman. Part of the residuary estate consisted of shares in a company whose directors had power, before recommending a dividend, to set apart out of the profits such sums as they thought proper as a reserve fund. After the testator's death the directors of the company decided to allot new shares (partly paid-up) to each shareholder, and to apply the bonus dividend in part payment of the new shares. This proposal was carried out and new shares were allotted to the remainderman and registered in his name. The Court of Appeal reversing the judgment of the Court below has held that the bonus belonged to the life-tenant. The House of Lords reversed that decision and held that the real nature of the transaction was that the Company did not pay or intend to pay any sum as dividend, but intended to and did appropriate the undivided profits as an increase of the capital stock, that the bonus dividend was therefore capital of the testator's estate and that the life-tenant was not entitled to the bonus or the new shares. In the judgment of Lord Herschell all the previous cases were fully reviewed and finally the opinion of Lord Justice Fry given in an earlier case was endorsed and that opinion was to the following effect:—

"When a testator or settlor directs or permits the subject of his disposition to remain as shares or stocks in a company which has the power either of distributing its profits as dividend or of converting them into capital, and the company validly exercises this power such exercise of its power is binding on all persons interested under the testator or settlor in the shares, and consequently what is paid by the company as dividend goes to the tenant for life, and what is paid-up by the company to the shareholder as capital, or appropriated as an increase of the capital stock in the concern, enures to the benefit of all who are interested in the capital."

In the present case there can be no question that the company had power to increase its capital and to appropriate its profits to such an increase and that it did so by

1. (1887) 12 A.C. 385.

capitalising its entire amount of profits and adding them to its capital by the issue of fully paid bonus shares to shareholders. The next important case where the question has been fully and authoritatively discussed is another decision of the House of Lords in *Inland Revenue Commissioners* v. *Blott*[1]. That case arose under the Finance Act, 1910, and was concerned with super-tax. A resolution was passed by the company in exercise of the power conferred in that behalf by the Articles declaring that out of its undivided profits a bonus should be paid to its shareholders and authorising the distribution among the shareholders of certain of its unissued shares credited as fully paid-up. The question was whether for the purpose of super-tax the shares so allotted to the respondent should be treated as part of his 'total income from all sources for the previous year' within the meaning of section 66 of the Finance Act. Their Lordships held that they were not part of his income but were an addition to his capital in that year and in doing so followed *Bouch* v. *Sproule*[2]. Viscount Haldane in his speech said :

> "I am, therefore, of opinion, both on principle and on authority, that the transaction in the present case was one in which the company was in law dominant on the question whether the money in question was to be capital or income for all purposes . . . . . ."

The juristic position was put in a lucid manner by Sir John Simon, as he then was. At page 174 of the report he argued :

> "Assume that a company makes a profit, one of three things may happen. First, it may declare a dividend in the ordinary way . . . . . Secondly, instead of distributing its profits, it may put a certain amount to reserve fund. That is only a reserve *pro tem* available in the company's hands as floating capital . . . . . 'Thirdly, the company may, in the exercise of its powers of domestic management, take that reserve fund and strike it permanently with the character of capital . . . . . . It is within the constitutional powers of a company either temporarily or permanently to capitalise its undivided profits and it thereby puts it out of its power to distribute the sum so capitalized as profits."

This exposition of the principle was adopted by the majority. These two decisions have been treated as final authority on the question and were followed in a catena of cases ever since. I shall only refer to one case as the facts of that case approximate to the facts of the present case. In In re *Spoir*[3] (*Holt* v. *Spoir*) a testatrix bequeathed 300 ordinary shares in a limited company upon trust to pay the 'dividends, bonuses and income' thereof to certain persons during their lives and to the survivor of them during the life of such survivor and after the death of the survivor the trustees were directed to hold the shares upon trust for the Infirmary absolutely. The company had accumulated as such a large reserve fund out of its profits and also had a large amount of undistributed profits in its hands not carried to the reserve. The company proposed to distribute by way of bonus a certain sum and the method adopted by the company was to capitalise that sum, and instead of distributing it in cash, to distribute it in the shape of fully paid shares. As in the present case the transaction was carried out by appropriate resolutions duly agreed to by the shareholders. A summons was taken out to have it decided whether the bonus shares so allotted to the trustees ought to have been transferred to the tenants for life or were rightly retained by the trustees as capital subject to the trusts of the will. It was held by the Court of Appeal applying the test laid down in *Bouch* v. *Sproule*[2] and *Inland Revenue Commissioners* v. *Blott*[1] that as a question of fact the issue of new shares by the company must be regarded as a distribution of capital, and not of income ; and that in the construction of the will the words "dividends, bonuses and income" did not cover the shares in question so as to pass them to the tenant for life. It is significant that even though the word 'bonuses' occurred in the will it was held that the expression did not cover the bonus shares issued in that case. The present case is *a fortiori* from that point of view because the only word used in Parasurama's will is '*varumanam*.' Next there is a case which went up on appeal to the Privy Council from the Supreme Court of New South Wales. The decision is found reported in *Robert Alan Hill* v. *The New Permanent Trust Company of New South Wales*[4]. After reviewing the various authorities including the cases cited above, their Lordships laid down

1. (1921) 2 A.C. 171.
2. (1887) 12 A.C. 385.
3. (1924) 1 Ch.D. 359.
4. (1930) 60 M.L.J. 320 : 1930 A.C. 720.

the principles in concrete propositions. Two of them may be set out here as having a direct bearing upon the question at issue :

> "Other considerations arise when a limited company with power to increase its capital and possessing a fund of undivided profits, so deals with it that no part of it leaves the possession of the company but the whole is applied in paying up new shares which are issued and allotted proportionately to the shareholders, who would have been entitled to receive the fund had it been, in fact, divided and paid away as dividend.
>
> The result of such a dealing is obviously wholly different from the result of paying away the profits to the shareholders. In the latter case, the amount of cash distributed disappears on both sides of the company's balance sheet. It is lost to, the company. The fund of undistributed profits which has been divided ceases to figure among the company's liabilities ; the cash necessary to provide the dividend is raised and paid away, the company's assets being reduced by that amount. In the former case the assets of the company remain undiminished, but on the liabilities' side of the balance sheet (although the total remains unchanged) the item representing the undivided profits disappears, its place being taken by a corresponding increase of liability in respect of issued share capital. In other words, moneys, which had been capable of division by the company as profits among its shareholders have ceased for all time to be so divisible, and can never be paid to the shareholders except upon a reduction of capital or in a winding up. The fully paid shares representing them and received by the trustees are therefore received by them as *corpus* and not as income."

The only Indian decision in which the point involved here came up in an indirect manner for consideration is the decision of the Privy Council in *The Commissioner of Income-tax, Bengal* v. *The Mercantile Bank of India, Limited*[1]. That arose out of an income-tax reference. In that case also the company had very large accumulations of undistributed profits and the proposal was to capitalise the company's reserves and make a distribution to the shareholders in the form of debentures on redemption of which the funds required would be available. The question raised was whether the assessee thereby received "income, profits or gains" within the meaning of section 4 of the Indian Income-tax Act. It was held by their Lordships of the Judicial Committee that the capitalised profits distributed by way of debentures were not "income, profits or gains" within the meaning of section 4 of the Income-tax Act and that the assessees were not liable to be taxed in respect of those debentures. It was pointed out that on the point, as to the capitalised profits being not liable to tax there was no distinction between the Indian and the United Kingdom enactments.

From the foregoing discussion of the principles it is abundantly clear that the bonus shares duly issued by the company in the present case are impressed with the character of capital and they are not in the nature of income for any purpose whatever. Upon a true construction of the will and a proper application of the principles the only possible conclusion is that the applicant is not entitled to any separation of the shares or to the allocation and separate registry of those bonus shares exclusively in her own name.

The application is dismissed with taxed costs, one set to the company (1st respondent) and one set to be shared between the 2nd and 3rd respondents.

K.S. ——— *Application dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDARAJACHARI.

R. Muthiah Thevar .. *Petitioner**

v.

P. Lakshmanan Pandithar .. *Respondent.*

Madras Agriculturists' Relief Act (IV of 1938), *section* 13, *proviso—Government order of* 7—7—1947 *altering* 6¼ *per cent. specified in the proviso to S.* 13 *and fixing* 5½ *per cent. per annum published in* Fort St. George Gazette *on* 29—7—1947 *when operative—New rate of interest—Date from which applicable—Open payments—Appropriation.*

L executed on the 9th of November, 1938, in favour of *S* a promissory note for Rs. 240 agreeing to pay interest at the rate of 12 per cent. per annum. There were two payments made to *S*, one of Rs. 100 on 4th November, 1941, and the other of Rs. 150 on 22nd July, 1943. *S* transferred the promissory note on 22nd July, 1945, to *M* who filed a suit on the promissory note on 11th March, 1946,

1. (1936) 71 M.L.J. 525 : L.R. 63 I.A. 457 (P.C.).

* C. R. P. No. 1168 of 1946. 21st July, 1948.

calculating interest at the contract rate and giving credit to the two payments. After adjusting the payments *M* claimed Rs. 160 as due to him. The lower Court dismissed the suit on the ground that the two payments were open payments and that they should be adjusted towards the principal and nothing was due. On revision,

Held, the case must be dealt with in accordance with the provisions of section 13 of Madras Act IV of 1938. *M* will be entitled to 6¼ per cent. per annum simple interest up to the coming into operation of the notification of July, 1947, and 5½ per cent. thereafter. The notification has no retrospective effect so as to apply from the date of the promissory note. The notification operates as from the date of its appearance in the Gazette (29—7—1947) and not the date on which the Government made the order (7—7—1947). It is sufficiently clear from the wording as well as the object of section 13 that the Legislature clearly intended to protect an agriculturist notwithstanding his own consent and it could not have intended to make his right to the benefit contemplated by the Act liable either to be defeated or materially curtailed by an act of the creditor to which the debtor is no consenting party. The creditor cannot therefore claim to appropriate the payments towards interest due and the balance for principal on the date of the plaint.

Petition under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the decree of the District Munsiff of Tenkasi, dated 10th July, 1946, and passed in S. C. S. No. 78 of 1946.

N. T. Raghunathan and *S. Ramayya Nayak* for Petitioner.

T. R. Srinivasan for Respondent.

The Court delivered the following

JUDGMENT.—The respondent executed on the 9th of November, 1938, in favour of one Subbamma a promissory note for Rs. 240 agreeing to pay interest at the rate of 12 per cent. per annum. There were two payments made to Subbamma, one of Rs. 100 on 4th November, 1941, and the other of Rs. 150 on 22nd July, 1943. The promissory note was transferred by Subbamma to the petitioner on 22nd July, 1945. In his plaint the petitioner gave credit to both the payments but he calculated interest at the contract rate and adjusting the payments made on that basis he claimed Rs. 160 as due to him on 7th March, 1946. The suit was filed four days later on 11th March, 1946.

The defendant-respondent alleged other payments but these were not made out and nothing was said about these payments at the hearing of the civil revision petition. The lower Court dismissed the petitioner's suit on the ground that the two payments were open payments and that they should therefore be adjusted towards the principal and as taken together they were in excess of the amount of principal there was nothing due to the petitioner. It may be observed in passing that the two payments were endorsed by the respondent on the promissory note on their respective dates as made towards the principal and interest due on the promissory note.

Mr. Raghunathan, counsel for the petitioner, pointed out that under section 13 of the Madras Agriculturists' Relief Act, which, according to both sides, is the relevant provision governing this case, there is no question of open payment, and that the manner in which the case was dealt with by the lower Court, is quite inappropriate to a promissory note which is executed after the coming into force of Madras Act IV of 1938, and which is not therefore governed by sections 7, 8 and 9.

Mr. Srinivasan, counsel for the respondent, frankly conceded that he cannot support the reasons given by the lower Court for the dismissal of the suit.

Both the learned counsel agreed that if the case is dealt with in accordance with the provisions of section 13, there would be some amount due to the petitioner, but as to how that amount is to be calculated and as regards the provisions of law governing such calculation there was considerable divergence.

The relevant portion of section 13 of Madras Act IV of 1938, is in the following terms :

" In any proceeding for recovery of a debt, the Court shall scale down all interest due on any debt incurred by an agriculturist after the commencement of this Act, so as not to exceed a sum calculated at 6¼ per cent. per annum simple interest, that is to say, one pie per rupee per mensem simple interest, or one anna per rupee per annum simple interest :

Provided that the Provincial Government may, by notification in the Official Gazette, alter and fix any other rate of interest from time to time."

In the *Fort St. George Gazette*, dated 29th July, 1947, was published the following notification which may be quoted *in extenso* :

" (G. O. Ms. No. 2919, Development, 7th July, 1947). In exercise of the powers conferred by the proviso to section 13 of the Madras Agriculturists' Relief Act, 1938 (Madras Act IV of 1938), His Excellency the Governor of Madras hereby alters the rate of $6\frac{1}{4}$ per cent. per annum simple interest specified in the said section and fixes in lieu thereof $5\frac{1}{2}$ per cent. per annum simple interest."

One of the points discussed before me was whether by reason of the notification the rate of $5\frac{1}{2}$ per cent. per annum therein provided should be calculated from the date of the promissory note or from the date when the notification came into operation. Subsidiarily, the question was raised whether the notification can be said to have come into effect on 7th July, 1947, when the Government order was passed or on 29th July, 1947, when the order was published in the Gazette.

The respondent's counsel contended that the notification operates as if there is a substitution of the figure of $5\frac{1}{2}$ per cent. per annum for the figure of $6\frac{1}{4}$ per cent. per annum found in section 13 and as if the new figure had always been there. He argued that in view of the dismissal of the suit by the lower Court, the Civil Revision Petition can be properly described as a proceeding for recovery of a debt. I may say that this last position was not contested by the petitioner's counsel. If this is such a proceeding, Mr. Srinivasan's argument went on, the Court in dealing with the civil revision petition is bound to direct a calculation to be made on the basis of $5\frac{1}{2}$ per cent. per annum as that rate has been substituted for the larger rate by the notification. The argument is attractive, but it seems to me that this would give retrospective operation to the notification which, in the absence of clear and unambiguous language, a Court of law can neither presume nor infer. It would be noticed that the proviso to section 13 says that the Provincial Government may alter and fix any other rate of interest from time to time. The alteration may as a question of legal possibility include a raising of the rate of interest though it must be conceded that this is most unlikely. And the rate of interest is also to be fixed from time to time. This language seems to me to indicate that having regard to the state of the money market at the time and such other considerations as may be germane, the Provincial Government should have the power to regulate the rate of interest which in its opinion is legitimately chargeable from an agriculturist. The words " from time to time " indicate that a certain state of things may exist for some time and then there may be a change calling for a corresponding adjustment in the rights and liabilities of the parties in regard to the rate of interest which an agriculturist may be called upon to pay. The language of the proviso would not, in my opinion, enable the Provincial Government to issue a notification so as to deal with a period which has gone by. So far as the language of the notification on which some emphasis has been laid by Mr. Srinivasan is concerned, it recites first that it is framed in exercise of the powers conferred by the proviso to section 13. Then it " alters the rate of $6\frac{1}{4}$ per cent. per annum simple interest " specified in that section and finally fixes in lieu thereof $5\frac{1}{2}$ per cent. per annum simple interest. The idea of a fixation of a different rate of interest in lieu of the rate of interest that is specified in the section may no doubt suggest an intention to give the notification retrospective effect but notwithstanding that circumstance, which seems to me to be of no great weight if the notification is read as a whole, there is not sufficiently clear language compelling a Court to give retrospective effect in the sense contended for by the counsel for the respondent. It is quite possible to read the notification as applying to the rate of interest which accrues as between a creditor and an agriculturist debtor after its date. The result of this construction would be that the petitioner will be entitled to $6\frac{1}{4}$ per cent. per annum simple interest up to the coming into operation of the notification and $5\frac{1}{2}$ per cent. thereafter.

It also seems to me that, having regard to the wording of the proviso to section 13 that the alteration of the rate of interest and its fixation from time to time should be by a notification in the official Gazette there is an indication that such notification should operate as from the date of its appearance in the Gazette which

as already stated was 29th July, 1947. The material date for this purpose, in my opinion, is that date and not the date on which the Government passed the order.

Mr. Raghunathan raised another interesting point. He said that the previous payments made by the respondent though unappropriated at the time when they were made were appropriated on the date of the plaint and according to section 60 of the Indian Contract Act and the law governing the appropriation of debts, he argued, that any relief which the respondent may be entitled to can only be given subject to that appropriation being maintained. In support of his argument he cited *Munuswami Mudali* v. *Perumal Mudaly*[1], *Gajram Singh* v. *Kalyan Mal*[2], *Corry Bros. & Co.* v. *Owners of Turkish Steamship "Mecca"*[3], *Commissioner of Income-tax, Bihar and Orissa* v. *Maharajadhiraj of Dharbanga*[4]. In the first of these cases it was held that

> "under section 60 of the Contract Act a creditor is entitled to exercise his right of appropriation in the manner most advantageous to himself and at any time before the filing of the suit."

In *Gajram Singh* v. *Kalyan Mal*[2], the matter was taken a little further and it was held that a creditor can appropriate the payment made to any debt until the judgment is pronounced by the trial Court though not thereafter. In *Corry Bros. & Co.* v. *Owners of Turkish Steamship "Mecca"*[3], Lord McNaghton enunciated the fundamental principles governing appropriation in the following well-known passage:—

> "When a debtor is making a payment to his creditor he may appropriate the money as he pleases, and the creditor must apply it accordingly. If the debtor does not make any appropriation at the time when he makes the payment the right of application devolves on the creditor . . . . . It has long been held and it is now quite settled that the creditor has the right of election . . . . . 'up to the very last moment', and he is not bound to declare his election in express terms. He may declare it by bringing an action or in any other way that makes his meaning and intention plain."

What Lord McNaghton said is the law of England has been applied without question in this country. (See *Commissioner of Income-tax, Bihar and Orissa* v. *Maharajadhiraj of Dharbanga*[4]).

The question however is whether the principle established by this and other cases, which is part of the general law of appropriation, has not been departed from in section 13 of Madras Act IV of 1938. It is true that sections 7, 8 and 9 of the Act deal with one subject, namely, debts incurred by agriculturists before 22nd March, 1938, on which date the Act came into operation, while section 13 statedly deals with debts incurred by an agriculturist after the commencement of the Act. It cannot, however, be forgotten that all the provisions were meant for the relief of agriculturists and that the Legislature was in giving relief to agriculturists overriding several provisions of the general law. If Mr. Raghunathan's argument is to be accepted the result would be that in a large number of cases where the debtor makes no appropriation at the time when he makes his payment and where he does not take the additional precaution of stating that his payment should be applied towards the interest due on the debt calculated at the rate specified in section 13 of the Act and not at the contract rate, he will be deprived of the benefit of the relief intended by section 13, and by a unilateral act the creditor can get round the provisions of section 13. While a departure from the law of the country is not to be easily inferred it is, in my opinion, sufficiently clear from the wording as well as the object of section 13 that the Legislature clearly intended to protect an agriculturist notwithstanding his own contract, and that it could not have intended to make his right to the benefit contemplated by the Act liable either to be defeated or materially curtailed by an act of the creditor to which the debtor is no consenting party.

Mr. Srinivasan does not quarrel with the proposition of law for which the petitioner's counsel cited *Ramalakshmi* v. *Gopalakrishna Rao*[5], namely, that if a debtor

1. (1919) 37 M.L.J. 367.
2. (1935) I.L.R. 58 All. 791 (F.B.).
3. (1897) A.C. 286.
4. (1933) 64 M.L.J. 612 : L.R. 60 I.A. 146 : I.L.R. 12 Pat. 318 at 337 (P.C.).
5. (1944) 2 M.L.J. 285.

consents to waive the benefit of the Act which he clearly does when he makes an endorsement evidencing an appropriation of a payment at the contract rate of interest, he is bound by such consent notwithstanding the provisions of the Act making interest at that rate not enforceable.

In this case, it is not suggested that there is anything from which the respondent can be said to have consented to an appropriation of the payments made by him towards interest at the contract rate and thereby to have waived the benefit of the Act.

The result is that the decree of the lower Court dismissing the suit will have to be set aside, and a decree passed in favour of the petitioner on the lines, laid down in *Thiruvengadatha* v. *Sannappan*[1]. Counsel are agreed that on the above basis the petitioner will be entitled to a decree for Rs. 71 with further interest thereon from this date at 5½ per cent. per annum. Each party will bear his own costs throughout.

K.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN.

R. Nilakanta Iyer .. *Petitioner**

v.

Ramanarayana Iyer and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 1, rule 3 and Order 2, rule 3—Suit for partition by a member of a joint Hindu family—Plaintiff claiming a share in certain leases standing in the name of a stranger to the family who was impleaded as a defendant to the suit—Stranger claiming title paramount—Suit, if bad for misjoinder of parties and causes of action.

Order 2, rule 3, Civil Procedure Code, should be read with Order 1, rule 3, in deciding what constitutes a misjoinder of parties and misjoinder of causes of action and in considering such a question, the Court should be guided principally by the averments in the plaint.

The plaintiff in a suit for partition claimed a share in certain leases standing in the name of a stranger to the family who was also impleaded as a defendant along with the members of the family. The plaintiff alleged that with reference to these leases that the title vested in the family and that the defendant in whose name they stood was only a benamidar for the head of the family. But that defendant's claim was one of title paramount.

Held, on the averments in the plaint, it was a clear case of misjoinder of parties and misjoinder of causes of action. The claim to a share in the leases is not based *under the same right* under which partition is sought. Such a claim cannot be tacked on to a general suit for partition.

Case-law discussed.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the finding of the Court of the Subordinate Judge, Tinnevelly, dated 21st January, 1947, in O. S. No. 33 of 1946.

K. S. Sankara Aiyar and *V. Sundaresan* for Petitioner.

K. R. Rama Aiyar, *R. Ramasubbu Aiyar* and *M. Murugappa Chettiar* for Respondents.

The Court delivered the following

JUDGMENT.—This petition arises out of a suit for partition instituted by the plaintiff. The correctness of the finding of the learned Subordinate Judge under issue No. 15, which was taken up for preliminary adjudication has been challenged in revision by the plaintiff. Issue No. 16 was also decided, and against that decision C. R. P. No. 1735 of 1947 was filed by the fourth defendant, but that petition was not pressed and was eventually dismissed.

In the suit for partition that the plaintiff instituted, he impleaded his brothers, defendants 5 and 6, his father the first defendant, and his mother, the second defendant. Besides, the third defendant, the daughter of the family, and the fourth defendant, her husband, were also made party defendants.

1. (1941) 2 M.L.J. 307 : I.L.R. 1942 Mad. 57 at 59.

* C. R. P. No. 972 of 1947. 20th August, 1948.

Two items of property in which the plaintiff claimed a share were leases, one the lease of certain properties in Thiruvaduthurai and the other a lease of certain other properties in Narasingampettai village both in Tanjore District.

The plaintiff's case with reference to the Thiruvaduthurai lease was set out in paragraph 15 of the plaint. The lease itself admittedly stood in the name of the fourth defendant. The plaintiff's case was that the first defendant had a third share in this lease for which he paid Rs. 6,000 to the fourth defendant even before the lease was taken by the fourth defendant :

> "so far as the first defendant's share is concerned, the fourth defendant is only a benamidar."

Defendants 4 and 1 in the statements that they filed admitted that the first defendant had originally advanced a sum of Rs. 6,000 to the fourth defendant with a request that the fourth defendant should assign to the first defendant a third share in the lease if the fourth defendant got it. The fourth defendant pleaded further that he eventually decided not to give any share in that lease to the first defendant, and that he returned this amount of Rs. 6,000 to the first defendant.

The plaintiff's case with reference to the Narasingampettai lease was set out in paragraph 14 of the plaint. The lease deed stood in the name of the fourth defendant and one K. S. Chidambaram Iyer who was not a party to the suit. That a half share in this lease belonged to this Chidambaram Iyer was common ground. The plaintiff's case was that the other half share belonged to the family of the first defendant and his son.

> "The lease deed of Narasingampettai stands in the name of the fourth defendant who has no interest in the lease and is only a benamidar for the family of plaintiff and defendants 1, 5 and 6."

Dealing with the plea of the first defendant and the fourth defendant that the first defendant had given up his interest in the lease after obtaining a sum of Rs. 4,000 from the fourth defendant, the plaintiff averred :

> "the whole story is false and has been invented to defraud him and defendants 5 and 6 after he sent notices to defendants 1 to 4 demanding partition."

The answer to these allegations was in paragraphs 8, 9 and 10 of the written statement filed by the fourth defendant. He contended that the original acquisition of a half share in the lease, excluding Chidambaram Iyer's half share, was for the fourth defendant alone, and that subsequently, at the request of the first defendant, he assigned his half share to the first defendant. Again, when the first defendant expressed his inability to manage that property, the fourth defendant took it back and paid the first defendant a sum of Rs. 4,000.

It was principally on the fourth defendant's contention that issue No. 15 :

> "whether the suit is bad for misjoinder of parties and causes of action?"

was framed. The learned Subordinate Judge held that, with the claims against the fourth defendant as they stood, the suit, which was primarily one for partition, was bad for misjoinder of parties and causes of action. The learned Subordinate Judge called upon the plaintiff to elect against which defendant or defendants he would proceed with his suit and to amend the plaint suitably. It is that order which the plaintiff seeks to set aside in this revision petition.

No doubt as was observed in *Shanmukha Nadar* v. *Arunachala Chetti*[1] :

> "partition is the occasion of a comprehensive settlement of the extent of the family estate available for division and of the *deductions* which have to be made from that estate on account of family liabilities."

Explaining the persons who should be made parties to a suit for partition, the Civil Rules of Practice and Circular Orders, Vol. I, lays down at page 261 :

> "In every suit for partition of property, all persons entitled to share therein, or to maintenance, shall be joined as parties, and if it is alleged that any co-owner has alienated any portion of the joint family property or his interest therein, in circumstances rendering the alienation not binding on the—

1. (1921) 42 M.L.J. 97 : I.L.R. 45 Mad. 194.

co-owners, the alienee shall be made a party to the suit and the plaint shall set out the particulars of the alleged alienation."

In Mayne Hindu Law and Usage, 10th edition at page 570, the learned author observed :

" Ordinarily a suit for partial partition does not lie, but in this sense, a suit for partial partition will lie when the portion excluded . . . . . is held jointly with strangers to the family who have no interest in the family partition."

That, of course, does not by itself help to decide the question at issue, whether in the suit for partition as the plaintiff framed it, he could ask for an adjudication on the issue, whether the acquisition of the two leases, the Thiruvaduthurai lease and Narasingampettai lease, made in the name of the fourth defendant, was benami for the benefit of the family of the first defendant.

In *Ramakrishna Iyer* v. *Krishna Iyer*[1], it was held that a suit for partition impleading the debtors of the family with a view to the determination of the nature and amount of the debts so as to bind the debtors was bad for misjoinder of causes of action. The learned Judges observed :

" It is, however, the well-established practice in a suit for partition to add persons claiming to be in possession as alienees of the property sought to be partitioned, and this practice is certainly justified by convenience."

It was probably this principle of convenience that was extended in *Shanmukha Nadar* v. *Arunachala Chetti*[2] to include within the scope of a suit for partition the validity or otherwise of simple money decrees obtained by creditors against the family. At page 200, however, in dealing with contentions of some of the creditors, the learned Judges observed :

" Firstly it is urged that the suit offends against Order 11, rule 4, because it is a suit in effect for the recovery of immoveable property and no other cause of action, such as is involved in the claim for the setting aside of the 7th to 18th defendants' decrees as collusive, should be joined with it. One possible answer is that these are claims in which the reliefs sought are based on the same cause of action and another possible answer is that in case the leave of the Court is asked for, as the wording of the rule implies that it can be asked for, that leave may be given."

The question for consideration now is, is there any justification to extend, on grounds of convenience or on other grounds, the principle, that persons who are not members of the family could be joined as parties to a suit for partition between members of a coparcenery, to cover cases of claims of the family as a unit against the strangers to the family who have no interest as such in the partition.

The position of the debtors of the family was referred to in *Ramakrishna Iyer* v. *Krishna Iyer*[1]. To similar effect was the decision in *Venkanna* v. *Sarayya*[3]. In that case the plaintiffs who were coparceners with the first defendant sued for partition of their properties and for dissolution of a partnership in which the coparceners and the other defendants impleaded in the case had a joint interest. Sankaran Nair, J., held that the suit was bad for misjoinder of causes of action. Pinhey, J., went further and held that the suit was bad not only for misjoinder of causes of action but bad also for misjoinder of parties.

It was principally on *Annapurna Debia* v. *Gopalmani Debia*[4], that the learned advocate for the plaintiff-petitioner relied in support of his contention, that the claim against the fourth defendant, that the Narasingampettai and Thiruvaduthurai leases were acquired by him benami for the benefit of the first defendant, could and should be investigated in the suit for general partition of the assets of the joint family of the plaintiff and defendants 1, 5 and 6. Mookerjee, J., observed thus at page 534 :

" The substance of the matter is that a suit for partition may and does often involve the investigation of disputed questions of title, and an attempt to avoid them can only lead to needless multiplicity of litigation."

That observation has to be construed with the discussion that preceded it. No doubt earlier, Mookerjee, J., pointed out :

1. (1907) 18 M.L.J. 85.
2. (1921) 42 M.L.J. 97 : I.L.R, 45 Mad. 194.
3. (1908) 19 M.L.J. 102.
4. (1922) 35 C.L.J. 530.

"It frequently happens that, in joint families, properties stand in the names of female members. In a suit for partition of the family estate, the plaintiff may include such properties and join the ladies as defendants so that they may be bound by the result of the litigation; if they contend that the properties belong to them personally, the matter must be investigated and decided."

But it should be remembered that even independently of any claim of title the presence of the female members of the family is necessary in suits for partition to settle their claims, if any, for maintenance. When a female member of a family is impleaded rightly, other questions between such a member, who is a necessary party to the suit, and the other members of the family may also arise for adjudication. We are not concerned now with the question, whether such other matters also should be adjudicated upon—principally a claim of title paramount put forward by such a female member. The principles that underlay his decision were explained by Mookerjee, J., in no unmistakable terms:

"The principle appears to us to be undoubtedly sound that where there is a conflicting claim to a share in the land under the same right under which the partition is sought, the determination of the conflict is incidental to the partition and cannot be avoided before partition is directed."

Just before and after that observation are other observations of Mookerjee, J., which puts its meaning beyond doubt:

"We need not discuss whether an adverse claimant, who has no community of interest with the parties to the suit, is in no view a co-tenant with them but stands out on his own independent right, and denies all right in his adversaries, can be drawn into a partition suit for decision of the question of title paramount."

Mookerjee, J., pointed out that:

"Where the conflicting claim to a share is under the same right under which partition is sought, such a case does not fall within the category of claims utterly hostile where each demands not a share but the whole."

It is obvious that Order II, rule 3, Civil Procedure Code should be read with Order 1, rule 3 in deciding what constitutes a misjoinder of parties and misjoinder of causes of action. In the present case the claim of the plaintiff as representing his family consisting of himself and defendants 1, 5 and 6 against defendant 4 with reference to the two leases in question was that the title vested in the family and that defendant 4 was only a benamidar. But defendant 4's claim was one of title paramount, which the averments in the plaint itself disclosed. Applying the principles laid down by Mookerjee, J., in *Annapurna Debia's case*[1], it should be fairly obvious that such a claim cannot be tacked on to a general suit for partition. It is obvious that the share in these two leases is not based *under the same right* under which the partition is sought. It is not as if defendant 4 was prepared to concede a share to the family. He claimed the whole of the interest in these two leases in which the plaintiff claimed a share. I am unable to see any real substance in the contention of the learned advocate for the plaintiff-petitioner, that where the transaction is alleged to be benami, the legal title must be deemed to have vested all along in the family of the first defendant. That in no way answers the question, whether the claim of defendant 4 with reference to that property was hostile to the family as a whole. That precisely is the position of the fourth defendant in this suit.

To sum up, I see no justification to extend the principles underlying Order 1, rule 3, Civil Procedure Code to cover in this case, the plaintiff's claim as against the fourth defendant with reference to the Thiruvaduthurai and Narasingampettai leases. No doubt, issues 8, 9 and 10, as they have been framed in the suit, would appear to be based on assumption, that there was an alienation of the half share in the Narasingampettai lease when the first defendant parted with that half share in favour of the fourth defendant for Rs. 4,000. But that transaction was challenged as false by the plaintiff. The plaint itself did not disclose even an alternative case, that the transaction could be viewed as one of alienation of property that at one time belonged to the joint family, and that such an alienation effected by the first defendant was not valid. The issues were raised not only on the basis of the

1. (1922) 35 C.L.J. 530.

pleadings in the plaint but also on the pleadings of the first defendant and the fourth defendant. But in considering the questions of misjoinder of causes of action and misjoinder of parties, we have to be guided principally by the averments in the plaint. Whether, if the plaintiff had put forward or were to put forward even an alternative case of an alienation of a half share in the Narasingampettai lease, the Court, in deciding the validity of that alienation, could go into the earlier transactions and decide whether the original acquisition of that half share was for the fourth defendant or was benami for the benefit of the first defendant, does not arise for consideration at this stage. On the averments as they stand in the plaint, the lower Court was right in holding that it was a clear case of misjoinder of parties and misjoinder of causes of action.

The petition fails and is dismissed with costs of defendant 4. The plaintiff will be given six weeks from now to notify his election in accordance with the directions of the lower Court.

V.S. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDARAJACHARI.

Sri S. Krishna Aiyar .. *Appellant**

v.

The Superintending Engineer, P.W.D. East, Road Circle, Chepauk, Madras .. *Respondent.*

Workmen's Compensation Act (VIII of 1923), *sections* 2 (e) *and* 12 (2)—*Contractor doing work for Government to whom the Government hired out their lorries with drivers at agreed rates—Contractor, if an "employer" of the drivers—Workmen's Compensation Act Rules—Rule* 39 (1) *and* (2)—*Non-observance of procedure prescribed by—If affects the right to claim indemnification under S.* 12 (2).

A private engineering contractor who has undertaken to do a certain work for the Government and to whom the Government hired out their lorries with the drivers at agreed rates for the purpose of the carrying out of the work, is an "employer" of those lorry drivers within the meaning of section 2 (*e*) of The Workmen's Compensation Act.

Rule 39 (1) and (2) of the Rules framed under the Workmen's Compensation Act is only intended to prevent multiplicity of proceedings and to decide if possible not only the claim for compensation but also any claim for indemnification arising out of the payment of compensation. But it cannot be said that the effect of the non-observance of the procedure laid in rule 39 (1) and (2) is to work out an extinguishment of the claim for indemnification altogether. An application under section 12 (2) of the Act would be maintainable notwithstanding the default on the part of the principal who has paid the compensation to pursue the procedure laid down under rule 39 (1) and (2).

Appeal against the order of the Court of the Commissioner for Workmen's Compensation, Madras, dated 18th October, 1945, in Case No. 206 of 1945, on its file.

T. R. Sangameswaran and *R. Narasimha Rao* for Appellant.

The Crown Solicitor (*H. M. Small*) for Respondent.

The Court delivered the following

JUDGMENT.—This appeal is against the order of the Commissioner for Workmen's Compensation, Madras, directing the appellant to indemnify the respondent who will hereafter be referred to compendiously as the Government, in respect of a sum of Rs. 1,800 paid by the latter to the widow of a workman under the provisions of the Workmen's Compensation Act, 1923.

The appellant is an engineering contractor. By a contract with the Government he undertook to form a link road between Aminjikarai and Villivakkam. For the purpose of this contract the appellant had to transport what are described as soling stones from a quarry at Chikarayapuram to the workspot. In respect of the transport of these stones, the Government agreed to hire out their lorries with drivers to the appellant for Rs. 45 per lorry per day for a run of 75 miles.

* A. A. O. No. 31 of 1946. 7th July, 1948.

The wages of the drivers, the taxes payable in respect of the lorries and all running and maintenance charges were to be borne by the Government. One of the lorries met with an accident on the evening of the 25th of November, 1944, at Maduravayal on the Great Western Trunk Road resulting in the death of the driver Raju on the 28th following. His widow made a claim for compensation under the Workmen's Compensation Act. The Government accepted the claim and paid the amount claimed, Rs. 1,800 to her on the 18th of May, 1945. Notice of these claim proceedings was not given to the appellant. The Government subsequently called upon the appellant to reimburse them in the amount that they had paid. When the appellant refused, the Government filed an application under section 12 (2) of the Workmen's Compensation Act and obtained an order in their favour and this appeal, as already stated, is against that order.

On behalf of the appellant, Mr. Sangameswara Aiyar has taken three points. I shall deal with them *seriatim.*

Firstly, he said that his client is not an employer within the meaning of section 2 (*e*) of the Workmen's Compensation Act, which is in these words :

"'employer' includes any body of persons whether incorporated or not and any managing agent of an employer and the legal representative of a deceased employer, and, when the services of a workman are temporarily lent or let on hire to another person by the person with whom the workman has entered into a contract of service or apprenticeship, means such other person while the workman is working for him ;".

Looking at the language of the section, it is difficult to see how it can be said that the services of the driver were not temporarily lent or let on hire to the appellant by the Government. Mr. Sangameswara Aiyar does not deny that if the appellant had obtained the services of the driver without the lorry it would be a case of temporarily lending such services ; and if any payment was stipulated then it would be a case of letting the services on hire. He says, however, that the fact that the Government made the lorry also available would make a difference. I am unable to see how it does. A consolidated amount was stipulated for the use of the lorry and the driver, so that it can be taken that a portion of that amount must be referable to and be regarded as payment for the services of the driver which were placed at the disposal of the appellant. Mr. Sangameswara Aiyar drew my attention to *Laugher* v. *Pointer*[1], *Jones* v. *Scullard*[2] and *Century Insurance Co.* v. *Northern Ireland Road Transport Board*[3], but I do not think that any of these cases helps the decision of the question which arises here.

It is well known that the Workmen's Compensation Act both in England and in this country departed to a considerable extent from the common law of master and servant. Even as between the Workmen's Compensation Act in England and our Workmen's Compensation Act there are considerable differences and it is somewhat curious that in regard to the particular provision with which we are concerned the English Act, at any rate till 1930, was just to the opposite effect as section 2 (*e*) of the Indian Act (*See* Halsbury's complete Statutes of England, Volume XI, page 531) where section 5 (1) of the Workmen's Compensation Act (England) 1925 is quoted).

Construing the relevant section I do not see any difficulty in holding that the appellant is an employer within the meaning of our Act.

It was next argued that in respect of the hire of the lorries the appellant must be regarded as the contractor and the Government must be regarded as a sub-contractor or to use the language of section 12, that the appellant is the principal and the Government is the contractor. I am unable to accept this argument also. The claim of the Government for indemnification is based, as already stated, on section 12 (2) of the Act. For its application this sub-section requires that the person claiming indemnification must be the principal while the person against

1. (1826) 5 B. and C. 547 : 108 E.R. 204.
2. (1898) 2 Q.B. 565.
3. (1942) A.C. 509.

whom indemnification is sought should be the contractor. The Government is having the road construction work carried out by the appellant and I do not see how the appellant can escape the conclusion that he is a contractor, within the meaning of section 12. It has not been explained how the Government can be regarded as a sub-contractor. I have already dealt with the aspect as to whether having regard to the arrangement about the hire of lorries the appellant is or is not an employer within the meaning of the Act. If his liability as an employer is established and if the Government which is the principal within the meaning of section 12 has paid the amount which is payable by him, the claim for indemnification under section 12 (2), would properly lie.

Finally, it was argued that rule 39, sub-rules (1) and (2) of the Rules framed under the Workmen's Compensation Act (1923) provide that where a claim for indemnification is made under section 12 (2), the person who is called upon to pay the amount in the first instance and who after payment applies to be indemnified under section 12 (2) must, when he was first called upon to answer the claim for compensation, see that notice is issued to the party against whom he subsequently proposes to proceed for indemnification. Mr. Sangameswara Aiyar's argument was that these provisions are mandatory and since in this case the procedure laid down was evidently not followed the claim for indemnification must fail. Leaving out the non-essential parts, rule 39 (1) runs as follows :

"....... he (the person from whom compensation is claimed) shall when first called upon to answer the application present a notice of such claim (claim under sub-section (2) of sec-tion 12 to be indemnified) accompanied by the prescribed fee, and the Commissioner shall thereupon issue notice to such person in form J.

Sub-rule (2) provides that :

" If any notice is so issued the person to whom it is issued shall have all the rights of a party to the proceedings ; " and that " in default of so appearing he shall be deemed to admit the validity of any award made against the opposite party and to admit his own liability to indemnify the opposite party for any compensation recovered from him."

It is obvious that the object of these rules is to prevent multiplicity of proceedings and to decide if possible not only the claim for compensation but also any claim for indemnification arising out of the payment of compensation. Otherwise, the person against whom indemnification is claimed may raise the question over again whether the person claiming compensation is entitled to it and also raise a dispute as to the amount which should have been awarded. If the procedure laid down in rule 39 (1) and (2) is followed he would be precluded from re-agitating these questions. But it seems to me that the effect of the non-observance of the procedure laid down in rule 39 (1) and (2) is not to work out an extinguishment of the claim for indemnification altogether which is in effect what Mr. Sangameswara Aiyar's argument would come to. I may point out that in this case it was not disputed before the Commissioner by the appellant that the claim of the widow of the deceased driver to compensation under the Act is a proper one, nor was any dispute raised as to the amount of compensation. It would no doubt have been open to the appellant, if he were so advised to agitate these two matters before the Commissioner in view of the fact that he was not a party to the proceedings between the claimant and the Government. But he rightly accepted the position that the claimant was entitled to compensation and raised no dispute about the amount.

From the construction that I am inclined to place on rule 39 sub-rules (1) and (2) it follows that the failure of the Government to have the appellant brought in, in the proceedings for compensation does not preclude them from claiming indemnification later on. The application under section 12 (2) was therefore maintainable notwithstanding the default on the part of the Government to pursue the procedure laid down under rule 39, sub-rules (1) and (2).

In the result the appeal fails and is dismissed with costs.

V.S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL AND MR. JUSTICE PANCHAPAKESA SASTRI.

Bongu Sri Ramamurthy Naidu and others .. *Petitioners**

v.

Bongu Satyanarayana Naidu and others .. *Respondents.*

Federal Court (Enlargement of Jurisdiction) Act (I of 1948), sections 2 and 3—Suit for partition held not maintainable by trial Court—High Court holding suit maintainable and remanding suit for disposal after the trial Court had given findings on issues relating to the debts of the family and the liabilities of the family—Appeal to Federal Court against order of High Court—If lies.

A suit for partition was held to be not maintainable by the trial Court as there had been a prior partition. Some other issues were also considered, but with regard to the issues relating to the debts of the family and the liabilities of the family, no findings were given. On appeal, the High Court held that there had been no prior partition and that therefore the suit for partition was maintainable. It remanded the suit for disposal after the trial Court had given findings on the important issues as to the debts and liabilities of the family on which evidence had been let in. On an application for leave to appeal to the Federal Court against such an order,

Held, that no final order was passed by the High Court. As important questions relevant to a partition suit had not been decided by the trial Court, it cannot be said that the matters in dispute between the parties have been finally decided and hence leave could not be granted to appeal to the Federal Court against such an order.

Petition under section 3 (*a*) (1) of the Federal Court Enlargement of Jurisdiction Act I of 1948 and sections 109 and 110 and Order 45, rule 2, Civil Procedure Code praying that in the circumstances stated therein the High Court will be pleased to grant leave to the petitioners to appeal to the Federal Court against the judgment and decree of the High Court dated 22nd January, 1948 in App. Nos. 340 and 414 of 1945 preferred against the decree of the Court of the Subordinate Judge of Chicacole in O.S. No. 49 of 1947.

D. V. Reddi Pantulu for the Petitioners.

A. L. Narayana Rao and *S. Ramamurthi* for the Respondent.

The judgment of the Court was delivered by

Horwill, J.—This is an application for leave to appeal to the Federal Court against the judgment and decree of this Court in A.S. Nos. 240 and 414 of 1945.

The suit was one for partition. No less than fourteen issues were framed. One of the questions raised in the issues was whether the suit was maintainable in view of the allegation that there was a prior partition. The learned Subordinate Judge found that issue against the plaintiffs. He also considered some other issues ; but with regard to issues 6 to 8, relating to the debts of the family, the F Schedule property, and the liabilities of the family, he gave no finding at all, directing that these matters might be determined by a commissioner in the course of execution. In appeal, this Court held that there had been no prior partition and that therefore the suit for partition was maintainable. This Court further held that it was wrong on the part of the learned Subordinate Judge not to have decided issues 6 to 8, on which evidence had been let in. The appeal was therefore allowed and the suit remanded for disposal after the learned Subordinate Judge had given findings on issues 6 to 8.

It is argued on these facts that the order of this Court was a final order, in that it determined the cardinal questions in issue in the suit and that the matters left open were of little importance. We are unable to accept this view.

The learned advocate for the appellant has relied principally on two cases referred to in the judgment of the Privy Council in *Abdul Rahman* v. *D. K. Cassim and Sons*[1]. They are *Muzhar Hossein* v. *Bodha Bibi*[2], and *Rahimbhoy Habibhoy* v. *Turner*[3]. Their Lordships however pointed out in *Abdul Rahman* v. *D. K. Cassim and Sons*[1], that those cases were decided with reference to the Civil Procedure Code

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* C. M. P. No. 3089 of 1948. 18th August, 1948.

1. (1932) 64 M.L.J. 307 ; L.R. 60 I.A. 76 : I.L.R. 11 Rang. 58 (P.C.).
2. (1894) L.R. 22 I.A. 1 : I.L.R. 17 All. 112 (P.C.).
3. (1890) L.R. 18 I.A. 6 : I.L.R. 15 Bom. 155 (P.C.).

of 1882, in which the wording of the relevant section differed materially from that of the Code of 1908. Their Lordships then went on to say with regard to *Muzhar Hossein* v. *Bodha Bibi*[1], the case relied on principally by the appellants, that,

> " if the effect of the Appellate Court's decree had been (as in the present case) merely to remand the case for trial on the merits, different considerations would have applied. Their Lordships think, therefore, that neither of these authorities is applicable to the case now before them."

The principle laid down by their Lordships was that the test of finality is whether the order in question finally disposes of the rights of the parties. That principle was laid down in *Ramchand Manjimal* v. *Goverdhandas Vishindas Ratanchand*[2], and adopted by their Lordships in *Abdul Rahman* v. *D. K. Cassim and Sons*[3]. In the latter case, the plaintiff was adjudicated an insolvent and the Official Assignee refused to proceed with the suit. The trial Court thereupon held that the suit was no longer maintainable. In appeal, it was held that the claim for damages did not vest in the Official Assignee and the suit was therefore remanded for disposal on the issues in the suit. It was held that the order of the appellate Court was not a final order since the questions that arose in the suit were still open.

There are two decisions of this High Court dealing with this question. The first of them is *Mangayya* v. *Venkataramanamurthi*[4], in which the learned Judges held, that where a suit was remanded for further trial on the merits, it would not amount to a final judgment within the meaning of S. 109 (*a*) of the Civil Procedure Code. They further held that an order of remand could only be said to be a final order when every issue of fact had been found by the appellate Court and the remand was directed solely with a view to give the consequential reliefs dependent upon the conclusions of the appellate Court. More recently, the matter came before this Court in *Ramanathan Chettiar* v. *Palaniappa Chettiar*[5], where the learned Judges were considering an appeal from a decree in a suit on a promissory note. The learned Judges in appeal disposed of all the main issues in the suit; but were unable to pass a decree, because they held that the interest admissible on the promissory note was at the Rangoon *nadapu* rate; and since there was no evidence as to what the " Rangoon *nadapu* rate " was, it became necessary to remand the suit and appoint a Commissioner to determine it. The learned Judges held that even though that was the only question left open, the rights between the parties were not finally disposed of. They referred to *Abdul Rahman* v. *D. K. Cassim and Sons*[3], and *Ramchand Manjimal* v. *Goverdandas Vishindas Ratanchand*[2], and pointed out that *Muzhar Hossein* v. *Bodha Bibi*[1] and *Rahimbhoy* v. *Turner*[6], were not authorities on the current law, and that the Court was not concerned in the interpretation of the present Code with the question whether the cardinal points in the suit had been determined, but only with the question whether the rights of the parties had been finally disposed of.

In the present case, important questions relevant to a partition suit had not been decided by the learned Subordinate Judge. It cannot be said that those relating to the outstandings of the family, the F. Schedule property, and the liabilities of the family are of so little consequence that the matters in dispute between the parties can be said to have been finally determined.

We therefore find that no final order was passed by this Court and that therefore leave cannot be granted to appeal to the Federal Court.

This petition is dismissed with costs. (one set).

V.S. ——— *Petition dismissed.*

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1. (1894) L.R. 22 I.A. 1 : I.L.R. 17 All. 112 (P.C.).
2. (1920) 39 M.L.J. 27 : L.R. 47 I.A. 124 : I.L.R. 47 Cal. 918 (P.C.).
3. (1932) 64 M.L.J. 307 : L.R. 60 I.A. 76 (83) : I.L.R. 11 Rang. 58 (P.C.).
4. 1918 M.W.N. 844.
5. (1939) 2 M.L.J. 40.
6. (1890) L.R. 18 I.A. 6 : I.L.R. 15 Bom. 155 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

V. Venkataraman .. *Petitioner**

Federal Court (Enlargement of Jurisdiction Act) (*I of* 1948), *sections* 2 and 3—*Appeal to Federal Court against an order made under section* 491, *Criminal Procedure Code—If lies—Government of India Act* (1935), *section* 205.

An order made by the High Court in an application under section 491, Criminal Procedure Code is in the exercise of criminal jurisdiction of the Court and hence no appeal lies to Federal Court against such an order under the provisions of the Federal Court (Enlargement of Jurisdiction) Act, 1948.

Where no question of interpretation of the Constitution Act is involved in the disposal of the case under section 491, Criminal Procedure Code no right of appeal can arise under section 205 of the Government of India Act.

Venkatachala Thevar, In re, (1948) 2 M.L.J. 76, followed.

Petition under clause 15 of the Letters Patent praying that in the circumstances stated therein the High Court will be pleased to grant a certificate to enable the petitioner herein to appeal to the Federal Court against the order of the High Court dated 19th May, 1948, in Crl.M.P. No. 883 of 1948 presented to the High Court for the issue of directions in the nature of Habeas Corpus for the production of the petitioner herein before the High Court for being dealt with according to law.

A. K. Pillai for *Row and Reddy* for the Petitioner.

The Assistant Public Prosecutor (*A. S. Sivakaminathan*) for the Crown.

The Court made the following

ORDER.—In Crl.M.Ps. Nos. 883 and 916 of 1948 which were dismissed by me on 19th May, 1948, an application was made orally by the learned counsel for the petitioners for leave to appeal to the Federal Court; and as it was then brought to my notice by the Public Prosecutor that it had recently been held by a Bench of this Court that an appeal did not lie against an order made under section 491, Criminal Procedure Code. I posted the matter to be heard on the point to this date with regard to both these applications. In the meantime a written application has been made in Crl.M.P. No. 883 of 1948 for leave to appeal to the Federal Court against the order and judgment in that case.

Under section 3 (*a*) of the Federal Court (Enlargement of Jurisdiction) Act, 1947, which came into force on 5th January, 1948, it is provided that—

"an appeal shall lie to the Federal Court from any judgment to which this Act applies."

In section 2 (*b*) the expression "judgment to which this Act applies" is defined to mean,

"any judgment, decree or final order of a High Court in a civil case from which a direct appeal could have been brought to His Majesty in Council, either with or without special leave, if this Act had not been passed."

It has been held by Horwill and Govinda Menon, JJ., in C.M.P. No. 2849 of 1948[1] which arose out of an order made in Crl.M.P. No. 439 of 1948 under section 491, Criminal Procedure Code, that an order made under section 491 was in the exercise of the criminal jurisdiction of this Court, and that, in any case, it was not in the exercise of Civil jurisdiction within the meaning of the Federal Court (Enlargement of Jurisdiction) Act, 1947 (Act I of 1948). It was in that view held by the learned Judges that no appeal lay to the Federal Court against an order made under section 491, Criminal Procedure Code. In the course of that judgment reference was made to a number of decisions and adverting to the Privy Council decision in *Emperor* v. *Sibnath Banerjee*[2], it was pointed out that the Privy Council assumed that the jurisdiction exercised by the High Court under section 491 was criminal. In the case before the Privy Council the question arose, treating the matter as one falling within the criminal jurisdiction of the High Court whether an appeal lay against the judgment of the High Court to the Federal Court and in turn against the judgment of

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* S. R. No. 6762 of 1948. 25th May, 1948.

1. Since reported in (1948) 2 M.L.J. 76. 2. (1945) 2 M.L.J. 325 : 1945 F.L.J. 222 (P.C.).

the Federal Court to the Privy Council. The conclusion arrived at by their Lordships was that although there is no specific right of appeal provided under the Criminal Procedure Code against orders passed under section 491, section 205 of the Government of India Act provides one of the exceptions referred to in section 404, Criminal Procedure Code and that section 205 of the Constitution Act relates both to criminal and civil jurisdictions of the High Courts. The result of this ruling is that, where questions affecting the interpretation of the Constitution Act or of orders in Council passed thereunder are involved in the disposal of a case under section 491 of the Criminal Procedure Code, a right of appeal would arise under section 205 of the Government of India Act.

A contention now put forward by Mr. A. K. Pillai in Crl.M.P. No. 883 of 1948 is that the case falls within the exception pointed out by the Judicial Committee. The argument is that under section 59 of the Government of India Act, 1935,

> "all executive action of the Government of a Province shall be expressed to be taken in the name of the Governor."

and that,

> "orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor . . . . ."

It is argued that the orders in this case did not conform to the requirements of section 59. In the present case, however, the order of detention was passed by the Commissioner of Police under powers duly vested in him on that behalf. No orders were passed or other instruments made by the Provincial Government. What was done, as required under Madras Act No. I of 1947 was that after the Commissioner of Police communicated to the Provincial Government the order of detention and the grounds, the Provincial Government sent to the detenu in turn certain grounds and particulars as prescribed under section 3 of that Act. It was only a memorandum despatching to the detenu the grounds of the detention which had been ordered by another authority duly constituted. Clearly, therefore, section 59 has no application to an instance of this kind.

Secondly, section 59 (1) of the Constitution Act deals with the normal executive activities of Government which are not covered by statute. It does not purport to limit the scope and extent of any special enactment passed by a competent legislature and within its province. Act I of 1947 confers upon the Provincial Government the power of detention and authorises them to delegate those powers to other officers. No objection has been or can be taken to the order of detention made in this case as having contravened the provisions of section 59 (1) of the Constitution Act.

Thirdly, no question of the interpretation of section 59 is involved here ; nor was one raised in the affidavits or even orally at the time of the hearing of the petition. The application was first heard on the 4th and 5th May, when Mr. Mani argued the case. It was subsequently posted for the examination of the Commissioner of Police, Madras, on the 18th and heard again on that date, when Mr. A. K. Pillai, further argued the case on behalf of the petitioner. Immediately after the close of the hearing, judgment was pronounced on that day and on the following day. When the judgment was concluded on the 19th, Mr. Ramachandran orally asked for leave to appeal to the Federal Court against the order which was then pronounced, and as already stated, the matter was adjourned to this date for hearing. At none of these stages did either Mr. Mani or Mr. A.K. Pillai, or Mr. Ramachandran raise the contention that there was a contravention of section 59 of the Government of India Act or invite the Court to apply the provisions of that Act to the memorandum that was sent by the Provincial Government containing the grounds of detention. The only argument that had been raised on the 4th by Mr. Mani was that the copy of the grounds that was delivered to the petitioner at the Central Jail, Vellore was signed by one Mr. M. G. Menon, and a doubt was raised as to who he was and what authority he had to sign on behalf of the Chief Secretary, who was however admitted to be the proper and duly constituted

authority for signing such communications on behalf of the Provincial Government. The only doubt was as to the genuineness of the copy of the memorandum that was served. It was that contention that was mentioned by me in my judgment in Crl. M. P. No. 883 of 1948. No questions were raised to the effect that an order had been passed by the Provincial Government and that it had to be, if it was to be valid, in the name of the Governor, and that since the memorandum did not purport to have been issued by the Chief Secretary in the name of the Governor it involved a question under section 59 of the Government of India Act.

Mr. A. K. Pillai drew my attention to sub-section (1) of section 205 in which it is stated that,

"it shall be the duty of every High Court to consider in every case whether or not any such question is involved and of its own motion to give or to withhold a certificate accordingly."

As already stated, there is no question of the interpretation of the Constitution Act or of any order in Council made thereunder involved in these proceedings. I am therefore of opinion that neither of those two provisions of the Government of India Act has any application to this case; and as this is not a case falling within the ambit of section 205, I am bound by the Bench decision of this Court above referred to. I must hold that since these are orders passed in the exercise of criminal jurisdiction no appeal lies to the Federal Court under the provisions of the Federal Court (Enlargement of Jurisdiction) Act, 1947.

Leave to appeal is refused.

V.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDARAJACHARI.

Valluri Kamanna and others .. *Appellants.**

Court-Fees Act (VII of 1870) *(as amended in Madras), Article 17-B—Applicability—Suit framed as one against guardian and trustee for accounts and claiming specified amount with* ad valorem *court-fee paid thereon—Decree for possession and for the amount claimed as profits—Appeal against—Court-fee.*

The plaintiff sued for recovery of certain properties and prayed that the defendants who were described as guardians and trustees should render an account of the rents of the properties of which they were in management. The plaintiff however treated the suit as a claim for recovery of a specified amount and paid *ad valorem* court-fee thereon. The trial Court decreed the suit with reference to the relief of possession and with reference to the amount claimed, it allowed the same as profits and interest, the exact amount however being left to be determined later. The defendants having preferred an appeal, the question of court-fee, only as regards the amount payable was raised on a reference under section 5 of the Court-Fees Act.

Held, that with respect to the claim for mesne profits and account it was not possible for the defendants to estimate the value of the relief granted by the decree as against them and that they should pay a court-fee of Rs. 100 on the memorandum of appeal, the same being leviable to court-fees under Article 17-B of the Court-Fees Act as amended in Madras.

Appeal sought to be preferred to the High Court against the decree of the Court of the Subordinate Judge, Rajahmundry, dated 25th July, 1947, in O. S. No. 3 of 1945.

C. Rama Rao for Appellants.

The Government Pleader (*K. Kuttikrishna Menon*) for Government.

The Court made the following

ORDER.—This reference under section 5 of the Court-Fees Act arises in the following circumstances. The plaintiff who is a woman filed the suit for recovery of two sets of properties, lands which are described in Schedule A and jewels which are described in Schedule B. There are two sets of defendants, defendants 1 to 8 forming one group and defendants 9 to 13 another. The 9th defendant is the father of the plaintiff and the first defendant was her maternal grandfather. Defend-

* S. R. No. 1660 of 1948. 23rd July, 1948.
(Appeal sought to be preferred).

ants 2 to 8 are his sons and grandsons. It is alleged that throughout the relevant period defendants 1 to 8 were members of a joint Hindu family. The plaintiff's case shortly is that the properties described in Schedules A and B belonged to her mother who died on 28th May, 1928, in the house of the first defendant where she had gone for confinement; that the first defendant took possession of the jewels and the lands; that he subsequently agreed with her paternal relations that he would look after the properties during the minority of the plaintiff and hand them over to the plaintiff after she attained majority, together with the income which he may, during his period of management, realise. In paragraph 3 of the plaint the plaintiff describes the first defendant and his family as her guardians and trustees. There is also an averment that they are liable to account for the rents on the A Schedule property with interest. In paragraph 6 of the plaint there is a reference to notices which are said to have been issued, one shortly after the plaintiff's marriage by her father-in-law and another in 1943 by her husband and guardian, the plaintiff being still a minor then, calling upon the defendants to deliver possession of the properties as per Schedules A and B. It is alleged that the defendants made certain tendentious allegations and refused to deliver possession as requested. In paragraph 9 the first defendant is described as the trustee for A and B Schedule properties and it is said that in that view there is no bar of limitation. The reliefs are valued in paragraph 12 where under item 3 the rent payable on the plaint lands with interest as per the account filed along with the plaint is set down as Rs. 4,085-0-5. The relevant prayer for the purpose of the question of court-fee which has been raised is prayer (*b*) in paragraph 13 of the plaint. It runs merely as a direction to the defendants to pay Rs. 4,085-0-5 being the amount as per sub-paragraph 3 of paragraph 12 and representing the rents realised by the defendants on the A Schedule properties with interest. The future payments to be made by the defendants are definitely described as future profits and sub-paragraph (*c*) of paragraph 13 prays for a direction to the defendants to pay future profits from the date of plaint till the plaintiff is put in possession of the A Schedule lands. The account referred to in paragraph 12, sub-paragraph (3) sets out in detail the paddy rents realised and their market value, deducts the amount of taxes paid in the particular years, states the net income that remained and after calculating interest in respect of each of these amounts gives the total amount payable to the plaintiff as Rs. 4,085-0-5. Looking at the plaint therefore it is fairly clear that while there are references to the legal relationship between the parties which would make the defendants accountable, both in valuing the claim and in framing the relevant prayer, the plaintiff's advisers somehow regarded it as in substance a claim for money. If they had realised that they could describe the claim merely as a claim for accounts, they would have asked for the rendering of accounts by the defendants and would have valued the particular relief under section 7 (*iv*) (*f*) of the Court-Fees Act. It is well known that it is open to a plaintiff to put any value he or she likes as a claim for accounts. I have no doubt that if the plaintiff's advisers had appreciated, the true legal position, they would not have paid a large court-fee on the amount of Rs. 4,085-0-5 which they treated as a claim for the recovery of money and were prepared to pay an *ad valorem* court-fee upon.

The first defendant died during the pendency of the suit. Defendants 2 to 8 would appear to have offered to surrender possession of the lands which they acknowledged to belong to the plaintiff. On 16th August, 1946, an interim decree was accordingly passed directing delivery of possession of the lands to the plaintiff. The interim decree would appear to have also provided that the profits claimed in the suit and subsequent profits will be determined on a separate application. It must be pointed out that there is no justification for calling upon the plaintiff to file a separate application. Once a suit for recovery of possession and for profits or for the rendering of accounts by the defendant is filed, it is the duty of the Court to go on with the suit till the right of the plaintiff to all and every one of the reliefs claimed by the plaintiff is adjudicated upon. It is obvious from the wording of

the *interim* decree which I have borrowed from paragraph 5 of the judgment of the Court below, dated 25th July, 1947, that there was no clear appreciation of the real nature of the claim which the plaintiff is making in regard to the amounts realised by way of rents from time to time by the defendants. The issues show the same confusion. Under issue No. 1, the question is asked "to what profits is the plaintiff entitled and from whom?" Issue 2 (*d*) raises the question whether defendants 5 to 8 are liable to account. Issue 2 (*e*) is in these words "If liable, what is the amount due both in respect of jewels and rents?"

In the judgment under appeal in paragraph 8 the learned Subordinate Judge rightly observes that the better opinion appears to be that the first defendant is liable to account for the profits from 1929 till possession was taken in pursuance of the *interim* decree. In paragraph 9 however he refers to mesne profits and in paragraph 10 to profits. It is obvious that the real nature in law of the plaintiff's claim against the defendants had not been kept clearly in view either by the Court or by the plaintiff's advisers.

I am saying this to show that it is impossible to say on the plaint as framed that the plaintiff valued the relief with which I am concerned in this reference as one coming under section 7 (*iv*) (*f*). This in my opinion is a material circumstance to be borne in mind in dealing with the question as to the appropriate court-fee that is leviable in respect of the memorandum of appeal.

The memorandum of appeal is filed by defendants 2, 5, 6 and 7 and is directed against the judgment and decree of the learned Subordinate Judge, dated 25th July, 1947, in which the learned Subordinate Judge recorded a finding that the

"only relief to which the plaintiff is entitled is profits and interest as found under issues 1 and 3 recoverable from the one-third share of the first defendant in the hands of his legal representatives."

In paragraph 8 he directed that the exact amount will be as ordered in the *interim* decree of 16th August, 1946.

The appellants paid Rs. 2 by way of court-fee on this memorandum of appeal. In fact, according to the arguments addressed on behalf of the appellants based on *Kandunni Nair* v. *Raman Nair*[1], no court-fee need be paid at all. This argument proceeds upon the footing that the claim is really one for mesne profits and if a decree merely declares that the defendant is liable to pay mesne profits but does not assess the amount, the defendants in an appeal from such a decree need not pay any court-fee. The learned Government Pleader claims that there is an earlier decision in *Punya Nahako*, In re[2], with which the decision in *Kandunni Nair* v. *Raman Nair*[1] is at variance. It is however not necessary for the purpose of this reference to resolve the conflict, if any, between these two decisions because I am not prepared to accept the argument on behalf of the appellants that this must be regarded as a claim for mesne profits. It is frankly stated by Mr. Rama Rao that it is not possible to describe the possession of the defendants as unlawful and therefore to contend that they would be liable to the plaintiff in mesne profits. The decision in *Kandunni Nair* v. *Raman Nair*[1] may therefore be put aside.

The objection raised by the office in regard to the court-fee payable on this memorandum of appeal is based on the decision of the Full Bench in *Dhanukodi*, In re[3]. In that case it was held that if a defendant appeals from a preliminary decree in a suit for an account, he is not at liberty to place an arbitrary value on his relief but is bound to accept the valuation given by the plaintiff in the plaint and to stamp his memorandum of appeal according to that valuation. It seems to me that the present case is not a case like the one contemplated by the Full Bench. The Full Bench was dealing with a case where a plaintiff valued his relief as a claim for account under section 7 (*iv*) (*f*). If the plaint was cast in that form and the valuation proceeded on that basis, it would not be open to the defendant, according

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1. (1930) 58 M.L.J. 497 : I.L.R. 53 Mad. 540.
2. (1926) 52 M.L.J. 128 : I.L.R. 50 Mad. 488.
3. (1938) 1 M.L.J. 628 : I.L.R. (1938) Mad. 598 (F.B.).

to the Full Bench when the amount payable by him is not finally ascertained, to put his own valuation. Pending the final fixation of the amount between the parties, the defendant as well as the plaintiff are bound to proceed on the basis of the personal valuation put upon the suit by the plaintiff. But here as I have already indicated the suit has not been valued on that basis at all. Mistakenly or otherwise the plaintiff has valued her suit as a claim for money. If the decision in *Dhanukodi*, In re[1], is to be applied to this case, we have, so to say, to recast the plaint and read the plaint as if it treated the relevant claim as a claim for accounts and value it on that basis which, as I have pointed out, it did not do. It would therefore be imputing to the plaint a valuation which is certainly not to be found in it. Having regard to the several portions of the plaint which I have already referred to and particularly paragraphs 12 and 13, I think it is not possible to apply the rule laid down in *Dhanukodi*, In re[1].

The question then arises as to what the court-fee leviable in respect of this plaint is. If court-fee is not to be levied on the scale indicated in *Dhanukodi*, In re[1], the learned Government Pleader contends that court-fee may be payable under Article 17-A, Schedule II, Madras Court-Fees Act, on the footing that this is a memorandum of appeal against what is in effect a declaratory decree. I am inclined to think that it may fall under Article 17-B, Schedule II as a memorandum of appeal where it is not possible to estimate the relief claimed in the appeal at a money value. The learned Government Pleader has drawn my attention to the rulings in *Reference under the Court-Fees Act, section* 7[2] and *Balavenkataraman* v. *Maruthamuthu*[3]. In the latter case there was no difficulty at all about estimating the value of the relief which was sought in the appeal, the question being whether certain persons who claimed to be trustees were personally liable to pay the amount due on a promissory note. Venkataramana Rao, J., however made certain observations as to when a subject-matter in dispute can be said to be incapable of valuation. He said that that can be said only when it is established that

> "by no possibility could it be stated approximately what would be the money value of the detriment that a person may suffer by reason of the adverse decision against him."

Whether one agrees with the emphasis implied in the above observation or not, it is not apparent why the description given by the learned Judge would not apply to the present case. Here it is not possible for the appellants to say how much they would ultimately be called upon to pay. That is a matter for future enquiry. The detriment caused to the appellants by a mere declaration of their liability cannot now be estimated. The view which I am inclined to take seems to be supported by the ruling of the Nagpur High Court cited in Chitaley's Commentaries on the Court-Fees Act, 1944 edition, page 499. The decision in *Reference under Court-Fees Act, section* 7[2], related to an appeal against a decree directing the defendant to pay the plaintiff for certain faslis before suit at 2½ per cent. on the gross revenue of a zamindary. The determination of the actual amount was reserved for the execution stage. The question arose whether the appeal by the defendant from that decree was capable of being valued. The ruling of the Bench is in the following terms :

> "The appeal is capable of being valued and it is for the appellants under section 7 (*iv*) (*f*) of the Court-Fees Act to say what the value is ; or in other words the defendant could put his own valuation in regard to the relief granted against him."

This last position however is opposed to the ruling in *Dhanukodi*, In re[1], which says in effect that the privilege of putting his own valuation under section 7 (*iv*) (*f*) of the Court-Fees Act is exclusively that of the plaintiff. But that apart, I am unable to see how the possibility of the defendant putting some hypothetical valuation on the decree which may ultimately be passed against him can make the relief which is now granted capable of being estimated at a money value. There is no

1. (1938) 1 M.L.J. 628 : I.L.R. (1938) Mad. 598 (F.B.).
2. (1894) 4 M.L.J. 22.
3. (1940) 2 M.L.J. 946.

further reasoning in *Reference under Court-Fees Act, section 7*[1] beyond what I have quoted above. Whether the memorandum of appeal in the present case is to be valued under Article 17-A or under Article 17-B of the second schedule to the Madras Court-Fees Act, it would make no difference as the court-fee in either case would be Rs. 100. Assuming Article 17-A applies, the jurisdictional value of the suit in so far as it relates to the property set out in Schedule A and the money decree claimed in respect thereof is less than Rs. 10,000. I therefore answer the reference made by the Master by declaring that a court-fee of Rs. 100 is payable on the memorandum of appeal. The appellants will pay the deficit court-fee before the end of this month.

B.V.V. *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE SATYANARAYANA RAO.

Singaravelu *alias* Singaram Chettiar .. *Appellant**

v.

Pattammal .. *Respondent.*

Maintenance—Decree obtained by Hindu wife—Execution for arrears—Unchastity of wife subsequent to decree if can be pleaded as a bar to enforcement of decree—Remedy of husband.

Where a Hindu wife obtained an unconditional decree against her husband for maintenance and tried to recover the arrears due under it by execution, on an objection that by reason of her unchastity subsequent to the decree she had forfeited her rights thereunder and was not entitled to enforce it,

Held, overruling the objection, that what the wife was seeking to enforce was not her right under Hindu Law as such, but her right under the special decree of Court which is not conditional in any manner. The husband's remedy can only be by way of a separate suit and not by way of an objection to the execution of the decree.

Maharana Shri Ranmalsangji v. *Bai Shri Kundan Kuwar* (1902) I.L.R. 26 Bom. 707, followed. *Venkayya* v. *Raghavamma*, I.L.R. 1942 Mad. 24, distinguished.

On appeal from the judgment and order of the Hon'ble Mr. Justice Subba Rao, dated 22nd July, 1948, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No. 1460 of 1948 in E. P. No. 55 of 1948 in C. S. No. 77 of 1944.

M. S. Venkatarama Aiyar and *S. Viswanathan* for Appellant.

Srimathi M. A. Janaki for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—The respondent is the appellant's wife. In C. S. No. 77 of 1944 on the Original Side of this Court, she obtained a decree against the appellant which directed him to pay her a sum of Rs. 50 per month as maintenance on or before the 10th of each month. She filed E. P. No. 55 of 1948, to recover the arrears of maintenance due under the decree from January 1946 to February 1948. The appellant raised an objection that subsequent to the passing of the decree, the respondent was leading an unchaste life and she was therefore not entitled to enforce the decree as she had forfeited her rights thereunder by her unchastity. The First Assistant Registrar before whom the application first came up for hearing overruled this objection of the appellant on the ground that the decree conferred on the respondent an unconditional and absolute right for maintenance. There was an appeal and the learned Judge sitting in Chambers confirmed the order of the First Assistant Registrar. He held that the executing Court could not go behind the decree and the decree, as it stood, was unambiguous and did not contain any condition to the effect that the respondent would lose her right

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1. (1894) 4 M.L.J. 22.

* O. S. A. No. 35 of 1948. 7th September, 1948.

to execute the decree if she became unchaste subsequent thereto. The learned Judge followed the ruling of the Bombay High Court in *Maharana Shri Ranmalsangji* v. *Bai Shri Kundankuwar*,[1] and dismissed the appeal. Against the decision of the learned Judge, the husband has filed this appeal.

In our opinion, the principle underlying the decision in *Maharana Shri Ranmalsangji* v. *Bai Shri Kundan Kuwar*[1] directly applies to this case. There the respondent had obtained a decree for maintenance against her husband, the appellant, on 14th June, 1898. On 22nd February, 1901, she applied for execution of the decree. The appellant objected and contended that she had lost her right to maintenance inasmuch as she had left his house without any cause and without his consent, sometime in December, 1900. For the husband it was argued that by her conduct the wife had forfeited her right to maintenance and therefore the decree became inexecutable. The learned Judges in overruling this objection of the husband observed thus :

> "This might be a good answer to a wife setting up an ordinary claim to maintenance under Hindu Law. But here the claim is under the special provisions of a decree expressly dealing with the circumstances of this particular case. And that decree, passed in relation to those circumstances, contained no provision whatever that the rights thereby conferred on the respondent should be dependent upon her place of residence or upon any other matter whatsoever. It conferred in terms an unconditional and absolute right to the maintenance specified therein . . . . It is binding in execution on the parties thereto, and neither of them could go behind it or add to it a condition which it does not contain. A decree for maintenance might be so framed as to admit of modification of its terms with reference to post-decretal changes in the circumstances or in the relations of the parties. No authority has, however, been cited to show that such modifications could be made on application in execution when the decree contains no provision in that behalf."

We respectfully agree with these observations.

It was contended by Mr. M. S. Venkatarama Aiyar for the appellant that under Hindu Law a wife is not entitled to maintenance even when such maintenance is fixed by a decree if she is unchaste. That may be so under Hindu Law. But what the respondent in this case is seeking to enforce is not her right under the Hindu Law as such, but her right under a decree. If her rights and obligations under Hindu Law are not mixed up with her rights and the appellant's obligations under the decree, the position is quite clear. The decree, as it stands, is not conditional in any manner. The husband's remedy can only be by way of a separate suit and not by way of an objection to the execution of the decree.

The ruling of a Division Bench in *Venkayya* v. *Raghavamma*[2] was cited to us and the following passage in the judgment of the learned Chief Justice was relied on by the Counsel for the appellant :—

> "The present case is not concerned with a matter of procedure or the adjustment or satisfaction of a decree. The question is whether the Court is to disregard a sound principle of law and enforce a decree the basis of which has by the action of the parties themselves been demolished. By returning to her husband the respondent became disentitled to claim maintenance against him. The decree which she had obtained must, it seems to me, be regarded in the circumstances as having become ineffective. By going back to her husband the wife restores the position to what it was when they were married."

These remarks were made in a case in which a Hindu wife who had obtained a decree against her husband thereafter cohabited with him for several years during which period she even bore a son. She again separated from her husband and then filed an application to execute the decree which she had obtained before she had rejoined her husband. It was held that the execution of the decree could not be ordered. It is not difficult to sustain the decision in this case on a principle analogous to the satisfaction of a decree. The husband who was bound to maintain the wife was directed by the decree to pay her a certain sum of money towards her maintenance. If subsequently she herself came and lived with him and he maintained her, there would be *pro tanto* a satisfaction of the decree. Apart from that, in that case there was no dispute as to facts and there was nothing which made it

1. (1902) I.L.R. 26 Bom. 707.

2. (1941) 2 M.L.J. 263: I.L.R. 1942 Mad. 24.

incumbent on the executing Court to make an enquiry into new allegations made in the course of execution proceedings. As Mockett, J., pointed out :

"It was within the knowledge of the executing Court that the whole basis of this decree had disappeared by the act of parties."

The learned Judge gives as an instance a case in which a Court would refuse to execute a decree if from its own records it came to its knowledge that the decree sought to be executed had been paid. The circumstances of that case are so essentially different from those in the present case that no assistance can be derived from it.

The learned Counsel for the appellant was unable to cite any authority for the position that an executing Court can enquire into an objection which really attacks the validity of the decree though at a period subsequent to the passing of the decree. As already observed, the appellant is not without his remedy, but that remedy is certainly not in execution.

The appeal is therefore dismissed with costs. Advocate's fee Rs. 100.

K.C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE SATYANARAYANA RAO.

Manickam and others .. *Petitioners**

v.

MR. RM. Ramanathan Chettiar and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 22, rules 3 and 4—Applicability to cases of Civil Revision Petitions —No question of abatement in cases of Civil Revision Petitions.

There is no provision in the Code of Civil Procedure making provisions of Order 22, applicable to Civil Revision Petitions. Nor is there any provision making the Order 22, applicable to Civil Revision Petitions in Rule 41-B of the Appellate Side Rules which makes certain provisions of the Code of Civil Procedure applicable *mutatis mutandis* to Civil Revision Petitions. Likewise, there is nothing in the Indian Limitation Act making any of the Articles in Schedule I applicable to Civil Revision Petitions. As there can be no question of abatement but for the combined application of the provisions of Order 22, rules 3 and 4 and the material Articles of Schedule I of the Indian Limitation Act, no question of abatement can arise in the case of Civil Revision Petitions.

Basavanjanayulu v. *Ramalingayya*, A.I.R. 1938 Mad. 115, overruled.

Petition praying that in the circumstances stated in the affidavit filed with C. M. P. No. 5101 of 1946, the High Court will be pleased to bring on record Muthukaruppan Chettiar as the legal representative of the deceased third respondent in C. R. P. No. 1543 to 1546 and Nos. 1518 to 1542 of 1944, presented to the High Court to revise the order of the Court of the Subordinate Judge, Sivaganga, dated 26th January, 1944, in A. S. No. 78 to 81, etc., of 1943, respectively.

A. Sundaram Aiyar for Petitioners.

A. Kuppuswami for *K. Umamaheswaram* for Respondents.

The Order of the Court was made by

The Chief Justice.—These petitions originally came on for disposal before Govinda Menon, J., who considered that they raised an important question as to the applicability of Order 22 of the Civil Procedure Code to the facts of the case, the quesion being whether when one of a group of trustees who are parties to an appeal dies, the provision of law applicable for bringing on record his successor is Order 22, rules 3 and 4 or Order 22, rule 10.

We do not think it necessary to go into this question, because these petitions have been filed in Civil Revision Petitions, and not in appeals. Order 22, rule 11 of the Civil Procedure Code expressly makes the provisions of that order applicable to appeals and says that the word "plaintiff" shall be held to include an

* C. M. Ps. Nos. 5101 to 5129 of 1946. 23rd August, 1948.

appellant, the word " defendant " a respondent, and the word " suit " an appeal. There is no provision in the Code of Civil Procedure making the provisions of Order 22, applicable to Civil Revision Petitions. In the Appellate Side Rules of this Court certain provisions of the Civil Procedure Code are made applicable *mutatis mutandis* to Civil Revision Petitions—*Vide* Rule 41-B, but there is no provision making Order 22, applicable to them.

Likewise there is nothing in the Indian Limitation Act making any of the Articles to Schedule I of that Act applicable to Civil Revision Petitions. So far as the presentation of such petitions is concerned, this Court has made a rule—Rule 41-A (2) under which no application in civil revision shall be presented after 90 days from the date of the order complained of, provided that the Court may, on sufficient cause shown excuse the delay in presentation. But for this provision there is no other provision prescribing a time limit for any application such as one for bringing on record legal representatives in the place of the deceased respondent in Civil Revision Petitions.

There can be no question of abatement but for the combined application of the provisions of Order 22, rules 3 and 4 of the Civil Procedure Code and the material Articles of Schedule I of the Limitation Act. As neither Order 22, nor the Indian Limitation Act applies to Civil Revision Petitions there can be no question of abatement. The decision of a single Judge of this Court in *Basavanjanayulu* v. *Ramalingayya*[1] has been brought to our notice. In that case Stodart, J., held that Order 22, rules 3 and 4 were applicable to proceedings under section 115. No authority was cited in support of this conclusion. The learned Judge contents himself with observing that in this Court, at any rate, and in the Calcutta High Court, Order 22, has also been applied to petitions under section 115. Learned Counsel has not been able to cite to us any instance in which this Court has definitely ruled that Order 22 applies to petitions under section 115. With respect to the learned Judge, we think his decision was wrong.

The applications to bring on record the legal representatives of the third respondent are ordered.

K.S. *Application ordered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Selathu and others .. *Petitioners**.

Indian Penal Code (XLV of 1860), section 506—Threat of social boycott if certain persons continued to work as agricultural labourers for their masters with whom the other labourers were trying to secure better terms—If offence punishable under section 506, Indian Penal Code.

Where some agricultural labourers are trying to improve their lot by bargaining with the mirasdars to obtain better conditions and trying to persuade their fellow labourers not to work until they had secured better terms, they are entitled to enforce social boycott against those who decided to work. It would not amount to an injury within the meaning of section 44, Indian Penal Code.

Arumuga Mudaliar v. *Muthiah Mudaliar*, 1933 M.W.N. 736, relied on.

It is difficult to see how it can be illegal to ask the barber and washerman not to shave or wash the clothes of those who refuse to help in securing better conditions of agricultural service. Accordingly, a threat of social boycott is not an offence punishable under section 506 of the Indian Penal Code.

Petition under sections 435 and 439, Criminal Procedure Code (V of 1898), praying that the High Court will be pleased to revise the order of the First Class Bench Magistrates, Uthamapalayam, in S. T. No. 720 of 1947, dated 26th April, 1948.

C. R. Pattabhiraman for *R. Ramasubbier* for Petitioners.

The Assistant Public Prosecutor (*A. S. Sivakaminathan*) for the Crown.

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1. A.I.R. 1938 Mad. 115.

* Cr R. C. No. 790 of 1948.
(Cr. R. P. No. 745 of 1948).

17th September, 1948.

The Court made the following

ORDER.—The 17 petitioners were charged by the First Class Bench Magistrates, Uthamapalayam, under section 506, Indian Penal Code, that on the night of 3rd June, 1947, they threatened P.Ws. 1 to 6 with harm and social boycott if they continued to work (as agricultural labourers) for their masters.

The consistent testimony as to what happened on the night of 3rd June, 1947, is only with regard to the social boycott. It is true that the various witnesses add some other threat, but in that respect one witness does not corroborate another. The Magistrates seem also to have taken into account the various threats and obstructions on the following morning which were not the subject of the charge.

Two questions only arise : (1) Whether the threat of social boycott is an offence punishable under section 506, Indian Penal Code and (2) whether it has been proved that all the 17 petitioners were guilty of the offence with which they were charged.

Since the petitioners were trying to improve their lot by bargaining with the mirasdars to obtain better conditions and trying to persuade their fellow-labourers not to work until they had secured better terms, it seems to me that they were entitled to enforce a social boycott against those who decided to work ; for that would not amount to an injury within the meaning of section 44, Indian Penal Code, as was held by Burn, J., in *Arumugha Mudaliar* v. *Muthiah Mudaliar*[1]. Excommunication may in some cases give a cause of action for a civil suit, but not for a criminal case. The threat to deprive the witnesses of the services of the barber and washerman may stand on a somewhat different footing ; but it is difficult to see how it can be illegal to ask these two servants not to shave or wash the clothes of those who refuse to help in securing better conditions of agricultural service. If this is not illegal, then the threat to do so is not punishable under section 506, Indian Penal Code.

The evidence as to the threat on the evening of the 3rd June, is very general and indefinite. It is that " they said, ' you should not go to work ' . . . ." ' they ' presumably meaning the 17 petitioners. It is most unlikely, however, that the 17 petitioners were speaking in chorus and using the very same words : " If you go, we will exclude you from having service of washerman and barber."

There is no reason to doubt that some of the petitioners said this ; but the witnesses have not attempted to discriminate between one petitioner and another. There is therefore grave doubt as to whether any particular petitioner uttered such a threat.

The petition is allowed, and the convictions and sentences set aside.

K.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AIYAR.

Maruthia Subrahmanyam .. *Petitioner**

v.

Nivarthi Lakshmi Narayanamma .. *Respondent.*

Court-fee and jurisdiction—Agricultural land—Income for " year " before the filing of plaint—Computation—Basis—" Revenue year " or " calendar year "—Definition of " year " in General Clauses Act—If applicable—Question of valuation—Revision—When lies.

In a suit relating to agricultural land the income for the " year " before the filing of plaint for purposes of court-fee and jurisdiction is to be computed for the revenue or the agricultural cultivation year and not the calendar year. It can be taken as the calendar " year " according to the General Clauses Act only if there is nothing else in the context to guide the Court.

When the matter involves a question of jurisdiction of the lower Court also and is not one affecting court-fee alone, a revision lies to the High Court.

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1. (1933) M.W.N. 736.

* C. R. P. No. 1294 of 1947. 17th September, 1948.

Petition under section 115 of Act V of 1908, praying that the High Court wil be pleased to revise the order of the Court of the District Munsiff of Gooty, dated 17th July, 1947, in O. S. No. 276 of 1946.

N. Suryanarayana for Petitioner.

E. Vinayaka Rao for Respondent.

The Court delivered the following

JUDGMENT.—The only point for determination in this petition is whether the lower Court went wrong in law in taking the year before filing the plaint to be the revenue or agricultural year 1945-1946, and whether it should have taken it to mean a calendar year, as contended by the learned counsel for the petitioner, relying on a clause in the General Clauses Act. I am of opinion that the lower Court did not go wrong in law. The General Clauses Act is, as its very name implies, a general Act subject to the particular context. If there is nothing else to guide the Court in the particular case, regarding the year, then the year has to be taken as a calendar year. In the present case, we are, admittedly concerned, with the income from the land, and it is well known that regarding land the annual income is understood usually to be the income from the revenue year or cultivation year, unless the parties have contracted otherwise, or unless there is something in the context to show that anything different was meant. So too, there is the financial year, the income-tax year, and several other years, apart from the calendar year, recognised for various purposes, in spite of the General Clauses Act and the provision referred to by the learned Counsel for the petitioner. The learned Counsel for the petitioner has relied on the ruling in *Ghasiram* v. *Hargovind*[1] and has contended that the lower Court may at least be directed to find out the income from the suit lands for a calendar year, *i.e.*, for 365 days, before the date of the filing of the plaint, in order to see whether the lower Court will have jurisdiction or not to try the suit. In the view I take, it is unnecessary to do so, since I am convinced that, ordinarily, in matters relating to land, in this part of the country, the revenue year or the agricultural year is taken for the purpose of income, whatever the case may be in Allahabad and the United Provinces.

The next point urged by the learned counsel for the petitioner was that the lower Court went wrong in estimating the income of even the revenue or agricultural year 1945-46 at Rs. 2,000 to Rs. 3,000, and that it should have taken it to be far above Rs. 3,000, calculating from the evidence given by P. W. 2 regarding the yield from the lands and the prices of the crops. It is obvious that the estimate arrived at by the lower Court regarding the income in the revenue or agricultural year 1945-46 was purely a question of *fact* having nothing to do with law, and will become an error in law only if the lower Court had *no evidence at all* to support its finding, and was merely acting on *surmise*. Here, it was obviously acting on evidence on record, and on *inferences* therefrom and not on *mere surmise* without any evidence. Therefore, this contention also must fail.

The learned Counsel for the respondent raised an objection that no revision petition would lie as the matter affected court-fee. I am unable to agree. If the matter affected *court-fee alone* which is one purely between the Government and the plaintiff, no revision petition might have lain, but when it involved a question of *jurisdiction* of the lower Court also, as here, the petitioner was clearly interested in the matter, as his rights of appeal to the High Court, etc., would be affected. So I overrule this preliminary objection of the respondent's Counsel.

In the end, therefore, the petition deserves to be and is dismissed, but, in the peculiar circumstances, without costs, as there is no direct decision stating that the year in this presidency regarding the income from agricultural land will mean the revenue or agricultural year, in the absence of any contract to the contrary or other circumstances compelling such inference.

K.S. — *Petition dismissed.*

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1. (1906) I.L.R. 28 All. 411.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE YAHYA ALI.

The Commissioner of Income-tax and Excess Profits Tax, Madras. *Applicant**

v.

Messrs. Chari and Ram, Madura .. *Respondent.*

Income-tax Act (XI of 1922), section 13—Valuation of stock-in-trade of assessee dealing in numerous items for computing profits—Proper method.

Stock-in-trade in hand is an essential item in the computation of the profits for a period. The accepted basis of valuation of stock is cost or market value, whichever is lower, at the date to which the accounts for a period are made up. Supposing the market value at the closing date is higher than the cost, the Income-tax Authorities cannot compel the assessee to value the stock on the basis of the market rate on the ground that the assessee had made a profit. There is no reason why there should be a different principle when there are several kinds of articles. The assessee cannot be compelled to adopt either the average cost for all the items or the market rate for all the items. The assessee is entitled to compute the income, profits and gains in accordance with the method of accounting regularly employed by him and ordinarily this method must be accepted by the department in the absence of anything to suggest that it is improper and patently false.

Case referred to the High Court by the Income-tax Appellate Tribunal, Madras Bench, under section 66 (1) of the Income-tax Act, Act XI of 1922, as amended by section 92 of the Indian Income-tax (Amendment) Act, Act VII of 1939, in 66 R. A. 39 and 57 Madras 1945-46 on its file.

C. S. Rama Rao Sahib for Applicant.

M. Subbaraya Aiyar for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—The question of law referred by the Income-tax Appellate Tribunal in accordance with the direction of this Court in C. M. P. Nos. 5830 and 5831 of 1946 is as follows :

"Whether on the facts and in the circumstances of this case while the opening stock had been valued on the average cost basis, in accordance with the method of accounting regularly followed by the assessee in the past, the method of valuing some items of the closing stock on the average cost basis and the others on the market basis of the relevant account year is in conformity with law and principle and whether the true profits of the year can be properly deduced from such basis of valuation."

The assessees are dealers in dye-stuffs and chemicals comprising numerous items. In valuing their opening and closing stock, the method followed by them was to take the average cost or market value, whichever was lower, in respect of each separate article of the stock. For the relevant period, the average cost of the opening stock was in respect of all the items lower than the market rate and so the assessees valued the opening stock (which was the closing stock of the next preceding year) on the average cost basis. At the time of valuing the closing stock, with regard to some of the articles the market rate was lower, whereas with regard to the other articles the market rate was higher than the average cost. Therefore, the respondents took the average cost as the value of the closing stock for those articles of which the cost was lower than the market rate and adopted the market rate for other articles of which the market rate was found to be lower than the average cost. The Tribunal accepted the method adopted by the assessees.

The contention on behalf of the Commissioner of Income-tax and Excess Profits tax is that this method is wrong and the correct method would be to arrive at two separate valuations of the closing stock, one the aggregate of the actual average cost for each of the articles and the other the aggregate of the market value of the same articles and to adopt the lower of the two aggregates.

The question for decision lies within a very narrow compass, but no authority directly in point has been cited to us by either counsel. The question shortly is whether in arriving at a valuation of the stock an assessee is entitled to adopt the average cost or the market rate, whichever is lower, *itemwise* or only in the aggregate.

* Case Referred No. 33 of 1947. 12th August, 1948.

It is admitted by learned Counsel for the department that if an assessee is doing business in one kind of article of merchandise, he is entitled to adopt for purposes of valuation of stock, either the average cost or the market rate, whichever is lower. He called this a concession, probably meaning thereby that there is nothing in the Act which lays down such a rule of valuation. But the rule appears to be well established both in England and in India, and it has not been contended by the Income-tax Authorities that it is a mere matter of concession *ex gratia* which they could refuse to grant in any particular case.

Stock-in-trade in hand is an essential item in the computation of the profit for a period. The accepted basis of valuation of stock is cost or market value, whichever is lower, at the date to which the accounts for a period are made up. In *Whimster and Co.* v. *The Commissioners of Inland Revenue*[1] the Lord President of the Court of Session in Scotland enunciated two general fundamental principles which have always to be kept in mind in computing the balance of profits and gains for the purposes of income-tax or for the purposes of Excess Profits duty, thus :

"In the first place, the profits of any particular year or accounting period must be taken to consist of the difference between the receipts from the trade or business during such year or accounting period, and the expenditure laid out to earn those receipts. In the second place, the account of profit and loss to be made up for the purpose of ascertaining that difference must be framed consistently with the ordinary principles of commercial accounting, so far as applicable, and in conformity with the rules of the Income-tax Act, or of that Act as modified by the provisions and schedules of the Acts regulating excess profits duty, as the case may be. For example, the ordinary principle of commercial accounting requires that in the profit and loss account of a merchant's or manufacturer's business the values of the stock-in-trade at the beginning and at the end of the period covered by the account should be entered at cost or market price whichever is the lower, although there is nothing about this in the taxing statutes."

Coutts-Trotter, C.J., states the rule as follows in *Commissioner of Income-tax* v. *Chengalvaraya Chetti*[2] :

"I should add that the accepted rule is that the assessee in crediting the closing stock figure is to take either the cost price or the market value whichever be the less—a provision obviously intended to be in favour of the trader and which enables him more evenly to distribute his loss."

This rule has been sometimes described as an exception to the general rule, namely, the rule that a precautionary reserve for anticipated loss is not allowable and no unrealised loss could be set off against the profits of the period. In Halsbury's Laws of England (2nd edition), Vol. 17, section 232, runs thus :

"It is to be observed that the allowance by the Inland Revenue Authorities of a writing down of stock when market value is lower than cost is in effect the allowance of a reserve for future unrealised loss and as such is an exception to the general rule that precautionary reserves are not allowable."

In *Whimster and Co.* v. *The Commissioner of Inland Revenue*[1], Lord Sands observed at page 827,

"The consideration of how it would be prudent for a trader to act does not solve the question here presented to us as one of Revenue law. Under this law the profits are the profits realised in the course of the year. What seems an exception is recognised where a trader purchased and still holds goods or stocks which have fallen in value. No loss has been realised. Loss may not occur. Nevertheless, at the clost of the year he is permitted to treat these goods or stocks as of their market value. This exception to the general rule has never, however, been extended to the case of probable or indeed apparently inevitable loss to be incurred in the execution of future contracts entered into during the year in question, and the authorities are against it."

Mr. Rama Rao Sahib, learned Counsel for the applicant, argued that the method adopted by the assessees in this case does not enable the profits and gains of the period to be properly deduced. He says that the profits of the business as a whole must be ascertained, and that means, whether with reference to the stock comprising several articles, the proper computation can be made only by ascertaining the aggregate of the market value of each of the articles. If the assessees are allowed to adopt the market value only when it is lower than cost with respect to a particular article on the theory of a notional loss, likewise, he contends, they must be compelled to adopt the market value even when it is higher than the cost because they would be making a notional profit. Calculating on this basis, so the argument

1. (1925) 12 T.C. 813 at 823. 2. (1925) 49 M.L.J. 425: I.L.R. 48 Mad. 836 at 840.

ran, the true profits and gains can be ascertained as regards the stock. Though at first sight the argument looks plausible, we consider that there is a fallacy underlying it. In the illustrative case which we mentioned above, namely, where the business comprised only one kind of article of merchandise, supposing the market value at the closing date is higher than the cost, the Income-tax authorities cannot compel the assessee to value the stock on the basis of the market rate on the ground that the assessee had made a profit. If this is so in a case where the business comprises one kind of article, we fail to see why there should be a different principle when there are several kinds of articles. The real point which cannot be overlooked is that as regards stock the income-tax department does not assess the unrealised notional profit.

In dealing with the case of a company carrying on the business of speculative building and the method of making out an account of the profits for a period of assessment, in respect of houses completed or partially completed, and unsold, in *B. G. Utting and Co., Ltd.* v. *Hughes (H. M. Inspector of Taxes)*[1], Caluson, L.J., observed thus :

"In order to ascertain the profit of the period of assessment he must credit the account with an item to represent the asset completed or partially completed but unsold. The normal method of dealing with this item would be to make it up by calculating cost or market value, whichever is the lower, of the various assets represented. The one thing which it would obviously be wrong to do would be to make up the item by putting on the assets the market value if it exceeds cost; that would result in swelling the gross profit (the balancing item on the other side) by bringing in as part of the gross profit an unrealised profit, *i.e.*, it would put into the profits of the period of assessment the profit expected to be realised in the future."

We, therefore, cannot accept the contention of the learned counsel for the department. If one can speculate on the rationale of the rule, which allows an assessee to adopt the market value when it is lower than the cost, it appears to be this : if one were to imagine a sale taking place on the closing day of the entire stock, it is reasonable to expect that the articles of which the market value is lower would not fetch anything more than at those rates, and therefore loss would be certain. But there would be no assurance that there would be a market for the entire stock of articles of which the market value is higher and therefore it would be hazardous to assume that the entire stock could be sold at the prevailing market rate and necessarily bring in a profit. Be that as it may, there is no provision of law or principle according to which the assessee could be compelled to adopt either the average cost for all the items or the market rate for all the items.

We consider that the question must be decided on the provisions of section 13 of the Income-tax Act. Under that section, the assessee is entitled to compute the income, profits and gains in accordance with the method of accounting regularly employed by him, and ordinarily this method must be accepted by the department. It is only if in the opinion of the Income-tax Officer the method employed is such that the income, profits and gains cannot properly be deduced therefrom that he can disregard it altogether. No doubt in cases of gross undervaluation of stock, the Income-tax Officer may refuse to accept the valuation of the assessee. Equally, the assessee will not be allowed to arbitrarily change the method of accounting to suit his purposes (vide *Commissioner of Income-tax* v. *Chengalvaraya Chetti*[2]). But if it is found as in this case that the method adopted by the assessees in the period of assessment is in accordance with the method of accounting regularly followed by the assessee in the past then that method must be accepted in the absence of anything to suggest that it is improper or patently false. As the Privy Council observed at page 244 in the *Commissioner of Income-tax Bombay* v. *Sarangpur Cotton Manufacturing Co., Ltd., Ahmedabad*[3], the section

"clearly makes such a method of accounting a compulsory basis of computation, unless, in the opinion of the Income-tax Officer the income, profits, and gains cannot properly be deduced therefrom."

1. (1940) 23 T.C. 174 at 185.
2. (1925) 49 M.L.J. 425 : I.L.R. 48 Mad. 836.
3. (1938) 1 M.L.J. 1 : L.R. 65 I.A. 1 : I.L.R. 1938 Bom. 239.

It has not been established before us in this case that there was anything in law or principle which empowered the Income-tax Officer to reject the method of accounting adopted by the assessees.

The answer to the question must be in the affirmative. The respondents will have their costs, Rs. 250.

K.S. *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE YAHYA ALI.

K. P. G. B. U. G. M. S. S. A. Mohamad Abdul Kareem and Co., Madura and another .. *Applicants**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922), section 3—Construction—Association of persons—Meaning—Association if must be for a lawful purpose—Partnerships between the lessees of arrack and toddy shops to run the shops in partnership without the permission of the District Collector—Liability to assessment as " association of persons " after rejection of application to be registered as "firms."

Persons who had taken leases of arrack shops in one case and toddy shops in another, separately constituted themselves into a partnership and agreed that the respective firms should run all the toddy and arrack shops taken on lease by the partners. An application for registration of the firm under section 26-A of the Income-tax Act was rejected for the reason that the formation of a partnership with regard to arrack and toddy shops was prohibited by the Abkari Law without the previous permission of the District Collector. The firm was assessed as " an association of persons," and the assessee claimed that it was not such an association.

Held, the words " other association of persons " in section 3 of the Income-tax Act have to be construed in their plain ordinary meaning and not *ejusdem generis* with the word " firm " immediately preceding or the words going before that word. So long as it is an association which produced income, profits or gains, it is assessable to tax by force of section 3. It is unnecessary in order to constitute an association that there should be any mutual rights or obligations among the members, enforceable in a Court of law. So long as the object of the association is to carry on for gain, a business which is not unlawful—the object in the present case being to sell arrack or toddy as the case may be under the authority of a licence duly granted by the Government—the supervening circumstance of the formation of a partnership in contravention of the Abkari law does not render the income, profits and gains of the association immune from taxation.

Cases referred to the High Court by the Income-tax Appellate Tribunal, Madras Bench, under section 66 (1) of the Indian Income-tax Act, 1922, Act XI of 1922, as amended by section 92 of the Indian Income-tax Amendment Act, VII of 1939, in 66 R. A. Nos. 213 and 214 and 215 and 216 Madras of 1946-47 on its file.

T. L. Venkatarama Aiyar for Applicants.

C. S. Rama Rao Sahib for Respondent.

The Judgment of the Court was delivered by

Yahya Ali, J.—Under section 66 (1) of the Income-tax Act, the Income-tax Appellate Tribunal has, at the instance of the assessees concerned in these cases, referred to this Court, the following identical question in both the cases :

" Whether on the facts and in the circumstances of the case, the Tribunal's finding that the assessee is an " association of persons " within the meaning of section 3 of the Income-tax Act is correct in law."

The facts in both the cases are also identical and it is convenient to treat them together.

Several persons formed into a partnership agreeing that all the shops leased in the names of those persons should be run by the partnership. In Referred Case No. 18 there were ten persons who had taken leases of ten arrack shops separately and had constituted themselves into a partnership by deed dated 24th February, 1943, and agreed that the firm should conduct business in the vilasam of K.P.G.B.

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* Case Referred Nos. 18 and 19 of 1947. 23rd August, 1948.

U.G.M.S.S.A. Mohamad Abdul Karim and Co. In R. C. No. 19, sixteen persons who had taken out separately leases of sixteen different toddy shops agreed by partnership deed dated 1st October, 1942, that the business should be conducted by the partnership under the vilasam of P.M.U.B.M.K. Kathan Hadar and Co. Except for the differences indicated above, which are wholly immaterial for the purpose of these references, the questions arising for consideration are identical.

On foot of the deeds of partnership, applications were made for registration of the firms under section 26-A which were rejected for the reason that the formation of a partnership with regard to arrack and toddy shops was prohibited by the Abkari Law without the previous permission of the District Collector. That order was confirmed on appeal by the Appellate Assistant Commissioner and a further appeal preferred to the Tribunal against that order was rejected as it was represented that the appeal was filed only as a formality.

The Income-tax Officer assessed each firm in the status of " an association of persons." Objection was taken to this course before the Appellate Assistant Commissioner and the Tribunal and it was contended that as there was no lawful partnership, assessment could be made only upon each individual lessee and not upon the entire body of lessees as an association. There was no objection however raised on the merits of the assessment. The contention of the assessees in both the cases that they did not constitute an " association of persons " within the meaning of section 3 was rejected by both the Appellate Assistant Commissioner and the Tribunal and hence these references.

The arguments advanced by learned Counsel for the assessees, briefly put, are that in order to attract liability under section 3, an association of persons must be a lawful association and the test of a lawful association, so the argument runs, is whether under the terms of association, mutual rights and obligations arise which are enforceable in a court of law. It was pointed out that the agreements of the nature embodied in the two partnership deeds in these cases are unlawful and have been held to be so, as being forbidden by law and opposed to public policy. As association formed for such an unlawful purpose has no legal existence and cannot be recognised as an assessable unit under the taxing statute. To support this contention, reference was made, followed by extensive citation of authority to the provisions of the English and Indian Companies Act which render unlawful companies doing business (other than banking) whose members exceed twenty in number. On that analogy and similar analogies, it was urged that the combination of the various individuals in the present cases for carrying on business did not amount to an " association of persons " so as to attract liability to tax under section 3.

We will first take up the law and the cases bearing upon the English Companies Act. S. 4 of that Act provides that no company, association or partnership consisting of more than 20 persons shall be formed for the purpose of carrying on any business (other than banking) that has for its object acquisition of gain unless it is registered as a company under the Act. The legal position with reference to illegal companies on the score of their consisting of more than 20 persons is discussed in Halsbury's Laws of England (Hailsham) 5th volume, page 840 and it is stated that where a company is formed, contravening the provisions of that section, the law can take no cognizance of its existence except perhaps from a penal point of view. It is also stated at page 842 that if a company is formed for legal purposes, the commission by it of illegal acts does not make it an illegal company. Palmer says in his " Company Law " (16th edition) that the Act of 1929 declares illegal all large unregistered companies or associations thus indirectly compelling associations with anything but a very small membership to avail themselves of the provisions of the Act. After citing a number of cases to some of which reference will be made presently, the learned author says referring to associations consisting of more than 20 persons : " In a word, the association is a phantom.

It has no legal existence." The leading case on the subject is *Smith* v. *Anderson*[1]. That was a case of an association of more than 20 persons formed for the purpose of carrying on business. The Court of Appeal held that the certificate holders did not form an association within the meaning of section 4 of the Companies Act. James, L.J., referring to the word "association" occurring in section 4 said that properly and etymologically it describes the act of associating together, from which act of associating, there is formed a company or partnership. At page 274 it was observed that there was never anything creating mutual rights or obligations between those persons and then came the following dictum :

> "Persons who have no mutual rights and obligations do not, according to my view, constitute an association because they happen to have common interest or several interests in something which is to be divided between them."

Brett, L.J., was of the opinion that the association mentioned in section 4 although not, strictly speaking, a company or a partnership must be something of a similar kind. Cotton, L.J., said :

> "I do not think it very material to consider how far the word 'association' differs from company or partnership, but I think we may say that if 'association' is intended to denote something different from a company or partnership it must be judged by its two companions between which it stands and it must denote something where the associates are in the nature of partners . . . . But whatever may have been the object of using the word 'association,' what we have to consider, in my opinion is whether this conglomeration, as I will call it, of the persons who subscribe their money under this trust deed, is an association formed to carry on any business within the meaning of this section having for its object the acquisition of gain."

The view taken in this case was re-affirmed in In re *Padstow Total Loss and Collision Assurance Association*[2]. With reference to an association which infringed the provisions of section 4, it was held by Brett, L.J., that since it was prohibited by law there never existed at any time any company, association, or partnership of which the law could properly take cognizance and with regard to which the Court could properly make a winding up order. To the same effect is the observation of Lindley, L.J., at page 149 where he said that such a company which is not registered is illegal in this sense, that it is a prohibited thing, and the law cannot take notice of it except, perhaps, in a penal point of view.

In the Indian Companies Act the relevant provision is in the same terms and the case law has also proceeded upon much the same lines. *Panchana Mancha Nayar* v. *Gadishare Kumaranchath Padmanabhan Nair*[3], was a case of a lottery in which more than 20 persons took tickets. It was held by Subramania Iyer and Davies, JJ., that there was no association of 20 persons for the purpose of gain and consequently, the plaintiffs were not precluded from suing for want of registration under section 4 of the Companies Act. The principle as applied was stated at page 73 in these terms :

> "Clearly, therefore to constitute an association, within the meaning of the section, the existence of a legal relation between more than 20 persons giving rise to joint rights or obligations or mutual rights and duties is absolutely necessary. Otherwise there would be a mere conglomeration of persons as Cotton, L.J., put it, but not an 'association.'"

In *Neelamega Sastri* v. *Appiah Sastri*[4] more than 20 persons entered into an agreement for creating a chit fund, but the only proprietors of the fund were the two organisers; it was held that the parties to such an agreement did not form an association of which registration was necessary under section 4 of the Indian Companies Act. The firm of *Pannaji Devichand* v. *The firm of Senaji Kapurchand*[5] was a case in which four unregistered firms entered into a partnership to purchase certain goods and to sell them at different times and divide the profits and it appeared that the total number of members of all the firms together came to twenty two. On a suit instituted by three of the firms against the fourth for dissolution of partnership and taking of accounts it was held that the suit partnership being composed of more than 20 persons, was illegal for want of registration and where a plaintiff comes to

1. (1879) 15 Ch.D. 247.
2. (1882) 20 Ch.D. 137.
3. (1896) 7 M.L.J. 26 : I.L.R. 20 Mad. 68.
4. (1906) 16 M.L.J. 385 : I.L.R. 29 Mad. 477 (F.B.).
5. (1926) 51 M.L.J. 667 : I.L.R. 50 Mad. 175.

Court on allegations which on the face of them show that the contract of partnership on which he sues is illegal, he is not entitled to any relief. This case was taken up on appeal to the Privy Council and was confirmed without any discussion whatever. Vide *The firm of Sanaji Kapurchand* v. *Firm of Pannaji Devichand*[1].

Turning to the other Indian High Courts reference may be made to *Mewaram* v. *Ramgopal*[2] in which case two ginning factories consisting of more than 20 shareholders from the very beginning started under an agreement. It was held that none of its members could sue in a Court of law for partition of the existing assets. Sulaiman, J., on whose dissent the matter was referred to a third judge who agreed with Mukherji, J., observed that any person who comes to Court and asks for its assistance in a way which would necessarily imply a recognition of the existence of such an association is out of Court. The Court must refuse to help him, even though he may have to suffer an injustice. The Lahore High Court in *Madangopal* v. *Shewal Das*[3] dealing with a similar case pointed out that section 4 of the Indian Companies Act is mandatory and any association formed in violation thereof is an illegal body and its existence cannot be recognised by law. It may be fitting to conclude this line of cases by reference to an income-tax case decided by the Lahore High Court in *Shri Gopalji Company* v. *Commissioners of Income-tax, Punjab and North West Frontier Provinces*[4]. There the assessee company constituted by 13 firms as partners with specified shares was carrying on business and the Company and the constituent firms were not registered under the Indian Companies Act or under the Indian Income-tax Act. It was held that the company was assessable as a firm or an association within the meaning of the Income-tax Act, its illegal constitution on account of the non-compliance with the provisions of the Companies Act not affecting its liability to assessment on its profits. Jailal, J., adverting to the claim of the company that it was not capable of being assessed to income-tax because it could not be deemed to exist in the eye of law made the following observation :

> " The claim of the company is, in my opinion, preposterous on the face of it. It amounts to this that, because the assessee is carrying on business without complying with the provisions of the law as to the mode of its constitution it is not liable to pay income-tax on its profits. It is all the same a firm or an association within the meaning of the Indian Income-tax Act. For analogous cases reference may be made to *Birendrakishore Manikya* v. *Secretary of State for India*[5], in which it was held that abwab income illegally realised by the assessee was liable to be assessed to income-tax, and to In re *Chunnilal Kalyandas*[6] where it was held that income or profits derived by the assessee from wagering contracts was liable to income-tax. In my opinion, whatever penalties or disabilities the Sri Gopalji Company may have incurred by not complying with the provisions of the Indian Companies Act, the matter does not affect its liability to pay income-tax on its profits."

The whole position has been put in the most telling manner by Rowlatt, J., in *Mann* v. *Nash*[7]. There the assessee was carrying on the business of providing automatic machines, the use of which had been held to be illegal. It was claimed that the portion of profits derived from that business was immune from taxation on the ground that it had been earned by unlawful means. It was held that the profits were chargeable with income-tax. Three arguments were addressed and each of them was met by Rowlatt, J., in his own inimitable manner :

> " The great mainstay of Mr. Field's argument quite rightly from his point of view, was the case of *Hayes* v. *Duggan*[8], decided in the Irish Free State, and that decision of the Supreme Court seems to have gone upon this principle that no construction could be admitted which recognised that the State should come forward and seem to take a profit from what the State prohibited, because the State ought to have prevented it ; and it was argued, if I may venture to say so, in a somewhat rhetorical style ; Does the State keep its revenue eye open and its eye of justice closed ? I must say, I do not feel the force of that observation at all. Would it have made any difference, I ventured to ask in the argument, if the State had kept both its eyes open and prosecuted the man for the lottery and taxed him for the profits at the same time ? That would at any rate have protected the State from the reflections which were made upon it in the words I have quoted. But, in truth, it seems to me that all that consideration is misconceived. The Revenue representing the State, is merely looking at an accomplished fact. It is not condoning it ; it has not taken part in it. It merely finds profits made from what appears to be a trade, and the Revenue laws happen to say that the profits made from trades have to be taxed, and they say : 'Give us the tax.' It is not to the purpose in

1. (1930) 59 M.L.J. 435 (P.C.).
2. (1926) I.L.R. 48 All. 735.
3. (1934) I.L.R. 16 Lah. 574.
4. (1931) 5 I.T.C. 257.
5. 1 I.T.C. 67.
6. 1 I.T.C. 418.
7. (1932) 16 T.C. 523.
8. (1929) I.R. 406.

my judgment to say : 'but the same State that you represent has said they 'are unlawful'; that is immaterial altogether and I do not see that there is any contact between the two propositions.

It was said in the Irish case that *allegans sham turpitudinum non est audiendus.* I cannot see that the State are alleging their own turpitude ; it is the appellant who is alleging his own turpitude. The State says : 'It is a business' ; the appellant says 'It is an unlawful one ;' he is alleging his own turpitude.

It is said again : "Is the State coming forward to take a share 'of unlawful gains ?' It is mere rhetoric. The State is doing nothing of the kind ; they are taking the individual with reference to certain facts. They are not partners ; they are not principals in the illegality or sharers in the illegality ; they are merely taxing a man in respect of those resources. I think it is only rhetoric to say that they are sharing in his profits, and a piece of rhetoric which is perfectly useless for the solution of the question which I have to decide."

There is no doubt that a partnership for carrying on toddy business without the Collector's previous permission is illegal as the rule under the Abkari Act provides that no privilege of supply or vend shall be sold, transferred or subrented without the Collector's permission. It was so held in *Ramanayudu* v. *Seetharamayya*[1] and a suit laid upon a promissory note executed by one partner after he became the successful bidder in favour of another for advances to be made by the latter for carrying on the business which they agreed to work as partners was dismissed as being not maintainable. This view was followed in a number of cases. It is sufficient to refer to *Italia* v. *Cowasjee*[2], where the entire case law was reviewed and the principle was re-affirmed as being in contravention of rule 27 of the Abkari Rules and section 23 of the Contract Act. Reference may in this connection be made to the decision of the Court of Session in Scotland, in *Lindsay, Woodward and Hiscox* v. *Commissioners of Inland Revenue*[3], the well known case of bootlegging that was carried by an American wine merchant who joined with two other persons in England in a venture of running whisky into the United States. In making the shipments from the United Kingdom to America deception had to be practised on Customs authorities of the United Kingdom by means of untrue declarations as to the destination of the whisky. The question came before the Court in the usual form as to whether there was evidence upon which the Special Commissioners of Income-tax could come to the conclusion that a partnership or joint adventure subsisted and that the profits of the sale of whisky were assessable to income-tax. The Court held that there was evidence. The Lord President (Clyde) made certain observations which are apposite to the present case. Considering the question whether the transactions were in the nature of trade, His Lordship observed :

"This point cannot be dissociated from another, namely, whether the trading transactions, if such they were, were so tainted with illegality and wrong doing that the profits made by means of them fall outside 'the profits of trade' which are assessable to income-tax under the Act of 1918 . . . . There are many transactions which are illegal in the sense that the obligations upon which they depend are not such as the law will enforce. I think it is plain that a contract of partnership the object of which is to trade in a way which necessarily involves resort to fraud on the Customs authorities of this country, is not a contract which this country's law will enforce. I do not, however, think that, merely because the contract was not enforceable by law, profits actually made by the partnership's trading operations must necessarily be placed beyond assessment to income-tax as profits of 'trade' . . . . But in the present case, the 'trade' did not consist in the commission of crime ; it consisted in the marketing of a commercial article. The frauds on the Customs authorities were only 'incidents of that trade.' Frauds are sometimes incidents of some 'trades' without exempting their profits from assessment to income-tax. On the other hand, it is true in this case that the frauds on the customs authorities were inseparable incidents of the conduct of the partnership trade. Is this enough to exempt the profits of the trade from assessment to income-tax ? I think not, because the marketing of the whisky in the United States was undoubtedly 'trade,' or 'in the nature of trade,' and was not less so because, in order to enable the whisky to be so marketed, it was necessary to commit a fraud on the Customs authorities at the stage of export."

Lord Sands said at page 56 :

"Crime, such as house breaking, is not trade, and therefore the proceeds are not caught by the tax. It does not follow, however, that there cannot be a business answering to the description of trade, albeit it is tainted with illegality. Trafficking in drugs, for example, is of the nature of trade, albeit such trafficking may in the circumstances be illegal. I respectfully adopt the dictum of Lord Haldane, in delivering the judgment of the Privy Council in the case of *Canadian Minister*

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1. (1934) 68 M.L.J. 570 : I.L.R. 58 Mad. 727. 2. (1944) 1 M.L.J. 97 : I.L.R. 1944 Mad. 697.
3. (1919) 18 T.C. 43.

of Finance v. *Smith*[1], that once the character of a business has been ascertained as being of the nature of trade, the person who carries it on cannot found upon elements of illegality to avoid the tax."

Lastly the dictum of Lord Morison is equally forcible :

> " It is, in my opinion, absurd to suppose that honest gains are charged to tax and dishonest gains escape : To hold otherwise would involve a plain breach of the rules of the Statute, which require the full amount of the profits to be taxed and merely put a premium on dishonest trading. The burglar and the swindler, who carry on a trade or business for profit, are as liable to tax as an honest businessman, and, in addition, they get their deserts elsewhere."

Southern (H. M. Inspector of Taxes) v. *A. B. Ltd.*[2], dealt with the business of a bookmaker and it was held that although the business was unlawful it nevertheless constituted a trade within the meaning of the Income-tax Acts and the profits therefrom were assessable to income-tax. Finlay, J., noticed the important distinction with reference to the illustration of a burglar that was given before him that if the burglar's income does not come within the purview of the Income-tax Acts, it was because what he does is not the carrying on of a "trade" within case I, and it is not because, carrying on a trade within case I, he is taken out by some considerations of morals or anything of that sort. In the case of *Minister of Finance* v. *Smith*[1] which came before the Judicial Committee from Canada there is the following observation :

> " Nor does it seem to their Lordships a natural construction of the Act to read it as permitting persons who come within its terms to defeat taxation by setting up their own wrong. There is nothing in the Act which points to any intention to curtail the statutory definition of income, and it does not appear appropriate under the circumstances to impart any assumed moral or ethical standard as controlling in a case such as this the literal interpretation of the language employed."

The principles deducible from the cases discussed above are clear. An association which contravenes the provisions of section 4 of the English Companies Act or the Indian Companies Act is unlawful and on foot of the contract or agreement amongst its members or partners, no relief will be granted by a Court as in the eye of law no company or association duly constituted is in existence. The same will be the position with reference to associations or partnerships formed in contravention of rule 27 of the Abkari rules. But that would not by itself conclude the question of the liability of the association to tax if the association comes within the scope of the charging section of the taxing statute. This will be so for the reason that so long as the object and purpose of the association is to carry on business which is not illegal (the case of an association to commit crime being distinguishable as an instance of an association formed for a criminal or unlawful object), its income is not immune from taxation because of the employment of unlawful means for achieving the income. The only test to be applied as indicated in the case of the *Ministry of Finance* cited above is whether the income falls within the purview of the charging section. That was also a case of illicit traffic in liquor and, as already stated, it was held, relying upon the dictum of Lord Haldane that Income-tax Acts are not necessarily restricted in application to lawful businesses only.

The question then that remains for determination is whether an association constituted as the two assessees in the present cases comes within the meaning of the term " other association of persons " occurring in section 3 of the Indian Income-tax Act which is the relevant charging provision. The expression itself is not defined in the Act and hence it follows that it must be understood in its plain and ordinary sense. In one of the cases cited already, it was pointed out that " association " properly and etymologically describes the act of associating together. But the dictionary meaning of the word " associate " is to join in common purpose or to join in an action. Any combination of persons who have joined together in a profit making enterprise would, according to ordinary parlance, amount to an association. The main argument of learned counsel for the applicants was that according to the frame of section 3, the words " other association of persons " in the context in which they appear should be deemed to have in them implicit the idea of there being in existence among the members of the association *inter se* certain mutual rights and obligations which can be legally enforced. It is to gain

1. (1927) A.C. 193. 2. (1933) 18 T.C. 59.

support for this argument that detailed reference was made to the provisions in the Companies Act and the Abkari Act and to the case law bearing upon them which has been already fully discussed.

Section 3 of the Income-tax Act runs thus :

> " Where any (Act of the Central Legislature) enacts that income-tax shall be charged for any year at any rate or rates tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions of, this Act in respect of (the total income) of the previous year of every (individual, Hindu undivided family, company and local authority, and of every firm and other association of persons or the partners of the firm or members of the association individually)."

The argument is that with regard to all the other units preceding the words " other association of persons," *viz.*, Hindu undivided family, company, local authority and firm, the common feature is the existence of such mutual rights and obligations. In one case, it may be the incident of status by birth ; in the case of companies it is the result of incorporation ; in the case of a local authority it is by operation of a statute and in the case of a firm it is attributable to the contract between the parties. Since in the present case the contract is void *ab initio* and there are no mutual obligations there can be no association. The doctrine of *ejusdem generis* was also invoked in this connection but with reference to these contentions learned counsel was unable to cite any authority in his favour. On the contrary all the cases bearing on the point tend to discountenance the position he contends for. In the *Commissioner of Income-tax* v. *Mohideen Sahib, Bellary*[1], a body of individuals agreed to take in auction, work and share the profits from four toddy shops. It was held that they could be taxed under section 3 of the Income-tax Act on the combined profits of the four shops. This decision is not of much direct assistance as it was found on an examination of the record that there was no evidence that the licence-holders had either sold, transferred or sub-rented the shops which they had taken on lease and hence there was no infringement of the provisions of rule 27 of the general conditions applicable to those licences and naturally the Court declined to presume illegality in the absence of any evidence of such illegality. The argument based on *ejusdem generis* was raised in a number of cases. In In re *B. N. Elias*[2], three individuals had combined to purchase various properties which they proposed to manage for the purpose of making profits and they were held to be an association of individuals. In *Mufti Mahomed* v. *I. T. Commissioner*[3], however, the Allahabad High Court expressed the view that the term " association of individuals " as it then existed in the old Act should be read *ejusdem generis* with the word " firm " immediately preceding. The same question arose in the Bombay High Court in *The Commissioner of Income-tax* v. *Laxmidas Devidas*[4] in a case where two persons associated together for the purpose of buying property and managed it so as to produce income. It was held that they constituted an " association of individuals " within the meaning of section 3. Beaumont, C.J., agreed with the view expressed by the Calcutta High Court in In re *B. N. Elias*[2] and differed from the view of the Allahabad High Court in *Mufti Mahomed* v. *I. T. Commissioner*[3]. It was pointed out by the learned Chief Justice that the rule of *ejusdem generis* being one of construction should never be invoked when its application appeared to be to defeat the general intent of the instrument to be construed and then it was pointed out :

> " Moreover, I know of no authority for applying the rule so as to limit the meaning of general words to the last of the particular words preceding. Here, there are three associations of individuals referred to in S. 3 of the Act,—A Hindu undivided family, a company and a firm ; and those three associations of individuals are marked by widely different characteristics. A Hindu undivided family is an association united by ties of birth ; members of a company are associated in such a manner that they become a legal entity ; and a firm is an association depending on contract but is not in itself a legal entity ; and I think it would be very difficult,—if not impossible,—to a suggest any other association of individuals which embodies substantially the peculiarities of the three particular types to which the Act refers. In my opinion, the only limit to be imposed on the words " other association of individuals " is such as naturally follows from the fact that the words appear in an act imposing a tax on income, profits, and gains, so that the association must be one which produces income, profits or gains. It seems to me that an association of two or more persons for the acquisition

1. (1927) 53 M.L.J. 719.
2. (1935) I.L.R. 63 Cal. 538.
3. A.I.R. 1936 All. 817.
4. I.L.R. 1937 Bom. 830.

of property which is to be managed for the purpose of producing income, profits or gains falls within the words " other association of individuals " in section 3."

It is significant that in this case, of the two individuals one was a minor. For that reason also there could be no partnership between an adult member and a minor. Nonetheless in that case it was held that since in point of fact the two assessees had associated together for the acquisition of property, whether or not the minor was bound by any contract entered into on his behalf was immaterial and since there was ownership of property by two persons and the production by that property of profits or gains, the assessee was taxable as an association.

Having bestowed close attention upon the question, we are inclined to agree with the view taken by the Calcutta and Bombay High Courts with regard to this matter in preference to the view of the Allahabad High Court. We may mention in passing that in a later decision of the Allahabad High Court, *Chandrika Prasad Ram Swarup* v. *Commissioner of Income-tax*[1], Iqbal Ahmed, J., as he then was, made the following important observation :

" The question of the legality or illegality of transactions entered into by a firm is totally irrelevant in calculating the net profits or the loss incurred by the firm in a particular year. For example if the assessee firm had entered into a wagering contract which resulted in huge loss it would not have been open to the Income-tax Department to decline to take that loss into account simply because the contract by way of wager was void in law. The income assessable to tax is the actual income of an individual or of a firm irrespective of the manner in which the income was derived. Legality or illegality of transactions culminating in profit or loss is, therfore, foreign to the scope of an inquiry into the income of an individual or of a firm for the purpose of taxing the same."

In the *Hotz Trust case*[2] it is to be noted that under the trust three trustees were appointed to conduct the business and the Court found that they could be grouped as a unit for the purposes of taxation and an assessment levied on them as such and that they could be held to be an association of individuals within the meaning of section 3 of the Income-tax Act in spite of the circumstance that there could *inter se* be no mutual rights and obligations as between the three trustees. The other case in point is that of *Commissioner of Income-tax* v. *Mrs. Saldanha*[3]. Although there could legally be no firm between an adult and minors it was held that a Christian mother and her minor children could legally constitute an association of persons within the meaning of section 3. Another illustration is found in *Mian Channu Factories Union* v. *Commissioner of Income-tax, Punjab*[4], where it was held that two firms and a Hindu undivided family could not constitute themselves into a firm within the meaning of the Income-tax Act but the larger group formed thereby was liable to be assessed as an " association of individuals." The question has arisen in the Courts constantly as to whether co-owners can be assessed as an association. A line of distinction has always been drawn, as in some of the cases which have been discussed above, between persons who have become co-owners by succession or inheritance and persons who combine in a joint enterprise to purchase property for the purpose of making profit by the joint enterprise.

Thus whatever may be the legal effects and consequences under the Company Law or under the law of contracts, we entertain little doubt that associations like those in the present cases are " other associations of persons " and their income, profits and gains are assessable to tax, so far at any rate as the Indian Income-tax Act is concerned. It must be remembered that there is no provision in the United Kingdom Act corresponding to section 3 of the Indian Act and in fact the expression " association of persons " is foreign to English law. In rule 1 of the General Rules applicable to schedules A, B, C, D and E of the English Act, the words employed are " every body of persons shall be chargeable to tax in like manner as any person is chargeable under the provisions of this Act," and the question for consideration under that Act always is whether the assessee falls within any one of the schedules or cases or rules forming part of the Act.

To sum up, the words " other association of persons " in section 3 have to be construed in their plain ordinary meaning and not *ejusdem generis* with the word

1. I.L.R. 1939 All. 690 (F.B.).
2. (1930) 5 I.T.C. 8.
3. (1932) 62 M.L.J. 600: I.L.R. 55 Mad. 891 (F.B.).
4. (1936) I.T.R. 203.

" firm " immediately preceding or the other words going before that word. So long as it is an association which produces income, profits or gains, it is assessable to tax by force of section 3. It is unnecessary in order to constitute an association that there should be any mutual rights or obligations among the members enforceable in a court of law. So long as the object of the association is to carry on for gain a business which is not unlawful—the object in the present case being to sell arrack or toddy as the case may be, under the authority of a licence duly granted by the Government—the supervening circumstance of the formation of a partnership in contravention of the Abkari law does not render the income, profits and gains of the association immune from taxation.

In view of these principles, we must answer the question in both the cases in the affirmative. In each case, the applicant will pay the Commissioner the costs of the reference, Rs. 250.

K.S. *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE YAHYA ALI.

The Calico Printers' Association, Ltd. (Manchester) by agents, The Mettur Industries, Ltd., Madras .. *Applicant**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922)—Purchase of shares by assessee with an understanding that the vendor should procure a declaration of dividend which was to be paid over by the vendee to the vendor as part of price of the shares —Dividend so declared—If income of purchaser liable to tax.

Where there is a purchase of shares by the assessee on the understanding that the vendor who owned practically all the shares should procure a declaration of dividend which was to be paid over by the purchaser to the vendor as part of the price of the shares purchased, the dividend will be the income of the purchaser assessable to income-tax though under the agreement it had to be paid over to the vendor.

Case referred to the High Court by the Income-tax Appellate Tribunal, under section 66 (1) of the Indian Income-tax Act, 1922 (Act XI of 1922) as amended by section 92 of the Income-tax (Amendment) Act, 1939 (Act VII of 1939) in 66 R.A. No. 334 of 1946-47 Madras (R. A. A. No. 84 (Madras) of 1945-46) on its file.

M. Subbaraya Aiyar for Applicant.

C. S. Rama Rao Sahib for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—The appellant is a sterling company incorporated in the United Kingdom. Messrs W. A. Beardsell & Co., Ltd., is a company incorporated under the Indian Companies Act, 1913, and has its registered office at Madras. Sir William Beardsell owned or controlled practically all the shares in the latter company. The applicant purchased from him 8190 ordinary shares sometime in 1940. Previously, it had purchased 4110 preference shares of the same company. A copy of the agreement relating to the purchase by the applicant from Sir William Beardsell is marked as Ex. T.A. It is necessary to set out material portions of this agreement on which ultimately the decision of the question referred to us in this case must depend. The preamble is as follows :

" WHEREAS .

(a) The vendor owns or controls all the shares in W. A. Beardsell & Co., Ltd (hereinafter called 'The Company") a company incorporated under the Indian Companies Act, 1913, and having its registered office at Madras aforesaid.

(b) The nominal capital of the company is Rs. 15,00,000 divided into 5,000 preference shares of Rs. 100 each and 10,000 ordinary shares of Rs. 100 each and all of the said capital has been issued.

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* Ref. Case No. 39 of 1947. 26th August, 1948.

(c) The association has agreed to purchase from the vendor acting for himself and all other holders of shares in the company all the shares in the Company and the vendor has agreed to sell the same or procure the same to be sold to the Association at the price and upon the terms and conditions hereinafter appearing."

Then follows the operative portion of the agreement, of which paragraphs 1 and 5 are as follows :

" 1. The Association shall (subject to the vendor carrying out his obligations under this Agreement) purchase from the vendor and the other holders of shares in the Company and the vendor shall sell or procure to be sold to the Association all the shares in the company for the sum of Rw. 14,00,000 (such price being subject to adjustment as hereinafter provided.) The said purchase price shall be paid as hereinafter provided.

" 5. The vendor hereby warrants to the Association that the net asset of the company as on the transfer date shall amount to the net sum of Rs. 14,00,000. The net assets shall for such purpose be ascertained by deducting the total of(a) all sums owing by the Company to its creditors as on the transfer date, (b) all sums owing or accrued or accruing due by the Company in respect of commissions, pensions or other sums due to employees and in respect of taxes, rates similar liabilities up to the transfer date (apportionment being made if necessary) and (c) any amount set aside in respect of a gratuity and/or pension Fund or in respect of other provisions for employees. (d) all dividend (less Indian Income-tax) accrued or accruing due on the preference shares up to the transfer date (apportionment being made if necessary) from the total of

(a) the stock-in-trade of the Company as on the transfer date valued as hereinafter provided.

(b) The furniture, baling press and other items like moveable assets valued in accordance with the past practice of the Company.

(c) The amount owing to the Company by its debtors in respect of goods sold as on the transfer date assessed as hereinafter provided.

(d) The cash in hand and at the Bank.

(e) The shares held by the Company in Mettur Industries Limited taken at cost price."

Paragraph 7 provides that the vendor, that is, Sir William Beardsell, shall be entitled to purchase and undertakes to purchase from the company all investments held by the Company other than the shares in Mettur Industrials Limited and such stock-in-trade of the company in excess of a total value of Rs. 5,50,000. Paragraph 9 is the most important for the purpose of this case, and it runs thus :

" The Association shall procure the Company to distribute to the vendor and the other persons who were on the 30th day of September, 1939, the holders of Ordinary shares in the Company by way of dividend on the ordinary shares a sum equal to the surplus of the assets over the liabilities of the Company as on the transfer date such surplus to be computed for the purpose of this clause by deducting from the value of the net assets ascertained in accordance with clause 3 hereof the sum of Rs. 14,00,000 after all capital and revenue payments and liabilities (exclusive of share capital but including any liabilities which may arise in respect of taxation and trading losses up to the transfer date such liabilities to be apportioned to that date so far as may be necessary) due by the Company other than those mentioned in clause 3 hereof shall have been paid or provided for together with all liability in respect of the dividend on the preference share up to the transfer date. Payment of such sum by way of dividend if any shall be made to the vendor and the other persons who were on the 30th day of September, 1939, the holders of ordinary shares in the Company as soon as is reasonably possible after the vendor shall have purchased from the Company the assets mentioned in clause 7 hereof and a computation shall be made as soon as possible showing whether or not for the purpose of this clause such surplus exists. The vendor shall give to the Company a written indemnity in respect of all tax payable in respect of any dividend so paid."

Paragraph 10 provides for the payment of the purchase price of Rs. 14,00,000 subject to such increase or diminution thereof as provided therein, and paragraph 12 for the delivery on the transfer date of share certificates held by the vendor and the other holders of shares in the company together with transfers executed by him and such other shareholders in favour of the applicant association or its nominees, whereupon the association shall become entitled to be registered or have its nominees registered as holders of the said shares.

The transfer date was 22nd April, 1940. On 5th October, 1942, Beardsell & Co., declared two dividends (1) a dividend on the ordinary share capital or 5 per cent. free of income-tax and surcharge, and (2) a bonus on the ordinary share capital of 8¾ per cent. free of income-tax and surcharge representing a sum equal to the excess over Rs. 14,00,000 of the net surplus of assets over liabilities of the company as on 30th September, 1939. The latter 'bonus' was apparently declared in accordance with the provision in paragraph 9 of the agreement above,

Under instructions from the assessee association a dividend warrant in respect of the bonus amount, Rs. 71,662-8-0 net was issued in the name of St. James Nominees, Ltd., Manchester, the nominees of the assessees. The dividend warrant was not endorsed in favour of Sir William Beardsell's executors, he having died before that date, but the dividend was sent by telegraphic transfer to the District Bank, Ltd., 55 King Street, Manchester, to the credit of J. B. Beardsell and A. E. Scott, through the Chartered Bank of India, Australia and China, and Madras, on 29th March, 1943. The assessee received the net amount of Rs. 40,950 as dividend at 5 per cent. mentioned above.

The assessee included in its return for the assessment year 1943-44 (the year of account ending 31st March, 1943) the amount of the latter dividend at 5 per cent. (Rs. 40,950 net or Rs. 55,486 gross) but did not include the bonus amount, on the ground that it was not really received by it as income. The Income-tax Officer held that the bonus was in law the income of the assessee association and taxed it accordingly. The circumstance that the assessee utilised the bonus payments to pay the vendor, Sir William Beardsell, in his opinion, did not alter the position, namely, that the payment was primarily a dividend under section 2 (6-A) of the Act. The Appellate Assistant Commissioner of Income-tax on appeal took the same view. The following passages from his order sum up his conclusions on the point in issue :

"6. From the description given in the relevant dividend warrant the bonus which is calculated at a definite percentage on shares is evidently dividend, pure and simple. The fact that it was passed on to Sir William Beardsell as part of the purchase price for his holdings will not secure for that amount exemption from tax in the hands of the appellant company. The dividend warrant stands in the name of St. James Nominees Ltd., Manchester the nominees of the Calico Printers' Association, Ltd., Manchester and the declaration in the dividend warrant is that the dividend relates to shares, which were the property of the appellant company at the time when the dividend was declared.

7. It will be seen from the facts stated above that the dividend was declared in respect of the shares held by the appellant company in Messrs. W. A. Beardsell & Co., Ltd., that the real owners of these shares were the appellant company themselves and that the appellant was entitled to receive the dividend by virtue of their holdings in Messrs W. A. Beardsell & Co., Ltd. The fact that the dividend belonging to the appellant company was utilised to fulfil an agreement between the appellant company and Sr William Beardsell, the original holder of the ordinary shares in Messrs. W. A. Beardsell & Co., Ltd., is immaterial. I therefore consider that the dividend income has been rightly included in the assessment of the appellant company."

The Income-tax Appellate Tribunal agreed with the Income-tax Officer and the Appellate Assistant Commissioner. On an application made by the assessee under section 66 (1), the Tribunal have sent up a statement of the case and referred the following question of law to this Court :

"Whether, in the circumstances of the case, the sum of Rs. 93,600, the gross bonus dividend, was the income of the Calico Printers' Association, Ltd., (Manchester) and assessable on them ?"

Mr. Subbaraya Aiyar, learned counsel for the applicant assessee contended that this was a case of a simple sale of shares *ex* dividend, and the vendor was entitled to the said dividend of Rs. 93,600 gross, and that was income in his hands. He developed his contention thus : one person may be registered shareholder at the time when a dividend is declared, but another person may be entitled to that dividend by virtue of a contract between the two. The contract of sale is the governing factor even for purposes of revenues to determine whose income a particular dividend really is. If under an enforceable contract the vendor is entitled to a dividend which is declared after the date of sale and the purchaser happens to be the registered shareholder at the time of the declaration of such dividend, then the shareholder when he receives the dividend receives it for the vendor as a trustee. The fact that the registered shareholder as such has certain rights to partake in the company's affairs, for example, the right of voting, is not inconsistent with the right to a particular dividend under a special contract between vendor and purchaser. There is nothing in the Income- tax statute to prevent the determination of the person really entitled to a particular dividend, as income.

In support of his contention, learned counsel relied mostly on observations in cases decided in Great Britain. In *Cole* v. *Commissioners of Inland Revenue*[1] the facts were entirely different from the facts of the present case, and the learned counsel referred only to a dictum of Finlay, J., at page 395 that :

> " there might be cases in which the shares belonged to one person but the dividend belonged to another."

We may also refer to the following passage in the judgment of Romer, L.J., in that case :

> " After the date of the agreement, any dividends received by the vendor declared in respect of the ordinary shares which he had agreed to sell . . . . would have been held by him as trustee for the purchasers, because he (the vendor) had been put in possession of the purchase money and was receiving the interest on the purchase money."

In *Commissioners of Inland Revenue* v. *Roberts*[2], Rowltat, J., after coming to the conclusion that on the facts before him there was a sale of shares *ex* dividend discusses the legal position thus :

> " . . . . . I do not think the Commissioners' decision can possibly be supported when they say that the dividend to the Associated Company (purchasers) accrued to them as a legal and beneficial owner and was the income of that company. I think it was not. It accrued to them and they were the legal owners, of course. They were on the register ; but they were not the beneficial owners. They had contracted to buy *ex* that sum as a dividend in order that the profits might be equalised and leaving it as profits to the man who sold it to them."

In the Court of Appeal, the decision of Rowlatt, J., was affirmed. Atkin, L.J., summed up the legal position in the following manner :

> " No doubt the transaction is a considerable transaction, but the legal relations are very ordinary. It is a simple sale of shares, and Mr. Roberts in this case sold his shares to the Associated Biscuit Company. When the sale of shares takes place it may take place expressly *cum* dividend or *ex* dividend or it may take place with the stipulation that the purchaser shall have the benefit of the dividend declared as from a fixed date and that the seller shall have it in respect of the period before that date. That is what happened in this case. . . . . The purchaser never had, under the terms of the contract, any right to that dividend at all. It was excepted from the sale and so far from it being a payment of the purchase price it was nothing but a return to the seller of something which he had not sold and which the purchaser got possession of as a trustee for the seller. In those terms it appears to me a very simple transaction. I think it was a payment which was received by the purchaser as a trustee for the seller, that he received it in that capacity as trustee of income for the seller and when he handed it over to the seller it was part of his income exactly as in the ordinary case of a sale *ex* dividend where the purchaser receives income on behalf of the seller and has to account for it."

The law in England relating to the treatment of dividend as income either of the vendor or of the purchaser on a sale of shares in respect of which the dividend is declared is laid down in paragraph 509 of Halsbury's Laws of England (2nd edition Vol. 17 :

> " Where there is a sale by a vendor of shares or securities *cum* dividend or interest, no part of the purchase price is income in the vendor's hands. On a sale of shares *ex* dividend, the dividend when declared is income of the vendor and if the purchaser actually receives the dividend he is trustee of it for the vendor."

No reported case of any Court in India directly bearing on this point was brought to our notice. How far the notion of the purchaser being a bare trustee for the vendor in respect of a dividend declared when the purchaser is the registered shareholder and the sale was *ex* dividend would apply to India, it is difficult to say. There is no difference between legal and equitable titles in the law of this country. It may be that there can be an enforceable right under a contract in the vendor to recover the amount representing the dividend with reference to which there has been a sale *ex* dividend. But this need not necessarily mean that the purchaser is a trustee for the vendor. Every debtor is not a trustee for his creditor. But even assuming that the law in this country is the same as in Britain, we are of opinion that the rule of law governing a sale of shares *ex* dividend does not apply to the present case, because the transaction here cannot be treated as a simple sale of shares *ex* dividend. The agreement between the vendor and the purchaser is

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1. (1933) 18 T.C. 387.
2. (1927) 13 T.C. 277.

complex and peculiar, and the legal position must depend entirely on a construction of the terms of the agreement.

The two cases cited by the learned counsel for the assessees, *Raja Bejoy Singh Dudhuria* v. *Commissioner of Income-tax, Bengal*[1] and *Commissioner of Income-tax, Bombay Presidency* v. *Tata Sons, Ltd.*,[2] have nothing in common with our present case. In the first of these cases, there was a charge on the estate of zamindar under a decree of Court for payment of maintenance to his step-mother. It was held that the amount representing maintenance allowance was not a part of the zamindar's income, though it came out of the income of the estate. In the second of the cases, there was an assignment of a portion of commission payable to a company under a managing agency agreement, and it was held that the share assigned away would cease to be the income of the transferor.

Now, what is the substance of the transaction between the parties? The vendor was practically the owner of the company, as it were, as he had almost entirely the ownership or control of all the shares in the company. What is the consideration for the sale, the price of the shares? In paragraph 1, it is mentioned as Rs. 14,00,000 (such price being subject to adjustment as hereinafter provided). The adjustment is presumably in accordance with the provisions of paragraph 9 of the agreement. We are clearly of opinion that the purchase price must be deemed to be Rs. 14,00,000 *plus* a sum equal to the surplus of the assets over the liabilities of the company as on the transfer date, such surplus to be computed in the manner set out in paragraph 9. The manner in which this surplus has to be paid over to the vendor is indicated in that paragraph. For the convenience of the purchaser and possibly with some other motive, to enable the purchaser to pay over such surplus to the vendor, the method of procuring a declaration of dividend on the ordinary shares was agreed upon. Actually, there was a declaration of the special dividend, representing the surplus of the assets over the liabilities, and a dividend warrant was issued to the nominees of the assessee. It is true that the assessee was under an obligation to forthwith pay over to the vendor the amount towards the balance of the purchase price. In such circumstance, how is this amount of dividend to be taxed? It cannot of course be taxed twice over as a dividend.

There are two decisions in England, both reported in 8 Tax Cases which throw considerable light on the question which falls for decision. The first is the case of *Commissioners of Inland Revenue* v. *F. B. Sanderson*[3]. The assessee in that case held nearly all the shares in a company which had made large profits, of which the major portion was carried over without being paid out as dividend. In July 1916, a Financial Corporation wanted to purchase all his shares. There were negotiations. The appellant refused to sell the shares at less than £ 3 for each share. But the Corporation were apparently unable to find the price at such a rate. It was therefore suggested to the assessee who had absolute control of the company that he should procure the company to declare a dividend of 10 sh. out of the large amount of profits which had been carried over. The suggestion was accepted and there was a declaration of dividend of 10 sh. and the assessee received a sum of nearly £ 40,000 as such dividend. Subsequently, on 12th October, 1916, an agreement was entered into in writing between the assessee and the Corporation for sale of the shares at £ 2-10-0 per share. It was stated in the agreement that the assessee was entitled to the special dividend of 10sh. per share which had been previously received by him and which had been declared subsequent to July 1916. The question arose whether the sum of £ 40,000 paid to the assessee was income of the assessee which he had to bring into account and declared for the purposes of super-tax. The Special Commissioners held that this sum constituted part of the purchase price of the shares and did not form part of the assessee's total income. But it was held by Rowlatt, J., and the Court of Appeal

1. (1933) 6 I.T.C. 449.
2. 1939 I.T.R. 195.
3. (1921) 8 T.C. 38.

that the amount formed part of the assessee's income, and it had not been received by him on behalf of the purchaser. The Court of Appeal held that there was no concluded enforceable agreement till the written agreement of the 12th October, though there were negotiations and therefore at the time of payment the dividend was paid to the assessee as dividend and it was undoubtedly his income. It was suggested in the argument of learned counsel in that case that there was a sale of the shares in July for £ 3, a binding and enforceable agreement to sell and that would be a sale *cum* dividend and therefore any dividend that might be declared after the contract was made would belong to the purchaser. Thereafter, the purchaser agreed to give up this dividend to the vendor, the assessee, and allowed him to receive it as part of the purchase price. Dealing with this argument, the Master of the Rolls says :

> "The argument then, as I understand it, is that that transaction does not make the amount of the dividend income of the vendor ; it is income of the purchaser, which the purchaser has chosen to apply in part payment of the capital sum which is to be paid in respect of the sale of the shares, and therefore it does not for that reason become income of the vendor, the Appellant. That is as I understand, the argument. Now, assuming the facts to be as I have stated them there, and as stated in the contentions of the Appellant, there is a great deal to be said for that contention."

But the Master of the Rolls did not finally decide the question because the real question turned upon different facts. The hypothetical case put forward in the argument of counsel in that case is in our view the present case. It would follow that the amount of the dividend would be the income of the purchaser which the purchaser had to apply in part payment of the purchase price.

The other case, *Roe* v. *The Commissioners of Inland Revenue*[1], is more directly in point. To enable a particular director to withdraw from the management of a company, it was arranged that the greater part of his shareholding should be avilable for purchase by the remaining shareholders, of whom the Appellant was one, in proportion to their existing holdings. In order to provide the shareholders with funds for this purpose, the directors recommended that a sum of £ 45,000 should be distributed out of the profits of the company by way of special dividend. At an extraordinary general meeting of the company, a resolution was accordingly passed, declaring out of the accumulated profits, a special dividend on ordinary and preference shares. Prior to the passing of the resolution, the appellant, one of the shareholders, signed a letter authorising the directors to use his portion of the special dividend in payment of the consideration money for such retiring directors' shares as were purchased by him, and similar letters were signed by the other shareholders. The appellant duly applied his portion of the dividend to the purchase of shares in accordance with the prior agreement. It was held by Rowlatt, J., that the special dividend was received by the shareholders including the appellant as income and that the arrangement to apply it in the purchase of other shares in the company could not affect the appellant's obligation to include this portion of the dividend in his total income. The learned Judge tersely put the matter thus :

> ". . . . .It is a case of declaring a dividend on the understanding, which they could not go back upon really, that the dividend should be used in a certain way, but it was a declaration of a dividend."

This language can be employed to describe the transaction in the case before us. This is also a case of procuring the declaration of a dividend on an understanding, which the assessees could not go back upon really, that the dividend should be used in a certain way, namely, used to pay over to the vendor, Sir William Beardsell, as part of the price of the shares. This dividend was therefore the income of the Association, though according to the terms of the agreement between it and the vendor it had to pay it over to the vendor.

The answer to the question referred to us must therefore be in the affirmative. The applicant will pay the costs of the Respondent—Rs. 250.

K.S. ——— *Reference answered.*

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1. (1924) 8 T.C. 613.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO.

Paturu Viswanatham and another .. *Appellants**

v.

Gunupati Balarami Reddi and others .. *Respondents.*

Limitation Act (IX of 1908), Articles 110 and 115—Tenant holding over and continuing in possession—Suit against by landlord for an amount as rent or as damages for use and occupation—Limitation.

A tenancy by sufferance after the termination of an agricultural lease is converted into a tenancy of holding over by the receipt of rents for faslis subsequent to the termination of the lease. In such a case the possession of the person holding over would be that of a tenant and the claim against him for the same could only be on the basis of rent. The Article of the Limitation Act applicable would therefore be 110. Even assuming that the defendant was in permissive possession of the land and was not a trespasser and the action against him is one for damages for use and occupation such an action is governed by Article 115 and not by Article 120.

It is not correct to say that the breach of a statutory duty to surrender possession on expiry of lease is the basis for an action for damages for use and occupation.

Sukh Devi v. *Lachmi Narain*, (1946) 46 A.L.J. 305, (2)dissented from.

The liability is referable to possession and enjoyment of the property by the ex-tenant and by reason of his enjoyment of the property the law implies an obligation to pay compensation. An action for damages for use and occupation against a tenant who continues in possession after the expiry of the lease is really based on an implied contract and not either on tort or on a statutory obligation and the only Article of the Limitation Act applicable to such an action is Article 115.

Authorites discussed.

Appeal against the decree of the District Court of Nellore in A.S. No. 150 of 1942 preferred against the decree of the Court of the Subordinate Judge of Nellore in O.S. No. 61 of 1936.

Ch. Raghava Rao for Appellants.

C. A. Vaidyalingam and *J. Venkatadri* for Respondents.

The Court delivered the following

JUDGMENT.—These three second appeals are between the same parties and relate to the recovery of an amount from the respondent in all the second appeals either as rent or as damages for use and occupation. The appellants along with others were co-sharers in certain Khandriga known as Patuvari Khandriga of an extent of about 25 acres. This land was in the possession of one Gunupati Balarami Reddi for a considerable length of time. In 1931, the Patuvari people who were the owners of this Khandriga instituted a suit for partition amongst themselves and impleaded in that suit as the sixth defendant Balarami Reddi also. Balarami Reddi pleaded in that suit that he had acquired permanent rights of occupancy in the land. So far as the documentary evidence goes this land was granted on lease to one Veeraraghava Reddi, the maternal uncle of Balarami Reddi, on the 28th of August, 1896, for a period of nine years under a registered lease. After the expiry of that lease Balarami Reddi's family seems to have continued in possession and on the 22nd of August, 1917, there was a further lease to Balarami Reddi by all the co-sharers for a period of eleven years on a rent of Rs. 300 per year for the first three years and Rs. 360 per year for the later eight years. This document, however, was not registered. But even after the expiry of the period fixed under that unregistered lease, admittedly, Balarami Reddi continued in possession. In the partition suit it was held that Balarami Reddi did not acquire occupancy rights in the Khandriga lands and that his possession was that of an yearly tenant as he was paying rent to the co-sharers. The suit as against him was therefore decreed, granting a decree in ejectment. There was an appeal to this Court against the decision in the suit, O. S. No. 22 of 1931 in A. S. No. 225 of 1942. This Court confirmed the finding of the trial Court that Balarami Reddi did not acquire occupancy rights in the land. He was directed to pay mesne profits at Rs. 360 per year to the co-sharers. This judgment of the High Court is dated 23rd November,

* S. A. Nos. 2029 of 1945 & 1695, 1696 of 1946. 22nd July, 1948.

1943. While the proceedings in the partition suit were going on, the present appellants some of the co-sharers instituted a suit, O. S. No. 61 of 1936 on the file of the Sub-Court, Nellore, which was really an earlier suit O. S. No. 472 of 1934 instituted in the Court of the District Munsiff and subsequently transferred and re-numbered as stated above. In that suit, the plaintiffs claimed for recovery of the appellants' share of rent or damages for use and occupation for faslis 1341, 1342 and 1343 from Balarami Reddi in respect of the suit land. For the subsequent period, faslis 1344 to 1349 a further suit, O. S. No. 222 of 1940, was filed on the same basis and for faslis 1350 to 1353, O. S. No. 416 of 1944 was filed. The suit, O. S. No. 61 of 1936, was disposed of by the learned Subordinate Judge of Nellore along with the partition suit and he granted a decree to the appellants for rent at the rate of Rs. 550 per year for the faslis 1341 to 1343 and also for the subsequent faslis up to 1351. The decree was confined only to the share of the appellants which was 19/48. There was an appeal against the decision of the learned Subordinate Judge to the District Court, Nellore. The learned District Judge modified the decree of the Subordinate Judge by reducing the rate of rent to Rs. 360 instead of Rs. 550 and also disallowing the decree relating to faslis other than 1341, 1342 and 1343, on the ground that there was no prayer in the plaint for a period of more than three faslis. Against this decision of the learned District Judge, S. A. No. 2029 of 1945 is filed by the appellants. The other two suits, O. S. Nos. 222 of 1940 and 416 of 1944, were disposed of by the District Munsiff, Nellore. He granted a decree on the basis of rent of Rs. 360 per year for faslis 1347 to 1349 in O.S. No. 222 of 1940 and faslis 1351 to 1353 in O. S. No. 416 of 1944. He disallowed for the other faslis on the ground that the claim was barred by limitation, treating the suit as one for rent governed by Article 110 of the Limitation Act. Against the decision of the learned District Munsiff in both the suits, there were appeals to the Subordinate Judge of Nellore. The learned Judge dismissed the appeals and confirmed the decree of the learned District Munsiff. S. A. No. 1696 of 1945 is against the decision in O. S. No. 222 of 1940 and S. A. No. 1695 of 1945 is against the decision in O. S. No. 416 of 1944.

Two questions have been raised in these second appeals. The first question is whether the Courts below were right in reducing the amount claimed in the plaint at the rate of Rs. 550 per year to Rs. 360 per year ; second, whether the decision of the Courts below that the claim for faslis 1344 to 1346 and 1350 was barred by limitation is correct.

As regards the first question in S.A. No. 2029 of 1945 we have the finding of the learned District Judge of Nellore based on a consideration of the oral evidence that the fact that the defendant agreed to pay a sum of Rs. 550 per year is not made out ; and that the plaintiffs were entitled to a decree only on the basis of rent at Rs. 360 per year. As the finding is based on an appreciation of oral evidence and as all the Courts have practically agreed on one ground or another that that is the proper rate to which the plaintiffs could be entitled to, I see no reason to differ from the finding of the Courts below on this point. The plaintiffs will, therefore, be entitled to rent at Rs. 360 per year as found by the Courts below.

As regards the second question, a very interesting question of law was raised by Mr. Raghava Rao, the learned Advocate for the appellants. His argument is that on the facts the defendant was not a tenant but merely a person in permissive possession of the land after the expiry of the unregistered lease of 1917 and that the claim of the plaintiff against the person in such possession could only be by an action for damages for use and occupation and that such an action is governed by Article 120 of the Limitation Act as it is neither a suit for mesne profits governed by Article 109 nor a suit for rent governed by Article 110 nor even a suit for damages for breach of contract express or implied governed by Article 115. I am however of the opinion that on the pleadings and the course the trial took in the various Courts, it is not open to the appellants now to contend that Balarami Reddi was not in possession as a tenant after the expiry of the unregistered lease. No doubt, the present appellants were not parties to the appeal against the partition decree

which was disposed of by this Court but the view taken by the learned judges who disposed of that case regarding the relationship between Balarami Reddi and the Paturvari people was that notwithstanding the inadmissible unregistered lease, as there was a demand for the rent and acceptance by the co-sharers, Balarami Reddi was in possession as a tenant from year to year. If, therefore, Balarami Reddi was in possession as a tenant from year to year till 1928, what was his position thereafter? The plaintiffs in all the three plaints with which we are now concerned put forward the case that Balarami Reddi continued to be a tenant and that under an oral agreement Balarami Reddi agreed to pay rent at the rate of Rs. 550 per year instead of Rs. 360 as under the unregistered lease and that, in fact, for the three faslis 1338, 1339 and 1340, Balarami Reddi did pay rent to them. The cause of action is stated to be 10th February of each year as that was the date on which rent became payable. In the suit which is the subject-matter of S. A. No. 2029 of 1945 in the trial Court the only issues raised with reference to this matter were issues 3 (*a*) and 3 (*b*). Issue 3 (*a*) reads as follows :

> "What is the amount of rent payable to the Khandrigadars every year by the defendant ?"

Issue 3 (*b*) runs thus :

> "What is the correct amount of rent payable to the plaintiffs every year by the defendants ?"

No issue was taken in the earliest of the suits on the question that Balarami Reddi was merely a person in permissive possession of the land and not as a tenant. On the contrary, the issues assumed a tenancy and the only question raised being regarding the rent, issues appropriate to that and that of the share of the plaintiffs were raised. The finding as stated by me already was that the rent payable was Rs. 360 per year and that the share of the plaintiffs was 19/48. In the two later plaints some arrangement was pleaded and the cause of action was stated to be the end of each fasli. In the judgment which is under appeal in S. A. No. 1695 of 1946 and S. A. No. 1696 of 1946, the learned Subordinate Judge says that it was admitted by the plaintiffs that the first defendant was let into possession as lessee or tenant in respect of the suit land and it was further admitted that the first defendant was paying rent separately to the co-sharers of the suit land. Then he proceeds to discuss the other question argued before him. In my opinion, therefore, in the face of the pleadings it is not really open to the plaintiffs now to raise the question that Balarami Reddi was not a tenant but was occupying an intermediate position between a tenant and a trespasser.

Even apart from this, I think that in view of the admission contained in the plaint in O. S. No. 61 of 1936 that after the expiry of fasli 1337 they had received rent from Balarami Reddi for faslis 1338, 1339 and 1340 clearly converts the tenancy by sufferance, assuming that for some reason or other, the tenancy determined in 1928, into a tenancy of holding over. This of course is on the footing that the oral lease put forward by the plaintiffs is false. Whether the oral lease pleaded by the plaintiffs in all its terms is true or not, there is the admitted fact that throughout the plaintiffs proceeded on the footing that the defendant was a tenant and not a person merely having permissive possession. Even otherwise, as stated already, by the admission of receipt of rent for three faslis the tenancy has been converted into one of holding over.

In this view of the matter the possession of Balarami Reddi throughout the relevant period would be that of a tenant and the claim against him for the same could only be on the basis of rent. The Article of the Limitation Act applicable would therefore be Article 110 and as the rent became payable even according to the plaintiff on the 10th of February each year, the view of the Courts below that the rent for faslis 1347 to 1349 and 1350 was barred by limitation is correct.

Even assuming that Balarami Reddi was really in possession as a person who was in permissive possession of the land and was not a trespasser, an action against him is one for damages for use and occupation ; in my opinion, such an action is governed by Article 115 and not by Article 120. We are now concerned in this case with an agricultural lease and all the provisions of the Transfer of Property Act are not strictly applicable to such leases. If Balarami Reddi did not pay rent

for the three faslis 1338 to 1340 and was merely holding over after the expiry of the year 1928 he would be in the position of a tenant by sufferance; and if the landlord did not collect any rent from him he would not be a tenant holding over. In England it is an established law that such a person is bound to pay a fair rent in respect of the land which continued to be in his possession on the basis of an implied contract. In *Chengiah* v. *Umadai Rajah Raja Damara Kumara Thimma Nayanim Bahadur*[1], Munro, J., had to consider the question. There was a difference of opinion between him and Abdur Rahim, J., on the question whether there was a cancellation of the lease or not but on the question which Article of the Limitation Act applied on the facts found by the learned Judges, Munro, J., was of the opinion that the plaintiff in the action was entitled only to compensation for use and occupation as the prior leases were validly cancelled. He had had to consider the further question whether a suit for recovery of damages for use and occupation was governed by Article 115 or some other Article. He was of the opinion that such an action was governed by Article 115, 2nd schedule of the Limitation Act. Abdur Rahim, J., held that it was a suit for rent as the lease was not determined and as the document was in writing registered, Article 116 and not Article 110 applied to the case. In *Madar* v. *Kadir Mohideen*[2], there are observations at page 56 of the report supporting the view that Article 115 and not Article 120 would be the proper Article applicable to such an action. On the facts of that case no doubt the question did not arise for express decision as the learned Judges were of the opinion that there was no relationship of landlord and tenant between the parties but only a relationship referable to their rights as co-owners and therefore Article 120 applied. In *Govindaswami Pillai v. Ramaswami Aiyar*[3], Sadasiva Aiyar, J and Moore, J., had to consider the question whether a claim for damages for use and occupation from a tenant who continued in possession of the land after the expiry of the lease was a mere right to sue and was not transferable. The conclusion arrived at by the learned Judges was that it was a mere right to sue and was not assignable. Of course, so far as the claim is one for damages, whether it is one based on tort or based on contract, it makes no difference so far as the transferability of the right is concerned. In both the cases it would be a mere right to sue. The learned Judges were against extending the common law principle obtaining in England that after the expiry of the lease, the tenant was in the position of a tenant by sufferance as in their opinion after the Transfer of Property Act, there was no scope of such a distinction. That case, however, though it contains some observations which support the argument that it is not based upon an implied contract, does not help very much in the decision of the question whether in essence a claim for damages for use and occupation is one based on contract or sounds in tort. In *Bibhuti Bhusan Sarcar* v. *Promoda Sundary Devy*[4], a single Judge of the Calcutta High Court took the view that Article 120 applied but the learned Judge did not give any reasons for his view and the basis of an action for damages for use and occupation by a person in permissive occupation of the land was not at all considered by the learned Judge. In *Sukhdei* v. *Lachmi Narain*[5], Yorke, J., of the Allahabad High Court was of opinion that an action for damages for use and occupation was not one based upon any contractual liability but is really a suit for recovery of damages for breach of duty which is imposed by section 108 (*a*) of the Transfer of Property Act upon the lessee to surrender possession of the property after the expiry of the lease. For breach of this duty the landlord would be entitled, according to the learned Judge, to damages for use and occupation. As I said, the lease in this case is not one governed by the Transfer of Property Act and I doubt very much whether the neglect of the person to surrender possession gives rise to a claim for damages for use and occupation on the basis of a breach of duty. The liability is referrable in my judgment to possession and enjoyment of the property by the ex-tenant and according to the law in England by reason of the enjoyment of the property the law implies an obligation to pay compensation. In my opinion,

1. (1910) 20 M.L.J. 555.
2. (1914) I.L.R. 39 Mad. 54.
3. (1916) 30 M.L.J. 492.
4. A.I.R. (1939) Cal. 468.
5. 1946 All. L.J. 305.

it is not correct to say that the breach of a statutory duty is the basis for an action for damages for use and occupation. I respectfully dissent therefore with the view of the learned Judge in that case. In *Manindra Chandra Pal Chowdhury* v. *Baramdi*[1] also Article 120 was applied ; but from the judgment it is not clear what exactly the facts were. The learned Judge himself states at page 400 (2nd column) that there was an implied contract and that that implied contract was to pay a reasonable rent. It would appear from the statement in the second column that defendants in that case were perfectly willing to pay reasonable rent. The only difficulty was as regards the amount upon which there was no agreement between the parties. Probably it was a case where the defendants even before the suit were ready and willing to pay damages for breach of the implied contract but they were not agreed as regards the amount. To such cases, the learned Judge holds that Article 115 would not apply and I respectfully agree with this conclusion. But in a case where there is no such promise by the person in occupation, the only action that could be maintained is an action for breach of an implied contract and for recovery of damages. I therefore think that this decision in *Manindra Chandra Pal Chowdhury* v. *Baramdi,*[1] does not support the contention of the appellants. The case, in my opinion, rather implies that the action for damages for use and occupation against a tenant who continues in possession after the expiry of the lease is really based on an implied contract.

If once it is established that the essence of an action for damages for use and occupation against a person who continues in possession as a tenant at sufferance is one based upon an implied contract and not either on tort or on a statutory obligation, the conclusion is irresistible that the only Article applicable to such an action is Article 115. In none of the cases that have been referred to, the real basis of the action was considered except perhaps the judgment of Sadasiva Aiyar, J., in *Govindaswami Pillai* v. *Ramaswami Aiyar*[2]. The observation in *Madar* v. *Kadir Mohideen*[3] and the judgment of Munro, J., in *Chengiah* v. *Umadai Rajah Raja Damara Kumara Thimma Nayanim Bahadur*[4] are directly in favour of the view that Article 115 applies. For all these reasons I am of opinion that even assuming that the action is one not for rent based on admitted tenancy but is one for damages for use and occupation the Article applicable would be Article 115 of the Limitation Act. In this view the claim in respect of fasli 1350 would not be barred by limitation. If Article 120 applies as contended by the appellants, the claim for all the faslis would be in time. But in the view I have taken of the pleadings in this case the decision of the Courts below that the claim for faslis 1344 to 1346 and 1350 is barred by limitation is correct.

The second appeals fail and are dismissed with costs ; one set in S. A. No. 2029 and one set in S. A. Nos. 1695 and 1696.

Leave refused.

K.S. *Appeals dismissed.*

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Madras.)[5]

PRESENT :—LORD SIMONDS, LORD OAKSEY AND SIR JOHN BEAUMONT.

Governor-General in Council represented by the General Manager, South Indian Railway .. *Appellant**

v.

The Municipal Council, Madura, through its Commissioner .. *Respondent.*

Railways Act (IX of 1890), sections 11 (3) (b) and 12—Applicability—Railway company constructing culvert under railway line as accommodation work under section 11 (1) (b), Railways Act, to take off overflow water from a tank—Tank and culvert within municipal limits—Culvert found subsequently insufficient to take off the entire water—Requisition by Provincial Government to Railway company to enlarge the culvert at its own cost

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1. A.I.R. 1940 Cal. 400.
2. (1916) 30 M.L.J. 492.
3. (1914) I.L.R. 39 Mad. 54.
4. (1910) 20 M.L.J. 555.
5. (1945) 2 M.L.J. 155.

* P.C. Appeal No. 48 of 1947. 15th June, 1948.

as a further or additional accommodation work—Legality—Work done by Railway company under protest and without prejudice to its claim to be repaid its cost either by the Government or the Municipality—Right of Railway company to recover by suit the cost from the Municipality—Contract Act (*IX of* 1872), *section* 70—*Applicability*.

In 1902 when a branch line was constructed the Railway company provided a culvert over a channel as an accommodation work under section 11 (1) (*b*) of the Railways Act to take off the surplus water of a tank and the storm and sewage water of several municipal drains which ran into the channel. Both the channel and culverts and the adjoining lands were within the municipal limits of the town of Madura. In 1936-1938 it was found that the culvert was unable to discharge the surplus water and the surrounding areas were flooded. On a representation by the Municipality, the Provincial Government of Madras purporting to act in exercise of the special powers vested in them under clause (*b*) of sub-section (3) of section 11 of the Railways Act issued a requisition to the Railway company to enlarge the culvert at its own cost as a further or additional accommodation work. The Railway company always denied its liability and protested that the requisition was illegal and *ultra vires*, but nevertheless carried out the work without prejudice to its claim to be repaid the cost either by the Provincial Government or by the Municipality or by both. But both the Government and the Municipality repudiated all liability for such expense. In a suit by the Railway company to recover the cost from the Municipality on the ground that the requisition of the Government was *ultra vires* and that the company was entitled to recover the cost from the Municipality by reason of the provisions of section 70 of the Contract Act,

Held: The obligation imposed upon the Railway company by section 11 (1) of the Act is to be measured by the conditions existing at the time of the making of the branch line in 1902. It cannot be said that the enlargement of the culvert was a work which was as necessary in 1902 as it was in 1938 because it is only the growth of the city of Madura that made the enlargement necessary. Hence, the Provincial Government had no power to issue the requisition in question.

But the Railway company cannot succeed in the suit for the reason, that though the work was lawfully done and it was not intended to be done gratuitously, it cannot, in the circumstances, be said that it was done for the Municipality or that the Municipality enjoys the benefit of it within the meaning of section 70 of the Contract Act.

J. M. Pringle, K.C. and *Charles Bagram* for Appellant.

Sir Herbert Cunliffe, K.C., *P. V. Subba Row* and *Gavin Simonds* for Respondent.

Their Lordships' Judgment was delivered by

LORD SIMONDS.—In this appeal, which is brought from a judgment of the High Court of Judicature at Madras affirming a judgment of the principal Subordinate Judge, at Madura, two main questions arise for consideration. The first, which turns upon the true meaning and effect of certain sections of the Indian Railways Act (IX of 1890), is whether in the circumstances of the case and upon a true construction of that Act and particularly of the proviso contained in section 11 (3) (*b*) thereof, the Provincial Government of Madras had power to issue a requisition to the South Indian Railway Company, which will be referred to as "the Railway," to enlarge at its own cost one of its culverts from a water way of 6 feet to one of 20 feet as a further or additional accommodation work for the use (as the appellant alleges) of the respondent, the Municipl Council of Madura. The second question, which only arises if the Provincial Government had no such power, is whether the Railway is under and by virtue of the provisions of section 70 of the Indian Contract Act (IX of 1872) entitled to recover from the respondent the cost of such enlargement.

The original plaintiff in the suit was the Railway but an order made on August 31, 1944, while the appeal was pending in the High Court, the Governor-General in Council was substituted as the appellant. The respondent is a statutory body governed by the provisions of the Madras District Municipalities Act (Madras Act V of 1920) and under that Act (by section 61) all public streets, sewers, drains, drainage works, tunnels and culverts within the municipal limits and (by section 125) all public water courses as therein defined are vested in the respondent. By section 137 it is required to provide and maintain a sufficient system of public drains and by section 162 to maintain and repair public streets and bridges.

In or about 1902 the Railway constructed a branch railway line between Madura and Manamadura. This line meets at right angles at a point called in the proceedings Mile J. 309/16 a water channel known as the Anupanadi surplus channel which flows through the south part of the Madura Municipality from the Anupunadi tank carrying the surplus water of the tank and the storm and sewage water of several municipal drains which run into the channel.

At the time of making the branch line the Railway provided a culvert 6 feet wide over this channel as an accommodation work under section 11 (1) (*b*) of the Railways Act. The surrounding land was then agricultural land and was only at a later date absorbed into the growing town of Madura. It cannot, as their Lordships think, be doubted that the culvert was at the time of its construction approved by the local Collector on behalf of the Madras Government, and that it was then considered adequate appears to be conclusively established by the letter written by the Collector of Madura to the Agent of the Railway on December 14, 1937, in which he says:

"The culvert which was found sufficient in 1902 when the line ran through agriculturist land is not sufficient now that the town has extended to the railway."

But in November, 1936, when the River Vaigai, with which the channel is concerned, was in heavy flood, the channel and the railway culvert were unable to discharge the surplus water as it came down, the surrounding lands were flooded and some damage was caused to roads and huts. Accordingly the respondent made representations to the Collector of Madura referring *inter alia* to the insufficiency of the channel and culvert in question in this case and stating that, unless sufficient protective works were carried out by the Public Works Department, flood damage within the town could not be prevented.

Upon this there followed a correspondence between the respondent, the Railway, the Collector and the Provincial Government, which their Lordships think it unnecessary to discuss in detail. It culminated in an order of the 26th November, 1938, by which the Provincial Government of Madras purporting to act

"In exercise of the special powers vested in them under clause (*b*) of sub-section (3) of section 11 of the Indian Railways Act."

issued to the Railway the requisition already referred to requiring the Railway to widen the ventway in the culvert to a depth of five feet and to a width of twenty feet at the cost of the Railway within six months from the date of the requisition. It must, however, be stated, as relevant to the second question that arises on this appeal, that at all times both before and after the requisition the Railway denied its liability, protested that the requisition was illegal and *ultra vires*, and asserted that it was only prepared to carry out the work without prejudice to its claim to be repaid the cost either by Government or by the respondent or both. To the respondent also the Railway wrote that the expense of the work was being incurred under protest, that it was not intended to be and was not being done gratuitously or voluntarily and that proceedings would be taken against the respondent or the Government or both for the recovery of the cost. It was, nevertheless, made clear to the Railway that both the respondent and the Government repudiated all liability for such expense. It was in these circumstances that the Railway executed the necessary work of widening the culvert and, having done so, instituted its suit in the Court of the Subordinate Judge at Madura against the respondent, claiming the sum of Rs. 16,222-5-0 as the cost of that work. It does not appear that any claim was made against the Government.

The suit was dismissed by the learned Subordinate Judge, who held that the requisition was not *ultra vires* and that, even if it was, the Railway could not rely on section 70 of the Indian Contract Act. This decision was on both points affirmed by the High Court[1] consisting of Sir Lionel Leach, C.J., and Lakshmana Rao, J.

Their Lordships are of opinion that the decision upon the second point is clearly right. The appellant can only succeed on this point if he establishes that the Railway lawfully did the work for the respondent, not intending to do so gratuitously and that the respondent enjoys the benefit thereof. It may be conceded that the work was lawfully done and that the Railway did not intend to do it gratuitously. But their Lordships agree with the learned Judges of the High Court in thinking that the work was not done for the respondent nor does the respondent enjoy the benefit of it within the meaning of the section. The Railway executed the work for no other reason than that it was ordered to do so by the Government

1. (1945) 2 M.L.J. 155.

and presumably thought it politic to obey the order rather than challenge its validity. The respondent throughout denied its liability to meet any expense. It is true that the first suggestion of further protective works, which ultimately took the form (*inter alia*) of an enlargement of the culvert, came from the respondent, but the Railway was left in no doubt that, if it executed this work at the requisition of the Government, the respondent would not pay for it. It would, in their Lordships' opinion, put an extravagant construction upon section 70 of the Indian Contract Act to hold that in such circumstances the work was done by the Railway for the respondent. Nor does the respondent enjoy the benefit of the work except in an indirect sense; substantially the persons who derive a benefit are the owners and occupiers of the buildings and land in the locality. Upon this point their Lordships cannot usefully add anything to the judgment of the High Court with which they are fully in accord.

A decision upon this point is sufficient to dispose of the appeal. But the question of general importance which arises upon the first point was fully argued and their Lordships think it proper since here they have come to a different conclusion from that reached by the High Court, to state their opinion upon it.

It is necessary to refer to two sections only of the Indian Railways Act, which can conveniently be set out here:

11. (1) A railway administration shall make and maintain the works for the accommodation of the owners and occupiers of lands adjoining the railway, namely:—

(*a*) such and so many convenient crossings, bridges, arches, culverts and passages over, under or by the sides of, or leading to or from the railway as may, in the opinion of the Provincial Government, be necessary for the purpose of making good any interruptions caused by the railway to the use of the lands through which the railway is made; and

(*b*) all necessary arches, tunnels, culverts, drains, water-courses, or other passages, over or under or by the sides of the railway, of such dimensions as will, in the opinion of the Provincial Government, be sufficient at all times to convey water as freely from or to the lands lying near or affected by the railway as before the making of the railway, or as nearly so as may be.

(2) Subject to the other provisons of this Act, the works specified in clauses (*a*) and (*b*) of sub-section (1) shall be made during or immediately after the laying out or formation of the railway over the lands traversed thereby and in such manner as to cause as little damage or inconvenience as possible to persons interested in the lands or affected by the works.

(3) The foregoing provisions of this section are subject to the following provisos, namely:—

(*a*) a railway administration shall not be required to make any accommodation works in such a manner as would prevent or obstruct the working or using of the railway, or to make any accommodation works with respect to which the owners and occupiers of the lands have agreed to receive and have been paid compensation in consideration of their not requiring the works to be made;

(*b*) save as hereinafter in this chapter provided a railway administration shall not, except on the requisition of the Provincial Government, be compelled to defray the cost of executing any further or additional accommodation works for the use of the owners or occupiers of the lands after the expiration of ten years from the date on which the railway passing through the lands was first opened for public traffic.

(*c*) where a railway administration has provided suitable accommodation for the crossing of a road or stream, and the road or stream is afterwards diverted by the act or neglect of the person having the control thereof, the administration shall not be compelled to provide other accommodation for the crossing of the road or stream.

(4) The Provincial Government may appoint a time for the commencement of any work to be executed under sub-section (1), and if for fourteen days next after that time the railway administration fails to commence the work or, having commenced it, fails to proceed diligently to execute it in a sufficient manner, the Provincial Government may execute it and recover from the Railway administration the cost incurred by it in the execution thereof.

12. If an owner or occupier of any land affected by a railway considers the works made under the last foregoing section to be insufficient for the commodious use of the land, or if the Provincial Government or a local authority desires to construct a public road or other work across, under or over a railway, he or it, as the case may be, may at any time require the railway administration to make at his or its expense such further accommodation works as he or it thinks necessary and are agreed to by the railway administration or as, in case of difference of opinion may be authorised by the general controlling authority."

The provisions which, for the purpose of this case, appear to demand particular examination are in section 11 (*b*), section 11 (1) (3) (*b*) and section 12.

But it is important to observe upon the general structure of section 11 that sub-section (3) of section 11 contains nothing more than provisos on the two preceding sub-sections, and in this connection the well-established rule of construction must be borne in mind which was thus stated by Lord Watson in *West Derby Union* v. *Metropolitan Life Assurance Society*[1]:

> "I am perfectly clear that, if the language of the enacting part of the statute does not contain the provisions which are said to occur in it, you cannot derive these provisions by implication from a proviso."

What then do sub-sections (1) and (2) of section 11, upon which sub-section (3) contains provisos, enact? They appear to be unambiguous. The obligation imposed upon the Railway, so far as relevant for the present purpose, is to make and maintain a culvert which will in the opinion of the Provincial Government be sufficient at all times to convey water as freely from or to the lands lying near or affect ed by the railway as before the making of the railway or as nearly so as may be. It is clear that the obligation under sub-section (1) is to be measured by the conditions existing at the time of the making of the railway. The words "as freely, etc." set the standard and definee the obligation. The adjoining owner is not to be injuriously affected by the construction of the railway: the *status quo* is to be preserved. The nature of the works having been prescribed by sub-section (1), the time within which they are to be carried out is laid down by sub-section (2). Then come the provisos in sub-section (3). The proviso in (*a*) is a qualification upon the statutory obligation for the benefit of the railway. So also is the proviso in (*c*). It is the proviso in (*b*) that is immediately relevant and it must first be observed that it is in form negative. It does not purport to vest any new rights in any person or to impose any new duty upon the railway. Whence then arises the obligation of the railway, for which the respondent contends to make accommodation works, the standard of which is determined not by the conditions existing at the making of the railway but by those which come into existence at a later date? It must be conceded that it can only arise if at all, from an affirmative which is to be implied from the negative. And this affirmative must amount to no less than a new obligation when the Railway, at the instance of the adjoining owner within 10 years or of the Provincial Government for all time, at its own cost to make accommodation works rendered necessary or convenient by a change of conditions which has taken place after the railway has been constructed. Their Lordships cannot accept such an implication as a fair interpretation of the proviso, unless it is otherwise meaningless. But it is by no means impossible to give meaning and effect to the proviso without doing violence to its language and to the cannon of construction to which reference has been made. For the "further or additional accommodation works" mentioned in the sub-section may be required not because those originally constructed have become insufficient owing to a change of conditions, but because the adjoining landowner has miscalculated what the conditions originally existing would demand for the commodious use of his land, and is given an opportunity within a limited time of making a fresh demand. Nor would it be unreasonable in the circumstances which prevail in large parts of India that an unlimited time should be given to the Government to require that the same standard should be established and maintained. Therefore, as it appears to their Lordships, section 11 (3) (*b*) ought not, even if it stood alone, to be given the wide meaning ascribed to it by the High Court.

But it further appears to them that some assistance is given to this view by the language of section 12. That section clearly is intended to cover works which the Railway is not bound to construct under section 11. For they are works which are to be erected at the expense of the adjoining owner or the Government. It is difficult to see what scope the section can have, if under section 11 (3) (*b*) the Government can for all time requisition such further or additional accommodation works as the commodious use of adjoining land may from time to time with altering

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1. (1897) A.C. 647 (652).

conditions require. There is, however, a clear reconciliation between the sections if the former relates only to such works as the physical conditions and use of the land at the time of construction of the railway required.

Their Lordships, therefore, come to the conclusion that the construction of the Railways Act, for which the appellant contends is correct. In coming to the conclusion they have had strict regard to the language of that Act. In the course of the argument before the Board and in the Courts of India, the appellant has relied largely on decisions in the English Courts upon the similar but no means identical provisions of the Railway Clauses Consolidation Act, 1845, and particularly upon *Rhondda and Swansea Railway Co.* v. *Talbot*[1] and *G. W. R.* v. *Talbot*[2]. From these decisions valuable guidance is to be obtained, but their Lordships agree with the learned Chief Justice in thinking that the difference in the language of the relevant statutes and in the conditions in which they are to be applied makes it dangerous to rely on them as authorities and they prefer to base their opinion upon the interpretation of the Indian Act alone.

Upon this part of the case one further point must be mentioned. The High Court, affirming in this matter also the decision of the Subordinate Judge held that the widening of the culvert to 20 feet was a work which was as necessary in 1902 as it was in 1938 and that therefore upon any construction of the Act the requisition of the Government in the latter year was valid. It appears to their Lordships that this finding ignores the fact and indeed the admission, to which reference has been made, that it was only the change of conditions which made the enlargement of the culvert necessary. It may well be that, if in 1902 the town of Madura had reached its present size, the result would be different. But the evidence is conclusive that the culvert made in 1902 enabled the water to be carried "as freely from or to the lands lying near or affected by the railway as before the making of the railway" and that, had the conditions remained unchanged, no enlargement would have been wanted.

For the reasons which have already been stated, the respondent succeeding on the second point, though failing on the first, is entitled to have the appeal dismissed with costs and their Lordships will humbly advise His Majesty accordingly.

Solicitor for Appellant : *Solicitor, High Commissioner for India.*

Solicitors for Respondent : *Lambert and White.*

V.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN.

S. Alaga Pillai and others .. *Petitioners**

v.

S. Doraiswami Pillai and another .. *Respondents.*

Madras Hindu Religious Endowments Act (II of 1927), sections 42, 79 and 79-A—Order under section 42—If and when could be challenged.

Though the correctness of an order passed under section 42 of the Madras Hindu Religious Endowments Act as such cannot be challenged by an application filed under section 79-A of the Act, it is not correct to say that in no circumstances can the validity of an order passed under section 42 of the Act can be called in question even by invoking the provisions of section 79 of the Act. Merely because the order of the Board complained of purported to be one under section 42 of the Act, it may not preclude a person aggrieved by that order from challenging the correctness or the validity of that order on the ground, that that order and the basis of that order were contrary to the provisions of section 79. If the order of appointment was contrary to usage saved by section 79, the validity of that order could be questioned under section 79-A, clause (1) and an adjudication of that dispute by the Board invited. Once there is a decision of the Board under section 79-A, clause (1), section 79-A, clause (3) would come into play and an application to set aside such an order

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1. (1897) 2 Ch. 331. 2. (1902) 2 Ch. 759.

* C. R. P. No. 710 of 1948. 15th September, 1948.

of the Board would be competent. If the basis of the appointment ordered under section 42 of the Act was contrary to the usage of the institution within the meaning of section 79, the validity of that order could be challenged on that ground ; and if a "dispute" arose as to the usage upon which the validity or invalidity of the order passed under section 42 would depend, that dispute would be within the scope of clause (1) of section 79-A.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the District Court, West Tanjore, dated 5th March, 1948, in O.P. No. 43 of 1947.

A. V. Viswanatha Sastri, K.R. Krishnaswami Aiyar and *S. P. Subramaniam* for Petitioners.

T.A. Ramaswami Reddi, N. Somasundaram and *M. Chockalingam* for Respondents.

The Court delivered the following

JUDGMENT.—The application of the petitioners purported to be under section 79-A of the Madras Hindu Religious Endowments Act. No evidence, documentary or oral, was placed on record, but the order of the Board, which the petitioners sought to set aside by their application, was made part of the pleadings. That order appointing Doraiswami Pillai, as one of the trustees till the minor, who was entitled to that trusteeship, came of age, purported to be one passed under section 42 of the Act.

No doubt, the correctness of an order of appointment passed under section 42 as such cannot be challenged by an application filed under section 79-A. But the question is whether the order complained of is one that infringes the provisions of section 79 of the Act.

The application to the lower Court, which professed to be under section 79-A, has to be treated as an application under clause (3) of section 79-A. Clause (3) can be invoked and the jurisdiction of the Court can be invoked only if there was a prior decision by the Board under section 79-A, clause (1). Section 79-A, clause (1) itself refers to disputes with regard to any of the matters mentioned in section 79. Merely because the order of the Board complained of purported to be one under section 42 of the Act, it may not preclude a person aggrieved by that order from challenging the correctness or the validity of that order on the ground, that that order and the basis of that order were contrary to the provisions of section 79. If the order of appointment was contrary to usage saved by section 79, the validity of the order, it seems to me, could be questioned under section 79-A, clause (1), and an adjudication of that dispute by the Board invited. Once there is a decision of the Board under section 79-A, clause (1), section 79-A, clause (3) would come into play, and an application to set aside such an order of the Board would be competent. If I am to understand the order of the learned District Judge to mean that in no circumstances can the validity of an order passed under section 42 of the Act be called in question even by invoking the provisions of section 79 of the Act, I should express my dissent from such a view. In my opinion, if the basis of the appointment ordered under section 42 of the Act was contrary to the usage of the institution within the meaning of section 79, the validity of that order could be challenged on that ground ; and if a " dispute " arose as to the usage upon which the validity or invalidity of the order passed under section 42 would depend, that dispute would be within the scope of clause (1) of section 79-A.

To reiterate, the order passed by the Board purported to be one under section 42. *Ex facie* there is nothing in the order to indicate that there was any prior adjudication of any dispute under clause (1) of section 79-A. No doubt, the annexure to the order could have been looked into and marked in evidence, if necessary. But I do not consider it necessary at this stage to mark in evidence the annexure to the order of the Board. The contention of the learned advocate for the petitioners was that the order complained of amounted to an implied decision of " a dispute " within the scope of section 79-A, clause (1). The petitioners contended that no minor could discharge the office of a trustee or be entitled to joint management along with the trustees of the other branches. Another contention of the petitioners'

advocate was that in no circumstances could a stranger to the family be permitted to participate in the management.

Whether the order of the Board amounted to an implied decision of the Board within the meaning of section 79-A, clause (1) should itself be one of the points for determination, and that aspect of the case was not considered by the learned trial Judge. If only there was a decision under section 79-A, clause (1) would an application to the Court under clause (3) of section 79-A lie. If, on the evidence on record, the learned trial Judge were to come to the conclusion, that there was no decision at all under section 79-A, clause (1) then, of course, the petition would have to fail as incompetent. But if there was such a decision, even an implied decision, the other questions that arise in these proceedings may have to be determined.

One of the points that may arise for determination by the Court is, whether the specific provision in section 42 (1) of the Act, that, where a hereditary trustee is a minor, the Board could appoint a fit person to discharge the functions of the trustee, amounts to an express provision within the meaning of section 79. Even that question, I think, it is better the trial Court adjudicates upon. It is not necessary at this stage to go into the soundness of the contention, based no doubt upon decrees which would bind the members of the family, that a minor during his minority is not entitled to assume or discharge the functions of a trustee. Even if under section 42, during the minority of a hereditary trustee, the Board could appoint another person as a trustee, whether the Board was entitled to appoint a stranger to the family as a trustee, or whether such an appointment would be in contravention of the provisions of section 79 may also arise for consideration. The other points raised by the learned advocate for the petitioners, that section 42 can in no event apply to the cases of trustees of a temple the management of which is governed by a scheme of a Court, and that under the provisions of the scheme applicable to the suit temple it is only the Court and not the Board that can appoint a trustee, I have not considered. The need to consider these contentions would arise only if the Court holds that the petition under clause (3) of section 79-A is competent.

The order of the lower Court is set aside and the petition is remanded for disposal afresh in the light of the observations of this order. Costs of the petition to this Court will be costs in the cause and will abide the result of the application in the trial Court.

V.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN.

Shankaranarayana Kadambalithaya .. *Petitioner**

v.

Vasudeva Achuta Hebbara and others .. *Respondents.*

Court-fee—Adequacy of court-fee paid on plaint—Decision of Judge—Re-opening of the question of adequacy of court-fee before succeeding Judge on the basis of a report of the court-fee examiner—Legality—Proper procedure —Court-Fees Act (VII of 1870), section 12 (2).

Where after the plaint was filed and before the written statement was put in, the question of the adequacy of court-fee paid on the plaint was raised and decided by the Judge in favour of the plaintiff, and subsequently after the written statement was filed and issues framed the question as to the sufficiency of court-fee was once again raised before the succeeding Judge on the basis of a report of the court-fee examiner,

Held, that the succeeding Judge could not reopen the question of adequacy of court-fee which had already been decided.

Held further, that any error committed by the judicial officer in deciding the question of court-fee could only be corrected under section 12 (2) of the Court-Fees Act.

Lakshmana Aiyar v. *Palaniappa Chettiar*, (1935) 69 M.L.J. 479, followed.

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* C. R. P. No. 1222 of 1947. 13th August, 1948.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the District Munsiff of Puthur, dated 4th July, 1947, in O.S. No. 68 of 1946.

K. Srinivasa Rao for Petitioner.

Respondent not represented.

The Court delivered the following

JUDGMENT.—It is unfortunate that the respondents are not represented. All the same, I do not think it necessary in the circumstances to issue notice to the Government Pleader, though the question for decision is the adequacy of the court-fee originally paid on the plaint.

It is not even necessary to canvass the correctness of the decision of the learned District Munsiff on the adequacy of the court-fee paid on the plaint. The contention of the learned advocate for the petitioner was that, whether the court-fee originally paid was sufficient or not, the learned Munsiff had no jurisdiction to demand any additional court-fee at the stage at which he passed that order. After objections had been taken to the court-fee paid the matter was placed before the learned District Munsiff, and he directed that the question should be heard in open Court and decided. "Call on Bench 26th February, 1946" was the order he passed. Apparently he heard the plaintiff's vakil and adjourned it from 28th February, 1946 to 4th March, 1946, for consideration of the authorities; the authorities must have been cited on the 4th March, 1946. The learned District Munsiff then passed the order:

"It is not necessary for the plaintiff to pray for a declaration that the vaidagini lease deed is not valid and binding on him. Court-fee if paid is correct. File."

Subsequently written statements were filed and issues were framed, by the learned District Munsiff who passed that order, dated 4th March, 1946. When the issue relating to the adequacy of court-fee paid came up for consideration before the successor of the learned Munsiff who passed that order, dated 4th March, 1946, that officer came to the conclusion that the court-fee paid on the plaint was insufficient.

I am unable to agree with the learned District Munsiff that the present case does not fall within the scope of *Lakshmana Aiyar* v. *Palaniappa Chettiar*[1], decided by Venkatasubba Rao, J. There the learned Judge upheld the order of the 15th February, 1932, in that case as a judicial decision which precluded any successor of the same judicial officer in that Court from re-opening the question of adequacy of the court-fee already paid. No doubt there was an issue in that suit whether court-fee paid was correct, and there was also the report of the court-fee examiner that the court-fee paid was not correct. As pointed out by Venkatasubba Rao, J., the intervention of the court-fee examiner can have no effect on the question for determination, whether a judicial officer having once judicially decided that the court-fee paid on the plaint was adequate was entitled to re-open the question at a later stage in the same Court. Any error committed by the judicial officer in deciding the adequacy of court-fee at that stage can only be corrected under the provisions of section 12, clause (2) of the Court-Fees Act. The learned Munsiff referred to *Venkatasubba Reddi* v. *Ramadas Reddi*[2], but in dealing with the facts of that case Happell, J., observed:

"It is clear from what the District Munsiff himself has said that he reserved the question of the correctness of the court-fee paid for decision at a later stage and that he did not apply his mind to and decide the question at the time when the suit was registered."

Such an observation in my opinion cannot possibly be applied to the order, dated 4th March, 1946. There was certainly no reservation apparent on the face of the order. Whether there was a mental reservation on the part of the learned District Munsiff, it is not possible to decide, nor would it be useful to embark upon such an investigation. The mere fact that subsequent to the filing of the written

1. (1935) 69 M.L.J. 479. 2. (1946) 1 M.L.J. 459.

statement an issue was framed by the same officer would not show that on 4th March, 1946, the learned Munsiff reserved, mentally or otherwise, that the question of court-fee would have to be gone into afresh. As pointed out by Venkatasubba Rao, J., it should be for the Court to decide the question of adequacy of court-fee at the earliest possible stage. The defendant's interest is not so much in the quantum of the court-fee paid, though his help might certainly be valuable to the Court in deciding the issue where the issue is left open for decision. To reiterate, in this case by the order, dated 4th March, 1946, that question was concluded by the District Munsiff, and he did not intend to leave it open for decision afresh in his own Court.

On the short ground that the learned Munsiff did not have the jurisdiction to revise the order, dated 4th March, 1946, I have to set aside the order, dated 4th July, 1947. The learned Munsiff will proceed with the trial of the suit on the basis of this plaint with the stamp it now bears.

The petitioner will be entitled to the costs of his application from the respondents.

B.V.V. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO.

S. Mohammad Sheriff (deceased) and others .. *Petitioners.**

Motor Vehicles Act (IV of 1939), *sections* 42 *and* 123—*Permit to carry* "*vegetables and foodgrains only on behalf of the military*"—*User for carriage of red sand for repairs to owner's factory—Conviction under section* 42 (1) *read with section* 123—*Sustainability.*

The permit in regard to a lorry authorised it to convey "vegetables and foodgrains only on behalf of the military." The lorry was used for carrying red sand for the purpose of repairing the road in the factory premises of the accused. The owner and driver were charged with an offence under section 42 (1) read with section 123 of the Act.

Held : From the use of word "only" in the permit it cannot be implied that the owner is precluded from using it for his own purpose, which he would be otherwise entitled to under proviso (3) of section 42 (1).

Further, the words 'in connection' in the 3rd proviso to section 42 are wider in scope than the word 'for' and the user of the lorry for carrying red sand to repair the road in the factory of the owner must necessarily be for more convenient user of the factory for his business and is therefore a user "in connection with" the business carried on by him.

In the circumstances, no offence was committed under section 42 (1) of the Motor Vehicles Act.

Petitions under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the conviction and sentence passed by the Second Presidency Magistrate, Court of the Presidency Magistrate, G.T., Madras, on 29th April, 1947, in C.C. Nos. 1172 and 1173 of 1946.

V. Rajagopalachariar for *T. A. Rajagopalan* and *R. V. Raghavan* for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown Prosecutor for the Crown.

The Court delivered the following

JUDGMENT.—The two accused were convicted by the Second Presidency Magistrate, Madras, under section 42 (1) read with section 123 of the Motor Vehicles Act for having used the lorry on 12th November, 1946, on Perambur Barracks Road in contravention of the conditions of the permit. The accused in Cr.R.C. No. 915 of 1947, Mohammad Sheriff, is the owner of the lorry and Joseph, the accused in Cr.R.C. No. 916 of 1947 is the driver of the said lorry. The owner was sentenced to pay a fine of Rs. 100, in default to simple imprisonment for one month and the driver to pay a fine of Rs. 25 in default to simple imprisonment for one week.

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* Cr. R. C. Nos. 915 and 916 of 1947. 23rd September, 1948.
(Cr. R. P. Nos. 814 and 815 of 1947).

Mohammad Sheriff is the owner of the Roxy Taxi Co., and he owns 12 taxis and four lorries. M.S.P. No. 815 is one of such lorries. Ex. C-1 was the permit in regard to the said lorry. Under the permit the owner was authorised to convey vegetables and foodgrains only on behalf of the military. It is admitted that on 12th November, 1946, the lorry was used for carrying red sand. Both the owner and the driver would be liable to be convicted and sentenced under section 42 read with section 123 of the Motor Vehicles Act unless the third proviso to that section applied. Section 42 (1) reads as follows:

"No owner of a transport vehicle shall use or permit the use of the vehicle in any public place, save in accordance with the conditions of a permit granted or counter-signed by a Regional or Provincial Transport Authority authorising the use of the vehicle in that place in the manner in which the vehicle is being used."

The third proviso reads as follows:

"Provided further that a public carrier's permit shall, subject to any conditions that may be specified in the permit, authorise the holder to use the vehicle for the carriage of goods for or in connection with a trade or business carried on by him."

Under the section the owner of a vehicle cannot use the vehicle in contravention of the conditions of the permit. But an exception was made in the case of user by the permit holder for or in connection with the permit holder's trade or business. Mr. Rajagopalachari argued that in this case the lorry was used for taking red sand for the purpose of repairing the road in the accused's factory premises. D.W. 1, the manager of the Roxy Taxi Company, deposed:

"Joseph was driving it. On its return journey, it carried red sand meant for road repairs in our factory premises. We purchased the red sand from Balu Reddiar of Red Hills. We were unloading the red sand near our factory gate. We did not carry red sand for hire."

There is no cross-examination and for the purposes of this case I must accept the evidence that the red sand was taken for the purpose of repairing the road in the factory premises of the accused. The question is whether such user can be said to be user in connection with a trade or business carried on by the accused. The words are "for or in connection with a trade or business carried on by him." The words "in connection" must necessarily be wider in scope than the word "for" and I think the user of the lorry for carrying red sand to repair the road in the factory must necessarily be for more convenient user of the factory for his business and is therefore a user in connection with the business carried on by him. The learned Public Prosecutor argued that assuming that the user was for or in connection with a trade or business carried on by the accused, still the proviso itself cannot apply as such a user is in contravention of the conditions of the permit. This argument was based upon the wording of the proviso itself. Ex. C.-1 is the permit given to the accused for running the lorry in question. In clause 8 under the head "Nature of the goods to be carried", it is stated "vegetables and foodgrains only on behalf of the military." The argument was that as the permit confined the user only to carrying vegetables and foodgrains only on behalf of the military, user for any other purpose even for his own purpose in connection with trade or business offends the proviso. The learned Public Prosecutor argues that as the authorisation in that proviso is subject to the conditions of the permit and as the condition confines it only to the military purpose the owner cannot use the lorry for any other purpose, even in connection with the trade or business. If this argument is accepted the proviso would become nugatory. The object of the proviso is that under that proviso every owner is authorised to use the vehicle for the carriage of goods for or in connection with a trade or business carried on by him. No doubt it is subject to any conditions that may be prescribed in the permit limiting or otherwise qualifying such user. The word used in the proviso is "shall" and such authorisation is absolute. The words "subject to any conditions.", therefore, in my view, cannot be so construed as to make that proviso itself nugatory.

Apart from that, assuming that in a permit a condition may legally be introduced preventing the permit holder from using the public carrier even for his

own purpose I am not satisfied that under clause 8 such a condition had been imposed in this case. If such a condition was intended, I would have expected such a condition to have been expressly stated in the permit. I cannot imply from the mere use of the word " only " in clause 8 of the permit that the permit holder is precluded from using it for his own purpose for which he would otherwise be entitled to use. The word " only " in clause 8 in my view means that vegetables and foodgrains only on behalf of the military can be carried. It only prohibits carrying even on behalf of the military any article other than vegetables and foodgrains. I therefore hold that both the accused did not commit an offence under section 42 of the Motor Vehicles Act. The convictions are set aside and the criminal revision cases are allowed. The fine may be refunded to the estate.

V.P.S. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Dhanaraju .. *Accused**

Criminal Procedure Code (V of 1898), S. 438—Disagreement between Sub-Divisional Magistrate and Trial Magistrate—Reference to High Court—Desirability.

References to the High Court are not desirable merely because the Sub-Divisional Magistrate disagrees with the Trial Magistrate, especially where the accused has a right of appeal if he felt that he had been wrongly convicted.

Maila Gowda v. *Emperor*, (1940) 2 M.L.J. 358 : I.L.R. 1940 Mad. 830, followed.

Case referred for the orders of the High Court under section 438, Criminal Procedure Code, 1898, by the District Magistrate, Chingleput, in his letter R.C. 2824 M. 48-C-2 dated 8th June, 1948.

Accused not represented.

The Assistant Public Prosecutor (*A. S. Sivakaminathan*) for the Crown.

The Court made the following

ORDER.—The only evidence against the accused is that when the servants of P.W. 1 went towards the oven where they heard a noise as of wood being chopped, they saw about ten men near the oven. All of them with the exception of the accused ran away ; and lying on the ground there was wood belonging to P.W. 1's well.

On this evidence the accused was convicted and the papers sent to the Sub-Divisional Magistrate for action under section 562, Criminal Procedure Code, who thought the evidence not sufficient to warrant the conviction of the accused, and so sent the papers to the District Magistrate, asking him to refer the matter to the High Court to have the conviction set aside. The District Magistrate did this, and the Government supports the reference.

With great respect, I agree with Lakshmana Rao, J. in *Maila Gowda* v. *Emperor*[1] that references of this kind are not desirable, merely because the Sub-Divisional Magistrate disagrees with the Trial Magistrate, especially as the accused has a right of appeal if he feels that he has been wrongly convicted. In the present case, however, there certainly was insufficient evidence to prove that the accused took the wood or even that he was in exclusive possession of wood or, in fact, in possession of the wood at all. His statement that he was attracted to the place by the light of the oven and that he had nothing to do with the cutting of wood or the illicit distillation that was going on, received some measure of support from the circumstance that he did not run away.

The reference is accepted, and the conviction set aside. The bail bonds of the accused are cancelled.

K.C. — *Conviction set aside.*

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* Cr. R. C. No. 624 of 1948. 17th September, 1948.
(Case Referred No. 36 of 1948).

1. (1940) 2 M.L.J. 358 : I.L.R. (1940) Mad. 830.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO.

Madiga Narasigadu, son of Peddanna and others .. *Accused.**

Indian Penal Code (XLV of 1860), *section* 193—*Statement under section* 164, *Criminal Procedure Code, before Taluk Magistrate by illiterate accused—Denial in the preliminary enquiry—Allegation of police coercion —Desirability of prosecution.*

Where the accused who were illiterate persons gave a statement under section 164, Criminal Procedure Code, that they had actually witnessed the assault which eventually resulted in the death of the deceased person, but later before the preliminary enquiry they varied their statements denying the earlier story and saying they were forced to make the earlier statement before the Taluk Magistrate as they were coerced by the police,

Held, that the prosecution of the accused for an offence under section 193, Indian Penal Code, would not be in the interests of justice, as they being illiterate it could not be ruled out that they were forced to make the statements which they did under section 164, Criminal Procedure Code and spoke the truth before the Court.

Emperor v. *Ningapa Ramappa*, I.L.R. (1942) Bom. 26, followed.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the District Magistrate, Anantapur, dated 28th May, 1947, in C. A. No. 5 of 1947, preferred against the order of the Stationary Sub-Magistrate, Dharmavaram, dated 5th March, 1947, in M. P. No. 4 of 1946.

N. Somasundaram for *C. Kondiah* for Accused.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—One Dasappa was murdered and certain persons were prosecuted under section 302, Indian Penal Code, in connection with that murder. The petitioners gave statements in that case under section 164, Criminal Procedure Code, in connection with the death of Dasappa before the Taluk Magistrate, Dharmavaram. They stated to the effect that they had actually witnessed the assault which eventually resulted in the death of Dasappa and some of them had been asked to watch over the injured persons. Later on in the preliminary enquiry they denied the earlier story and stated that they made the statements before the Taluk Magistrate as the police threatened them and that the statements were really made at the dictation of the police. Subsequently these witnesses were given up in the Sessions Court. The accused were tried and acquitted by the Sessions Judge, Anantapur. The learned Sessions Judge held on a consideration of the evidence that the prosecution failed to prove the case set up by them. Dasappa died on 18th January, 1946. The statements under section 164, Criminal Procedure Code, were made immediately thereafter and the judgment was delivered on 10th August, 1946. The application was filed before the Stationary Sub-Magistrate, Dharmavaram, in the latter part of the year 1946. Both the Sub-Magistrate and the District Magistrate held that in the interests of justice a complaint should be filed against the petitioners under section 193, Indian Penal Code.

It is no doubt true that either the statement made before the Taluk Magistrate under section 164, Criminal Procedure Code or the evidence given in P. R. C. No. 1 of 1946 on the file of the Stationary Sub-Magistrate, Dharmavaram, is false and false to the knowledge of the petitioners. If according to the case of the respondent the statements made under section 164, Criminal Procedure Code, were true the evidence given before the Sub-Magistrate in P. R. C. No. 1 of 1946 was false. But the petitioners say that they were forced to make false statements under section 164, Criminal Procedure Code and that later on they spoke the truth before the Magistrate. In similar circumstances, the observations made by Beaumont, C.J., in

* Cr. R. C. Nos. 582 and 1251 to 1254 of 1947. (Cr. R. P. Nos. 478 and 1137 to 1140 of 1947). 24th September, 1948.

Emperor v. *Ningappa Ramappa*[1], are very instructive and may be cited *in extenso*. The learned Judge says :

"No doubt, a man making a statement on oath before a Magistrate under S. 164, Criminal Procedure Code, should speak the truth but if he does not, the least he can do is to tell the truth when subsequently he goes in the witness box. To prosecute a man who has resiled from a false statement, made under S. 164 is to encourage him in the belief that it pays to tell a lie and stick to it. It is far better that a man should escape punishment for having made a false statement under S. 164 than that he should be induced to believe that it is to his interest, however false the statement may have been to adhere to it, and thereby save himself from prosecution. The danger of such a course leading to the conviction of innocent person is too great to be risked."

With great respect I agree with his observations. Applying those observations I must say that the prosecution of the petitioners would not be in the interests of justice. Further these petitioners are illiterate Madigas and it is impossible to rule out the possibility that they were forced to make the statements which they did under section 164, Criminal Procedure Code, and later on they spoke the truth before the Court.

For the aforesaid reasons I set aside the order of the lower Court and dismiss M. P. No. 4 of 1946 on the file of the Stationary Sub-Magistrate, Dharmavaram.

K.C. *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE SATYANARAYANA RAO.

Dr. C. S. Krishnaswamy Ayyar .. *Petitioner**

v.

Mohanlal Binjani and another .. *Respondents.*

Madras Buildings (Lease and Rent Control) Act (XV of 1946), *section* 7—*Chief Judge of Court of Small Causes, Madras, finding that cover containing cheque for rent was refused by the landlord but granting order for eviction on the ground that the tender was invalid—Error apparent on the face of proceedings—Issue of* writ of certiorari *to quash.*

A creditor who rejects a tender on other grounds must be deemed to have waived the objection as to the form of tender. A creditor who denies the tender is not entitled to question its sufficiency or validity.

Where the Chief Judge, Court of Small Causes, Madras, on appeal from an order of the Rent Controller under section 7 of the Madras Buildings (Lease and Rent Control) Act XV of 1946, has found that the landlord refused to receive a registered cover containing a cheque for rent accrued and due for the month as well as for future months but decided that the tender was invalid as the cheque included also an amount of rent for future months which the landlord was not bound to accept and since the landlord did not accept the cheque (in which case only he would have been under an obligation to treat the advance payment as a loan in his hands available for appropriation towards rent as and when it accrued due) there was no valid tender and therefore the landlord was entitled to an order for eviction, there is an error apparent on the face of the proceedings which must be quashed by the issue of a *writ of certiorari.*

Had the landlord received the letter by which the cheque was tendered, it would have been open to him to consider the matter in all the aspects and to have intimated to the tenant in proper time his choice so as to enable the tenant to comply with his conditions. Having failed to do so, he cannot question the validity or form of the tender.

Grounds on which a *writ of certiorari* can be issued reviewed.

The statement of the law in paragraph 1491 of volume 9 of Halsbury's Laws of England, second edition, is good law and has not in any way been affected or overruled by later cases.

Errors apparent on the face of the proceedings are always treated as errors of jurisdiction for the purpose of quashing by issue of a *writ of certiorari.* If from the evidence set out or the facts found the conclusion does not follow in law it is open to the superior Court to interfere with the order and quash it by issuing a *writ of certiorari* as the error is patent on the face of the record.

The question of tender is not one relating to a collateral matter which has to be established before the House Rent Controller is called upon to enter into an enquiry in the application for eviction. It is one of the grounds which constitute the merits of the application. Accordingly the

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1. I.L.R. (1942) Bom. 26.

* C. M. P. No. 2689 of 1948. 2nd September, 1948.

propriety of findings on questions of fact arrived at by the appellate authority cannot be canvassed in the proceedings to quash by writ.

The fact that after the order of the appellate authority, time was granted by consent of parties for vacating the premises does not constitute an election by the tenant so as to preclude him from questioning the eviction order in the proceedings for quashing it.

Authorities discussed.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a *writ of certiorari* calling for the records in H. R. A. No. 665 of 1947 in L. Dis. No. 2800 of H.R.C., 1947, on the file of the Chief Judge of the Court of Small Causes, Madras and quash the order dated 10th March, 1948 and made therein.

T. R. Venkatarama Sastri for *R. Rajagopala Aiyangar* for Petitioner.

V. K. Thiruvenkatachari for *U. S. Ramaswami Aiyar* for first Respondent.

The Order of the Court was made by

Satyanarayana Rao, J.—This is an application by a tenant to issue a *writ of certiorari* to call for the records in H. R. A. No. 665 of 1947 in L. Dis. No. 2800 of H.R.C., 1947, on the file of the Chief Judge, Court of Small Causes, Madras and to quash the order passed by the learned Judge on the 10th March, 1948, reversing the order passed by the House Rent Controller, Madras.

The petitioner is a tenant of house No. 13, North Mada Street, Mylapore and was let into possession by the previous owner before the respondent purchased it by a sale deed dated 7th November, 1946. He was paying a monthly rent of Rs. 75 at the date of the purchase by the respondent. On the 15th December, 1946, the respondent issued a notice, Ex. D-3, through his lawyer to the petitioner calling upon him to vacate the house and also to attorn to him and to pay the arrears of rent for the month of November, 1946. Upon receipt of this notice the petitioner sent Ex. P-1, dated 31st December, 1946, along with a cheque for a sum of Rs. 150 and in that letter the petitioner denied the right of the respondent to evict him and intimated to him that the cheque for Rs. 150 was enclosed, Rs. 75 as payment of the arrears of rent for the month of November, 1946 and the balance of Rs. 75 as advance rent for a month. The petitioner seems to have followed the practice of paying six months' rent in advance to the respondent's vendor and in this letter he enquired the respondent whether he would also be willing to follow the same practice which would save the petitioner the worry of sending the amount every month. The respondent received the cheque and the letter, but sent no reply. He waited for some time and as he did not hear anything from the respondent, the petitioner sent a further cheque for a sum of Rs. 508 with a letter Ex.-D-1, dated 15th January, 1947, through his advocate and in that letter it was stated that as per the settlement of account appended to the letter the sum of Rs. 508 covered by the cheque was advance rent till the end of June, 1947. This letter, however, was returned to the advocate of the petitioner as "refused." The petitioner and the respondent seem to have met together some time in the beginning of April and as a result of conversation, between them, the petitioner sent Ex. P-2 dated 30th April, 1947, along with a cheque for Rs. 525. In this letter reference was made to the conversation and to the willingness of the respondent expressed to the petitioner at the conversation to receive the amount. In pursuance of this agreement, it was alleged in the letter, that the cheque for Rs. 525 was sent partly representing the arrears due up to that date and partly as advance for future rent. This letter and the cheque were received by the respondent but after some deliberation and under legal advice the respondent returned the cheque to the petitioner on the 7th May, 1947. The ground for refusing to accept the cheque was that the rents which accrued due from 1st December, 1946, were not paid or tendered on the due dates. This refusal was subsequently followed by the application of the respondent on the 12th May, 1947, before the House Rent Controller, Madras for eviction of the petitioner on the sole ground that the rent was not paid or tendered by the petitioner, on the

due dates and the petition was based on section 7, sub-clause (2) (*i*) of the Madras Buildings (Lease and Rent Control) Act, XV of 1946. The petitioner contended before the House Rent Controller that there was a valid tender of the rent by a cheque sent on 15th January, 1947, which was refused by the respondent and that subsequently he sent again another cheque for Rs. 525 in April, 1947, which was received by the respondent but was returned later. He therefore contended that there was no default on his part and that there was a valid tender of rent. According to the allegations in the counter affidavit filed by the petitioner before the House Rent Controller, the main object of the respondent was to devise some means to secure the eviction of the petitioner from the house and that with this object in view, he had suppressed the previous tender and its refusal and filed the petition. The House Rent Controller accepted the case of the tenant, and found that the rents for December, 1946, and subsequent months were tendered by a cheque on the 15th January, 1947, and that it was improperly refused by the landlord. He therefore declined to grant eviction.

Against this order the landlord preferred an appeal to the Chief Judge, Small Cause Court. Before the learned Judge the arguments were more elaborate and various questions of law were raised. He agreed with the House Rent Controller in holding that the landlord evaded to receive the letter of 15th January, 1947, and the cheque but that the tender was not valid for two reasons : firstly that the advance remittance of rent by cheque in January, 1947, was not payment of rent for the months of January 1947 to April 1947 since the landlord did not accept the cheque in which case he would have been under an obligation to treat the advance payment as a loan in his hands available for appropriation towards rent as and when it accrued due ; secondly that it was not a valid tender even in respect of the rent due and accrued for the month of December 1946, as the cheque included also an amount of rent for future months which the appellant before him was not bound to accept. According to him, therefore, there was no valid tender of rent even for the month of December, 1946. In answer to the contention urged on behalf of the landlord that as the cheque sent in January, 1947, was enclosed in a registered envelope and even if there was a refusal of the letter he should not be fixed with knowledge of the contents and should not be deemed to have had knowledge of the tender, the learned Judge found, to quote his own words, as follows :—

" This and the next contention as to the sufficiency of a cheque as tender are concluded by the necessary inference which I draw from the facts to the effect that the appellant was not willing at that stage to accept tender in any form from the respondent. In such circumstances it has been held that the ignorance of the appellant about the contents of the registered letter and the particular form which the tender took are immaterial. (*Venkatarama Iyer* v. *Gopalakrishna Pillai*[1]).

Two questions arise for consideration on the arguments advanced on behalf of the petitioner and the respondent ; firstly, whether there is an error of law apparent on the face of the record and secondly whether this Court has jurisdiction to interfere with the order of the learned Chief Judge by issuing a *writ of certiorari* to quash.

The first point raises the question of the validity of the tender made by the petitioner in January, 1947. It may now be taken as established by the two orders that the tenant did issue a notice Ex. P-1 in a registered cover enclosing a cheque for Rs. 508 and that it was refused by the respondent and was returned back to the petitioner. The learned Chief Judge, from his finding already quoted, has distinctly found that the attitude of the respondent at that time was that he was in no mood to accept any tender in any form by the petitioner. In view of this finding, the argument advanced on behalf of the respondent that he had no knowledge of the contents of the latter and that the tender was in a form not acceptable to him and comprised a larger amount than was legally due on that date, namely, one month's rent, loses much of its force. It was immaterial, so far as he was concerned, whether he actually knew the contents or not as his mind was sealed once for all and it was equally immaterial whether the amount was tendered by cheque and comprised

1. (1928) 56 M.L.J. 255 : I.L.R. 52 Mad. 322.

future rent also. To such a situation the principle laid down in *Venkatarama Aiyar* v. *Gopalakrishna Pillai*[1], aptly applies. It was there stated :—

"His first contention rests on the broad proposition that tender of a cheque is not a valid tender. As an universal proposition that is hardly correct. Tender by cheque will be valid tender if the person to whom it is tendered is willing to receive payment by a cheque. But in the present case the negotiations never got so far. The plaintiff refused at the outset to receive the money in any form or shape. It was open to him, had he allowed the matter to go on and the second defendant had tendered a cheque, to refuse the cheque and demand cash, and there was still time for the second defendant to go and bring cash. But instead of that he refused to have the payment in any shape and by this tactics put it out of his power to receive payment in cash, and, therefore, to object now to the form of the payment. It is quite clear from the evidence that his objection was not to the form of the payment but to payment in any form. Where a party thus refuses to entertain the idea of payment at all and puts it out of the power of the tenderor to offer payment in a manner acceptable to the creditor, the offer of performance by a person then able to carry out the promise in its entirety is a valid tender in spite of the form of it being itself not legal tender. The tender, whether by cash and draft, or by a cheque, was a valid tender unless the plaintiff refused the form of it; the plaintiff did not refuse the form of it, and therefore it was valid."

In that case there was first an attempt to tender the money personally at the Cosmopolitan Club, by the second defendant in the case who was a subsequent purchaser but the plaintiff refused to take the money from the second defendant. The second defendant thereafter sent registered notices twice enclosing a cheque for the amount. The plaintiff refused to receive both the notices and he tried to justify that refusal on the ground that the covers gave no indication that they contained a cheque. It was found in that case that the plaintiff was determined not to receive payment from the second defendant under any circumstances. In the present case, had the respondent received the cover and intimated his objections to the tender now put forward, it would have been perfectly open to the petitioner to make a fresh tender, as by that date the petitioner had still 15 days' time during which to make a further tender. The respondent kept quiet until after a later meeting sometime in April, 1947.

Section 38 of the Indian Contract Act embodies the principles applicable to tender under the Indian Law. The word "tender" does not occur in the section. It requires that the offer to perform a promise should be unconditional, must be made at the proper time and place and must give a reasonable opportunity to the promisee to examine the thing that was offered. The principles embodied in that section are substantially the same that govern tender under English law. It has been recognised under English law ever since the well known *Wade's* case[2], that a tender may be made of a greater sum of money than the amount due. It was open to the creditor to accept so much of it as is due to him and reject the rest. The authorities on the point were exhaustively considered by Seshagiri Aiyar, J., in *Subramania Aiyar* v. *Narayanaswami Vandayar*[3]. Objection to the form of the tender may be waived by the creditor either expressly or impliedly. If the creditor rejects the tender on other grounds he is deemed to have waived the objection as to the form of tender. A creditor who denies the tender is not entitled to question its sufficiency or validity—see *Mahomed Mozaffer Ali* v. *Asraf Ali*[4]. The case very strongly relied upon by the respondent is the decision of the Lahore High Court in *Hira Lal* v. *Khizer Hayat*[5]. On the strength of this decision it was contended before us that if a single cheque was tendered for more items than one while only one of of which was due at the time and the others were not to be payable till a future date, as the cheque was one and indivisible, the tender cannot be said to be an unconditional tender and therefore it was invalid. If the interests of the creditor are not affected in any manner by the tender of a single cheque for more than one liability, it was open to the creditor to tell the debtor that he should split up the cheque or pay only so much as was then due. On the facts of that case it is clear that the interest of the mortgagee to whom the tender was made would seriously be affected if the tender under the circumstances of that case was treated as valid.

1. (1928) 56 M.L.J. 255 : I.L.R. 52 Mad. 322.
2. (1601) 5 Co. Rep. 114-a.
3. (1917) 34 M.L.J. 439 at 442.
4. (1914) 25 I.C. 93.
5. A.I.R. 1936 Lah. 168.

The mortgagee was authorised to remain in actual possession of the hypotheca for a period of 25 years from the date when he took possession of the property after redeeming the first mortgage. Owing to some litigation the second mortgagee was not able to obtain possession till 1918. It was found in that case that the mortgagee was entitled after deducting some period to continue in possession, till 25th April, 1939. Long before this date the mortgagor tendered the amount due under the mortgage which carried interest and also a further sum in respect of an amount paid to the second mortgagee. One of the contentions raised was that the stipulation in the mortgage deed postponing the date of redemption was a clog on the equity of redemption and that it was invalid. That contention was overruled and it was found that the mortgagee was entitled to remain in possession for the full period of 25 years, *i.e.*, till the 25th April, 1939. The tender, therefore, of the amount due under the mortgage in 1926, according to the learned Judge, had not the effect of estopping the running of interest as the mortgagee intended to treat the mortgage money as an investment to earn interest. The tender therefore, under those circumstances, cannot be deemed to be a valid tender as he was not entitled at all to make a tender, and the only question that arose for consideration in that case was whether the tender had the effect of stopping the interest from running. The decision, therefore, lends no support to the contention urged on behalf of the respondent that the tender of the rent that accrued due on 15th January, 1947, along with future rents was an invalid tender.

The position, therefore is, that on the face of the judgment of the learned Judge, the only conclusion possible is that there was a valid tender of the rent by the petitioner to the respondent.

The legal position of an advance of rent in the hands of the landlord was also discussed. The question arose for consideration in England in cases where the tenant paid rent to the lessor without knowledge that there was already an assignment of the term by the lessor to a third party. The effect of such payment had to be considered. In such cases it has been held that rent paid before it was due was not a fulfilment of the obligation to pay rent under the covenant, but is in fact an advance to the landlord with an implied agreement that as and when the rent became due he would treat the advance as a fulfilment of the obligation under the covenant. It may not be strictly correct to call it a loan to the landlord but it is merely an advance or a deposit in his hands. In cases where there was an assignment and a payment by the tenant to the assignor without the knowledge of the assignment, the tenant would be bound to pay it over again to the assignee—see *De Nicholls* v. *Saunders*[1]. If there is no complication of an assignment and the tenant pays the rent in advance to the landlord and the landlord accepts it, the landlord will be bound to appropriate the advance in his hands towards the rent as and when it accrues due. It is of course open to the landlord to decline the offer and ask the tenant to pay it only on the due dates. Had the respondent received the letter by which the cheque was tendered in January, 1947, it would have been open to him to consider the matter in all its aspects and to have intimated to the petitioner in proper time his choice so as to enable the tenant to comply with his conditions. This the respondent failed to do.

It has been strenuously urged on behalf of the respondent that even if there is an error of law in the judgment of the learned Chief Judge of the Small Cause Court, it was not open to this Court to interfere by issuing a *writ of certiorari*. The question of the limits of jurisdiction of a superior Court to interfere with the decision of an inferior tribunal by a *writ of certiorari* to quash has been fully canvassed before us. The principles on which a Court interferes by issuing a *writ of certiorari* to quash have been fairly well settled in England and have been followed in India. The difficulty is not so much in understanding these principles, as in applying them to the facts of a particular case. The principles have been analysed in the second edition of Halsbury's Laws of England (Vol. 9, Hailsham Edition).

1. L.R. (1870) 5 Common Pleas Cases 589 at 594.

from paragraphs 1484 to 1493 under four heads. A clear case for interference is where there is want of jurisdiction arising from the nature of the subject or from the absence of some essential preliminary requisite. Some times the jurisdiction of the inferior tribunal to act is dependant upon the establishment of some collateral fact and such tribunal or Court by a wrong decision in respect of such fact cannot confer upon itself a jurisdiction which it does not otherwise possess. In such a case, it has been held, that it will be open in the proceedings to quash by way of a writ to decide the correctness of the decision of the inferior tribunal on that collateral fact. The decision of Lord Esher, M.R. in *The Queen* v. *Commissioners for Special Purpose of Income-tax*[1], enunciates clearly the principles governing such cases. The defect of jurisdiction may also relate to the constitution of the tribunal as where a person who was not entitled to be a judge in his own cause takes part in the adjudication or the adjudication of the inferior Court may be vitiated by collusion, corruption or fraud. Lastly, errors apparent on the face of the proceedings are always treated as errors of jurisdiction for the purpose of quashing by issuing a *writ of certiorari*. It is under this ground that the petitioner wants to bring the present case, while the respondent maintains that the errors contemplated even under this heading are only errors of jurisdiction and not mere errors of law. The petitioner relies upon the passage in paragraph 1491 of Halsbury's Law's of England, while the respondent relies upon paragraph 1493. According to the respondent, there is a conflict between the two paragraphs and in the light of two decisions which will be referred to presently, he maintains that the law as stated in paragraph 1491 must be treated as having been overruled. Paragraph 1491 states as follows :—

"Where upon the face of the proceedings themselves it appears that the determination of the inferior Court is wrong in law, *certiorari* to quash will be granted. Thus, *certiorari* to quash will be granted, where the charge before the Magistrates, as stated in the information, does not constitute an offence punishable by the Magistrates, or where it does not amount in law to the offence of which the defendant is convicted, or where an order is made which is unauthorised by the finding of the Magistrates."

These are all illustrations of errors apparent on the face of the proceedings and involving merely a question of law. From the proceedings as set out in the order itself it would be patent that the conclusion of the tribunal was not warranted by law. In other words, the order is a "Speaking order", an expression used by Earl Cairns, L.C. in *Overseas of the Poor of Walsall* v. *London and North Western Railway Co.*[2] It is no doubt not necessary in all cases to set out the evidence or facts on which the decision was based, but if once they are so set out and if from the evidence set out or from the facts found the conclusion does not follow in law it is open to interfere with the order and quash it by issuing a *writ of certiorari*. As pointed out by Earl Cairns, L.C. in the case of *Overseas of the Poor of Walsall* v. *London and North Western Railway Co.*[2],

"All that was necessary was that the Court of Quarter Sessions, in making its order, should not make it an unspeaking or unintelligible order, but should, in some way state upon the face of the order, the elements which had led to the decision of the Court of Quarter Sessions. If the Court of Quarter Sessions stated upon the face of the order, by way of recital, that the facts were so and so, and the grounds of its decisions were such as were so stated, then the order became on the face of it, a speaking order ; and if that which was stated upon the face of the order, in the opinion of any party was not such as to warrant the order, then that party might go to the Court of Queen's Bench and point to the order as one which told its own story and ask the Court of Queen's Bench to remove it by *certiorari*, and when so removed, to pass judgment upon it whether it should or should not be quashed."

The two decisions in *The Queen* v. *Tomlinson*[3] and *The Queen* v. *Kay*,[4] also illustrate the same point. In both these decisions, on the face of the orders it was clear that the bastardy orders could not be maintained in law. The error was patent on the face of the order.

Of course the error which is apparent should not be a mere accidental or formal error which could always be set right by amendment ; it must be a substantial

1. (1888) 21 Q.B.D. 313.
2. (1878) 4 A.C. 30 at 40.
3. (1872) L.R. 8 Q.B. Cases 12.
4. (1873) L.R. 8 Q.B. Cases 324.

error and one which goes to the root of the matter. But as pointed out in paragraph 1493 of Halsbury's Laws of England :

"Where the proceedings are regular upon their face, and the Magistrates had jurisdiction, the superior Court will not grant the *writ of certiorari* on the ground that the Court below has misconceived a point of law. When the Court below has jurisdiction to decide a matter, it cannot be deemed to exceed or abuse its jurisdiction, merely because it incidentally misconstrues a statute, and admits legal evidence or rejects legal evidence or misdirects itself as to the weight of evidence or convicts without evidence. Nor will *certiorari* be granted to quash the decision of an inferior Court within its jurisdiction on the ground that the decision is wrong on matters of fact and the Court will not hear evidence impeaching the decision on the facts."

The question therefore to determine is whether the present order falls under the one category or the other. As pointed out already, some light is thrown on the meaning of the expression "Error apparent on the face of the proceedings" by the decision of Earl of Cairns, L.C., referred to above. This expression had to be construed by the Privy Council in another context, with reference to proceedings in arbitration. Lord Dunedin after examining the decisions on the point explains the expression in *Champsey Bhara and Co.* v. *Jivraj Ballo Spinning and Weaving Co.*[1], in these terms :—

"An error in law on the face of the award means, in their Lordships' view, that you can find in the award or a document actually incorporated thereto, as for instance, a note appended by the arbitrator stating the reasons for his judgment some legal proposition which is the basis of the award and which you can then say is erroneous. It does not mean that if in a narrative a reference is made to a contention of one party, that opens the door to seeing first what that contention is, and then going to the contract on which the parties' rights depend to see if that contention is sound."

Bearing these principles in mind we have no hesitation in holding that in the present case, as pointed already, there was an error apparent on the face of the order of the Chief Judge, Small Causes Court, Madras.

It is now necessary to refer to the decisions relied on by the learned advocate on behalf of the respondent in support of his contention that the statement of the law in paragraph 1491 of Halsbury's Laws of England must be taken to have been overruled by subsequent decisions. The first decision is *Rex* v. *Minister of Health*[2]. The point for decision in that case was whether the claimant was entitled to a superannuation allowance under section 11 of the Asylums Officer's Superannuation Act, 1909. The claimant's claim was rejected by the Committee of Visitors. He then appealed to the Minister of Health who upheld his contention and granted Superannuation allowance under section 11 of the Act. The Committee of Visitors of the Mental Hospital who were directed to pay the allowance obtained a rule *nisi* by a *writ of certiorari* to quash the determination of the Minister of Health who was the appellate authority. The Divisional Court discharged the rule and the decision of the Divisional Court was affirmed by the Court of Appeal. The only question on which there was difference of opinion was upon the interpretation of section 11 of the Act. Greer, L.J., referred to paragraph 1493 of Vol. 9 of Halsbury's Laws of England (second edition) and quoted the passage already extracted and it was pointed out by the Lord Justice that all that could be urged against the determination of the appellate authority was that his order misconstrued the words in section 11 and that did not entitle the visitors to apply for *certiorari*. The other Lord Justices agreed with that view and Slesser, L.J., observed (at page 249) :—

"It is sufficient to say that the appellants fail to show that the Minister acted outside his jurisdiction. He may or may not have come to an erroneous decision within his jurisdiction, which was to decide this dispute. Therefore he may be in a position to say, when the matter has to be decided, if it ever has, as a matter of substantive law, that he is right. But for the purposes of the present case, it is enough to say that the appellants have failed to show that the Minister exceeded his jurisdiction, they should not have obtained the rule *nisi* in the Divisional Court which they did obtain, and the Divisional Court were right in discharging the rule when it came before them for argument."

There is nothing in this judgment to indicate that the statement of the law in paragraph 1491 is erroneous. It is a clear case which fell within the principle laid down

1. (1923) 44 M.L.J. 706 : L.R. 50 I.A. 324 : I.L.R. 47 Bom. 578 at 586 (P.C.).
2. (1939) 1 K.B. 232.

in paragraph 1493. The next case is also a decision of the Court of Appeal, *Rex* v. *Rent Tribunal for Paddington*[1]. Under the Furnished Houses (Rent Control) Act, 1946, the Minister of Health had the right to appoint tribunals for different districts to determine as between a landlord and a tenant whether the rent paid is a fair and reasonable one or not. The tribunal reduced the contract rent of five pounds a week to three pounds six shillings. *Certiorari* was moved on the ground that the tribunal did not consider certain matters which they were bound to consider in deciding whether the rent was fair or not. Objection was raised that the tribunal being vested with discretion to determine the fair rent, it could not be interfered with by *ceritorari*. Lord Goddard, C.J., enunciated the principles by which the question of jurisdiction has to be determined. At page 449 it was stated as follows :—

"*Certiorari* is a very special remedy, and when it is sought in order to bring up the order of a judicial tribunal, the question which has to be considered is whether or not the tribunal were acting within their jurisdiction. 'Acting within their jurisdiction' is an expression which has been applied to more than one set of circumstances. It is, for instance, applied to a case where it is said that a Court is not properly constituted. It may be that justices or other members of a Court are alleged to be disqualified or to have a bias in the matter which should have resulted in their not sitting and in those circumstances this Court has never hesitated to grant the writ to bring up the order to be quashed, because the members of a tribunal had no jurisdiction to give a decision in the case, but it is very old and definite law that *certiorari* to quash proceedings only lies for want of jurisdiction or where the order is bad on its face. It may be bad on its face, because, on looking at it, the Court can see that the tribunal, in making it, acted outside their jurisdiction, or it may be shown that they decided some question which was not before them."

From this passage it was argued that the learned Judge pointed out only two grounds on which an order may be attacked as being bad on its face, *i.e.*, either because on the face of it it was obvious that the tribunal acted outside their jurisdiction or that they decided some question which was not before them. These are the only two grounds, it is urged, on which an order may be shown to be bad on its face. We are, however, of opinion that the learned Judge is not there enumerating exhaustively all the grounds under which an order may be bad on its face. The learned Judge was only trying to illustrate what may be deemed to be "bad on its face." At page 450 it is again observed :—

"It follows from the fact that the tribunal were exercising the functions with which they had been entrusted by the Act of Parliament that it must have been within their jurisdiction to consider it and to give a decision. What we are really being asked to say is either that they have misconstrued the statute or that they have rejected evidence or misdirected themselves in some way, but even if they came to a decision without evidence, that is not a matter on which *certiorari* can be granted, and it follows that this application must fail."

From the conclusion of the learned Judge so stated, it is clear that it was a case which clearly fell within the principles laid down in paragraph 1493 of Halsbury's Laws of England. The decision, therefore, does not in any manner affect the principles laid down in paragraph 1491.

It only remains to refer to two decisions of this Court in *Mahomed Ashan Maracair* v. *Bijili Sahib*[2], and *Sankaranarayana* v. *Miran Sahib*[3]. We do not think that either of these decisions helps the respondent. These two decisions, in our opinion, do not carry one farther than the principles which have been so fully set out in Halsbury's Laws of England. It is unnecessary therefore to deal with these decisions further.

One other argument urged on behalf of the petitioner may also be considered. The petitioner contended that reading the provisions of section 7 and the other provisions of the Madras Buildings (Lease and Rent Control) Act, 1946, the question of tender was really in the nature of a collateral fact which had to be established before the jurisdiction to grant an order for eviction could be exercised, and that therefore it was open to us to canvass the propriety of the findings of fact arrived at by the appellate authority. We do not, however, agree in this view of the sections.

1. (1947) All.E.R., Vol. 1, p. 448.
2. (1933) 66 M.L.J. 367: I.L.R. 57 Mad. 571.
3. (1934) 66 M.L.J. 601: I.L.R. 57 Mad. 582.

Section 7 of the Madras Buildings (Lease and Rent Control) Act, 1946, precludes the landlord from evicting a tenant in any other manner than that provided by the section and for the reasons mentioned in it. The mode is to approach the House Rent Controller with a petition and the petition can only be filed on one or other of the grounds mentioned in clause (2) of that section. If those grounds are established before the House Rent Controller, then the Controller would direct the tenant to put the landlord in possession of the building ; if not, the petition would be rejected. These grounds really are not collateral matters which have to be established before the House Rent Controller is called upon to enter into an enquiry. They constitute the merits of the application. We are, therefore, unable to accept this contention of the petitioner.

Lastly we must notice a contention very faintly urged on behalf of the respondent that as after the order of the Chief Judge was pronounced time was granted by consent of parties for vacating the premises, the petitioner who had the advantage of such extended period should be deemed to have elected to abide by the decision of the appellate authority and that it was not now open to him to question its legality. No question of election in such a case arises and the matter is really concluded by the authority of the House of Lords in *Lissenden* v. *C. A. V. Bosoh Limited*[1]. The principle of approbate and reprobate cannot be made applicable to the rights of a litigant to an appeal either from a judgment or from an award. There is no scope for the application of the doctrine of election in such circumstances. It is not a conditional order under which the petitioner accepted any benefit so as to preclude him from disputing its validity. The principle of election, it may be pointed out, would be applicable only when there are alternative rights.

The result is the rule *nisi* is made absolute ; the order of the Chief Judge, Small Cause Court, is quashed which of course results in restoring the order of the House Rent Controller. The petitioner is entitled to his costs here. Advocate's fee Rs. 100.

K.S. *Order quashed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO.

Subbaraya Padayachi and another .. *Petitioners**

v.

Kozhandaivel Udayar .. *Respondent.*

Civil Procedure Code (V of 1908), *Order* 16, *rule* 19 (b)—*Expert witness—Right of party to examine on commission.*

A party to a suit has a right to ask for the issue of a commission to examine a witness beyond the prescribed distance. The same principle applies even in the case of an expert witness. A party can ask for a commission to examine a handwriting expert of his choice as a matter of right.

Accordingly where in a suit on a promissory note the defendant who contends that the endorsement was a forgery applies for the issue of a commission to examine Mr. Dixit, Government Examiner of questioned documents, Central Provinces and Berar, it is not open to the Court to dismiss the application on the ground that it was desirable that the suit document should be examined by the Government Examiner of the Central Government.

When a petitioner is entitled to select his own witnesses and he selects one of the two witnesses that are available, it cannot be said that he is guilty of an abuse of the process of Court.

Sitamma v. *Subraya*, (1911) 21 M.L.J. 889 at 890 and *Jagannadha Sastri* v. *Sarathambal Ammal*, (1922) 44 M.L.J. 202 : I.L.R. 46 Mad. 574, relied on.

Observations in *Palaniappa Chettiar* v. *Narayanan Chettiar*, (1946) 1 M.L.J. 179, that "it is a matter of discretion for the Court in the circumstances of each particular case " to issue a commission, treated as mere *obiter* and not followed.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the District Munsiff of Vridhachalam in I.A. No. 223 of 1947 in O.S. No. 101 of 1946, dated 5th May, 1947.

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1. (1940) A.C. 412.

* C. R. P. No. 1054 of 1947. 22nd September, 1948.

T. E. Ramabhadrachari for Petitioners.

S. Krishnamachariar for Respondent.

The Court delivered the following

JUDGMENT.—This is a revision against the order of the lower Court dismissing the application to issue a commission to examine Mr. Dixit, Government Examiner of questioned documents, Central Provinces and Berar, on commission. The suit was on a promissory note. The defence was that the endorsement was a forgery. The respondent filed an application I.A. No. 223 of 1947 for issuing a commission to Mr. Dixit, Government Examiner of questioned documents, Central Provinces and Berar. The learned District Munsiff dismissed the application on the ground that both under the rules and as a matter of expediency it was desirable that the suit documents should be examined by the Government Examiner of the Central Government.

A party to a suit has a right to ask for the issue of a commission to examine a witness beyond the prescribed distance. The same principle applies even in the case of an expert witness. In *Sitamma* v. *Subraya*[1], Abdur Rahim and Sundara Aiyar, JJ., recognised that principle and stated that the defendants were entitled as of right to the issue of commission apart from the question whether they would have ultimately benefited by it. The same principle is followed and applied in *Jagannadha Sastri* v. *Sarathambal Ammal*[2]. Wallace, J., after considering the various decisions cited before him expressed his conclusion as follows :—

> " The balance of authority is in favour of the view that (1) ordinarily, in the case of a witness not under the control of the party asking for the commission who resides beyond the limit fixed under Order 16, rule 19 (*b*), Civil Procedure Code, a commission should issue as a matter of right, unless the Court is satisfied that a party is merely abusing its authority to issue process and (2) that it is not for the Court to decide whether the party will be benefited thereby or not, that is a matter entirely for the party."

With great respect I agree with this observation. In a recent decision of this Court in *Palaniappa Chettiar* v. *Narayanan Chettiar*[3], Bell, J., considered the same question. Referring to *Jagannadha Sastri* v. *Sarathambal Ammal*[2], the learned Judge observes at page 180 :

> " In my opinion it is a matter of discretion for the Court in the circumstances of each particular case."

That observation in that case is a mere *obiter* as the finding in that case was that the particular application was an abuse of the process of Court. I therefore hold that the petitioner is entitled to examine the expert, Mr. Dixit, on commission. The reasons given by the learned District Munsiff do not in any way indicate that the petitioner was guilty of an abuse of the process of Court. It is common case that the expert is necessary and the only dispute is whether that expert should be the Nagpur or Delhi expert. It is impossible to say when a petitioner is entitled to select his own witness, and he selects one of the two witnesses that are available, that he is guilty of an abuse of the process of Court. Therefore the lower Court should have allowed the application No. 223 of 1947. The lower Court's order is set aside. The revision petition is allowed with costs.

K.S. *Petition allowed.*

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1. (1911) 21 M.L.J. 889 at 890.
2. (1922) 44 M.L.J. 202: I.L.R. 46 Mad. 574.
3. (1946) 1 M.L.J. 179.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

R. Srinivasan and others .. *Petitioners**

v.

The Andhra Bank, Ltd., having its Head Office at Masulipatam .. *Respondent.*

Civil Procedure Code (V of 1908), *Order* 21, *rule* 66 (2) (e) *and* (f) *(Madras)—Sale proclamation—Market value—Court, if bound to mention its own valuation.*

It is not obligatory upon the executing Court to embark upon an enquiry regarding the value of the property to be sold and insert such value in the proclamation of sale.

Clause (*e*) of Order 21, rule 66 (2), Civil Procedure Code, only requires that the proclamation should contain the value of the property as stated by the decree-holder and judgment-debtor. It cannot be said that in spite of this provision a duty is cast on the Court by clause (*f*) of Order 21, rule 66 (2) to fix its own valuation and to insert it in the sale proclamation. By enacting the new clause (*e*) it should be deemed that the residuary clause (*f*) is intended to cover matters other than the market value.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Trichinopoly, dated 6th March, 1948, in E.P. No. 152 of 1947 in O.S. No. 83 of 1945.

S. Ramachandra Aiyar for Petitioners.

P. Somasundaram for Respondent.

The Court delivered the following

JUDGMENT.—In this petition, preferred against the order of the Sub-Judge of Tiruchirapalli passed under rule 66 of Order 21, Civil Procedure Code, the chief point argued is that the lower Court acted with material irregularity in the exercise of jurisdiction in not fixing a market value for the property that is sought to be sold by the proclamation which was settled in accordance with the above provision of law. The learned Subordinate Judge after appointing a Commissioner to inspect the property and submit a report, regarding the market value of it, did not give a finding of his own about the matter, but directed that the proclamation should contain the statement, that the decree-holder values the first item, about whose price alone there is now any controversy, at Rs. 5,000, defendant 2 one of the judgment-debtors values it at Rs. 40,000, defendant 3 to defendant 5 at Rs. 1,00,000 and that the commissioner estimates the market value at Rs. 39,000. Other relevant facts are also directed to be inserted in the proclamation for sale.

Defendant 3 to defendant 5 now question the propriety of the order of the lower Court on the ground that under Order 21, rule 66 (2) (*f*) the value of the property according to the decision of the Court is a thing which the Court should consider as material for a purchaser to know in order to judge the nature and value of the property intended to be sold.

Mr. S. Ramachandra Aiyar for the petitioners seeks aid for this contention from the decisions of the Privy Council reported in *Saadatmand Khan* v. *Phul Kuar*[1] and *Marudanayagam* v. *Manickavasagam*[2]. In the former case their Lordships laid down that the value of the property of which the sale has to be ordered is a material fact within the meaning of section 287 (*e*) of the Code of 1882 and that a misstatement of the same was a material irregularity in conducting and publishing the sale.

In *Marudanayagam* v. *Manickavasagam*[2], the decision turned upon the misstatement by the decree-holder of prior encumbrances on the properties which resulted in a low valuation of the properties. In both the cases the Judicial Committee had to consider the effect on a sale of property, of a misstatement made by a decree-holder regarding the value of what was intended to be sold.

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* C. R. P. No. 797 of 1948. 6th August, 1948.

1. (1898) L.R. 25 I.A. 146 : I.L.R. 20 All. 412 (P.C.).

2. (1945) 1 M.L.J. 229 : L.R. 72 I.A. 104 : I.L.R. (1945) Mad. 601 (P.C.).

Explaining the dictum of the Privy Council in *Saadatmand Khan* v. *Phul Kuar*[1], the learned Judges in *Thiruvengadasami Aiyangar* v. *Govindasami Udayar*[2], expressed the view that the Court itself is under no obligation to fix in the proclamation of sale its own valuation of the property to be sold. This decision considers not only the Privy Council judgment in *Saadatmand Khan* v. *Phul Kuar*[1], but other cases of various High Courts as well. The opinion of the learned Judges in *Thiruvengadasami Aiyangar* v. *Govindasami Udayar*[2] has been statutorily accepted by the insertion in 1936 of a new clause in Order 21, rule 66 (2) (*e*) to the effect that the proclamation should contain the value of the property as stated by the decree-holder and the judgment-debtor.

The petitioners' counsel contends that in spite of this specific clause (*e*), it is incumbent upon the Court to undertake an enquiry about the value of the property, come to a decision about it after taking such evidence as is found necessary and then insert that in the proclamation of sale and this duty is cast upon the executing Court because of clause (*f*) of Order 21, rule 66 (2). It seems to me that this argument is fallacious and unacceptable. In so far as one of the necessary requisites of a sale proclamation, *viz*., the value of the property, is concerned there is a specific clause regarding what the proclamation should contain and that is clause (*e*). Clause (*f*) cannot be reasonably construed as including within its ambit any statement about the Court's view about the market value. By enacting the new clause (*e*) it should be deemed that the residuary clause (*f*) is intended to cover matters other than the market value. This does not prevent the Court, if it thinks necessary, from including the market value as decided by it. Neither of the Privy Council decisions relied on by Mr. S. Ramachandra Aiyar makes it obligatory upon the executing Court to embark upon an enquiry regarding the value of the property and insert such value in the proclamation. In fact the Lahore High Court had amended Order 21, rule 66 by adding a sub-clause that it shall not be necessary for the Court to give its own estimate of the value of the property. Our own amendment also by implication means the same.

Moreover in settling a sale proclamation, the Court is ordinarily functioning in its administrative capacity except where a final decision regarding the rights of the parties is given. Such being the case, in my opinion, the lower Court was justified in the direction it gave and the civil revision petition is dismissed with costs.

V.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MACK.

Sudarsana Venkatacharyulu and others .. *Petitioners**

v.

Sri Venugopalaswami Varu situate in Georgepet, represented by the trustees Garlapati Venkataramayya and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 33, rule 5—Application to sue in forma pauperis*—Objection as to pecuniary jurisdiction—If should be determined before leave is granted.*

An objection to pecuniary jurisdiction need not be determined before permission to sue *in forma pauperis* is granted as it does not come within the scope of Order 33, rule 5 of the Code of Civil Procedure as one of the grounds on which an application for permission to sue *in forma pauperis* may be rejected.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the orders of the Court of the Subordinate Judge of Coconada, dated 4th March, 1947, in O.P. No. 22 of 1945.

B. V. Subrahmanyam for Petitioners.

D. Narasaraju and *K. B. Krishnamurthi* for Respondents.

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1. (1898) L.R. 25 I.A. 146 : I.L.R. 20 All. 412 (P.C.).
2. (1927) 55 M.L.J. 363 : I.L.R. 51 Mad. 655.

*C. R. P. No. 762 of 1947. 30th July, 1948.

The Court delivered the following

JUDGMENT.—The order of the learned Subordinate Judge is in accordance with existing practice and is correct. An objection to his pecuniary jurisdiction need not be determined before permission to sue *in forma pauperis* is granted. It does not come within the scope of Order 33, rule (5) of the Civil Procedure Code—as one of the grounds on which an application for permission to sue *in forma pauperis* may be rejected. The petition is dismissed with costs. Advocate's fee Rs. 35.

V.P.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE GOVINDA MENON.

Harichandran Pagadai .. *Petitioner**

v.

Thangaswami Nadar .. *Respondent.*

Criminal Procedure Code (V of 1898), sections 248 and 345—Complaint under section 323, Indian Penal Code and section 24 of the Cattle Trespass Act—Statement by complainant that matters relating to offence under section 323, Indian Penal Code, compromised and that he had no witnesses to prove complaint as regards offence under section 24, Cattle Trespass Act—Effect—Resiling from statement so made—Permissibility.

The complainant in a complaint under section 323, Indian Penal Code and section 24 of the Cattle Trespass Act filed a petition stating that he had compromised the matter relating to the offence under section 323, Indian Penal Code and that with regard to the offence under section 24, Cattle Trespass Act, he had no witnesses to prove his complaint. On the next adjourned date the complaint resiled from his previous petition and wanted to proceed with the case.

Held, that the complaint under section 323, Indian Penal Code, was compounded. Though there can be no question of compounding the case under section 24 of the Cattle Trespass Act, the petition should be deemed to be one under section 248, Criminal Procedure Code, by which the charge under section 24 of the Cattle Trespass Act was withdrawn by the complainant for which the Court gave permission.

When a litigant files an application in Court stating that he has withdrawn his complaint against his opposite party and for some reason or other the Court is not able to pass orders immediately, it is not open to that litigant later on to come forward and plead that he has changed his mind and that the previous petition should not be acted upon.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1899, praying that the High Court will be pleased to revise the order of the Court of the Stationary Sub-Magistrate of Tiruchendur, dated the 6th day of May, 1947, and made in C. C. No. 353 of 1947.

U. Somasundaram for Petitioner.

J. S. Vedamanikkam for Respondent.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—This is an application to revise the order of the Sub-Magistrate acquitting the respondent of offences under section 323 of the Indian Penal Code and section 24 of the Cattle Trespass Act. After the complaint was registered and the accused appeared in the Court on the 2nd May, 1947, the complainant filed a petition in Court stating that he had compromised the matter relating to the offence under section 323 of the Indian Penal Code and that with regard to the offence under section 24 of the Cattle Trespass Act he has no witnesses to prove his complaint. The petition was adjourned to some later date and on that adjourned date the complainant resiled from his previous petition and wanted to proceed with the case. The learned Judge found that the complainant had compounded the case so far as the offence under section 323 of the Indian Penal Code was concerned, and had withdrawn the case under section 248 of the Criminal Procedure Code so far as the offence under section 24 of the Cattle Trespass Act was concerned.

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* Crl. R. C. No. 885 of 1947. (Crl. M. P. No. 775 of 1947). 23rd January, 1948.

In revision Mr. Somasundaram contends that section 24 of the Cattle Trespass Act is not one of the offences mentioned in section 345 of the Criminal Procedure Code and that such an offence cannot be compounded even with the permission of the Court. I agree with that contention because section 24 of the Cattle Trespass Act is not one of those sections mentioned in section 345 of the Criminal Procedure Code and therefore the question of compounding the case under section 24 does not exist any longer. The complaint under section 323 was rightly compounded.

With regard to the offence under section 24 of the Cattle Trespass Act, I am inclined to treat his application as one by which the matter had already been withdrawn. When a litigant files an application in Court stating that he has withdrawn his complaint against his opposite party and for some reason or other the Court is not able to pass orders immediately, it is not open to that litigant later on to come forward and plead that he has changed his mind and that the previous petition should not be acted upon. Therefore the petition dated 2nd May, 1947, should be deemed to be one made under section 248 of the Criminal Procedure Code by which the charge under section 24 of the Cattle Trespass Act was withdrawn by the petitioner for which the Court, after being satisfied that it is a fit case for withdrawal, gave permission.

In these circumstances and especially in view of his statement that he has no witnesses to prove the offence, I am not inclined to interfere in revision. This petition is dismissed.

V.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN.

Chekka Appa Rao .. *Petitioner.**

Madras General Sales Tax Act (IX of 1939), sections 15 (b) and 16-A (as amended by Act XXV of 1947)—Failure to pay tax due under law as it stood before amendment—Prosecution—Sustainability—Validity of assessment—If can be gone into by the Court.

The offence with which the petitioner was charged was failure to pay the tax due under the law as it stood before the complaint was lodged on 4th May, 1947. The amended section 15 (*b*) of the Madras General Sales Tax Act, made punishable the failure to pay the tax assessed, not failure to pay the tax due. In the absence of any provision in the Amending Act to make that definition as amended in section 15 (*b*) applicable to acts committed prior to that enactment, the Court will have to investigate whether the accused was guilty of the offence with which he was charged, *i.e.*, failure to pay the tax *due* under section 15 (*b*) of the Act as it stood before it was amended. The expression " due " can only be interpreted to mean " lawfully due." Section 16-A cannot be construed independently of the amended section 15 (*b*) both of which came into effect on 1st January, 1948, long after the alleged commission of the offence with which the petitioner (accused) was charged.

As the Magistrate has to consider in the present case whether the offence with which the accused was charged, *viz.*, failure to pay the tax due, was committed, it is fully open to the accused to prove that the tax was not lawfully due and that no offence was thereby committed. It cannot be said that section 16-A barred the investigation of the validity of the tax assessed.

Decision of Govinda Menon, J., in Cr. R C. No. 183 of 1947, considered and not followed.

Decision of Rajamannar, J., in Crl. R. C. Nos. 1257, 1258 and 1259 of 1946, relied on.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the Additional First Class Magistrate, Tanuku, dated 28th June, 1948, in C. C. No. 136 of 1948.

N. Subrahmaniam for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—The charge against the petitioner was under section 15 (*b*) of the General Sales Act, Madras Act IX of 1939, that he failed to pay the tax due from

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* Crl. R. C. No. 877 of 1948. 29th September, 1948.
(Crl. R. P. No. 826 of 1948).

him within the time allowed. The complaint was preferred on 4th May 1947, and the offence alleged to have been committed by the petitioner was anterior to the enactment of section 16-A of the Amended Act. Section 16-A came into operation on 1st January, 1948. It is really unnecessary to decide whether any vested right is taken away even if section 16-A is to be given retrospective effect. The offence with which the petitioner was charged was failure to pay the tax due under the law as it stood before the complaint was launched on 4th May, 1947. The Amending Act XXV of 1947 amended section 15 (*b*) also, and the offence that was made punishable under the Amended Act was failure to pay the tax *assessed*, not failure to pay the tax *due*. Quite obviously, in the absence of any specific provision in the Amending Act to make that definition amended in section 15 (*b*) applicable to acts committed prior to that enactment, the Court will have to investigate whether the accused was guilty of the offence with which he was charged, *i.e.*, failure to pay the *tax due* under section 15 (*b*) of the Act, as it stood before it was amended.

The next question is whether section 16-A of the Amended Act bars the criminal Court from going into the question whether the tax was due. Here again the prosecution will have to prove that the accused is guilty of the offence with which he was charged, *i.e.*, that he failed to pay the tax *due* from him. The expression "due" can only be interpreted to mean "lawfully due". Section 16-A cannot be construed independently of the amended section 15 (*b*), both of which came into effect long after the alleged commission of the offence with which the petitioner accused was charged. The view of the learned Magistrate that section 16-A barred the investigation of the validity of the tax assessed cannot be sustained.

Except in one case, Crl. R.C. No. 183 of 1947, unreported, decided by Govinda Menon, J., it has been consistently held by this Court that the validity of the assessment can be gone into by a criminal Court in deciding whether any offence punishable under section 15 (*b*), as it stood before the amendment, was committed. It is only necessary to refer to the latest of these decisions of Rajamannar, J., as he then was, Crl. R. C. Nos. 1257, 1258 and 1259 of 1946 (unreported). On a perusal of the order of the Govinda Menon, J., in Crl. R. C. No. 183 of 1947, I think the difference is more apparent than real. The learned Judge did not hold that the finality he referred to was really final. The learned Judge observed "the accused can dispute the correctness of the amount levied but he has not done so here." If the finality was not so final as to preclude a dispute about the correctness of the amount levied, I am really unable to understand how the other "disputes" about the correctness of the levy including its validity can be excluded from investigation. The same learned Judge Govinda Menon, J., in *Narasingamuthu Chettiar* v. *King*[1], went elaborately into the question of burden of proof in cases arising under section 15 (*a*) of the General Sales Tax Act. If the accused cannot be permitted to raise the question of the validity of the assessment, the investigation of the question of onus of proof cannot arise. Taking the decision in Crl. R. C. No. 183 of 1947 with reference to the facts of that case and with reference to the views the same learned Judge expressed in *Narasingamuthu Chettiar* v. *King*[1], I think the learned Judge had no real intention of departing from the principles laid down in the series of decisions I have referred to above ending with that of Rajamannar, J., as he then was in Crl. R. C. Nos. 1257, 1258 and 1259 of 1946, I have therefore considered it unnecessary to refer this question to a Bench for decision.

Following the trend of cases decided in this Court—and the decisions as I have pointed out have been consistent on the point—I hold that as the offence was alleged to have been committed prior to 1st January, 1948, when the Amending Act came into force, what the learned Magistrate had to decide was whether the offence with which the accused was charged, *viz.*, failure to pay the tax due, was committed ; and before that question can be decided, it is fully open to the accused

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1. (1948) 2 M.L.J. 93.

to prove that the tax was not lawfully due and that no offence was therefore committed.

The petition is allowed. The learned Magistrate will dispose of the case in the light of the observations of this judgment.

K.S. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN.

Manicka Goundan .. *Petitioner**

v.

Krishna Goundan .. *Respondent.*

Civil Procedure Code (V of 1908), *Order* 5, *rule* 19 *and Order* 9, *rule* 13—Ex parte *decree—Duty of Court to record finding that summons has been duly served—Application under Order* 9, *rule* 13—*If bars right to have the decree set aside in revision.*

The only material on which a Court could come to a conclusion that a summons has been duly served is the endorsement verified on oath on the summons itself, and the Court is not entitled to proceed with the inquiry *ex parte* and pass a decree without an order that the defendant had been duly served.

The filing of an application under Order 9, rule 13 of the Code does not take away the right of the defendant to have the *ex parte* decree set aside in revision especially when he had filed a revision petition against the order dismissing his petition under Order 9, rule 13.

Badvel Chinna Asethu v. *Vattipalli Kesavayya*, (1920) 39 M.L.J. 697, distinguished.

Petition under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the decree of the Court of the Subordinate Judge of Vellore dated 5th March, 1947, in S. C. S. No. 4 of 1947, etc.

A. Seshachari and *A. Srinivasan* for Petitioner.

A. V. Viswanatha Sastri for Respondent.

The Court delivered the following

JUDGMENT.—These petitions arise out of a suit instituted on the small causes side of the Court of the Subordinate Judge of Vellore for the recovery of a sum, which the plaintiff alleged he had advanced as a loan to the defendant. The suit itself was filed on 24th February, 1947. On the application of the plaintiff, suggesting that a short interval should suffice for effecting service of summons on the defendant, the suit was posted to 5th March, 1947, and summons were ordered to issue to the defendant. On 5th March, 1947, the defendant was not present, and the plaintiff's suit was decreed *ex parte*. From the original of the summons returned to the Court it would appear that the summons was tendered to the defendant on 26th February, 1947, and that he refused to accept the same. The endorsement on the summons was dated 6th March, 1947, and it was apparently only subsequent to 6th March, 1947, that the served copy of the summons with the endorsement of the process server and the earlier one of the village munsiff was sent to the Court. But on 5th March, 1947, itself the suit was decreed *ex parte*. The defendant filed I. A. No. 365 of 1947 under Order 9, rule 13 of the Civil Procedure Code to set aside the decree that had been passed *ex parte*. Security had to be furnished and there was a delay of one day in putting into Court the fair bond. In I. A. No. 551 of 1947 the defendant asked the Court to condone the delay. That petition was dismissed. As a result of that I. A. No. 365 of 1947 was also dismissed. Against the decree passed *ex parte* C. R. P. No. 1337 of 1947 was filed. Against the orders on the Interlocutory applications, C. R. P. Nos. 387 of 1948 and 388 of 1948 were also filed.

Order 5, rule 19 of the Civil Procedure Code runs :

"Where a summons is returned under rule 17, the Court shall, if the return . . . . has been so verified . . . . . either declare that the summons has been duly served or order such service as it thinks fit."

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* C. R. Ps. Nos. 1337 of 1947 and 387 & 388 of 1948. 16th September, 1948.

In this case the notes paper of the learned Subordinate Judge shows an entry, apparently recorded by his bench clerk, " Defendant refused. Affixed. Sufficient. Call on." Whether the learned Subordinate Judge approved of that record it is not possible for me to decide. Below that a summary of P.W. 1's examination was recorded and the order of the learned Subordinate Judge decreeing the suit *ex parte* was also recorded. Even if the learned Subordinate Judge is to be held to have decided that service was sufficient, such an order could not possibly be maintained in view of the provisions of Order 5, rule 19 of the Civil Procedure Code. The only material on which the learned Subordinate Judge could have come to a conclusion, that the summons had been duly served, was the endorsement verified on oath on the summons itself, that summons having been returned to Court prior in point of time to the order that the defendant had been duly served. The summons having been returned only on 6th March, 1947, the learned Subordinate Judge could not have been in a position on 5th March, 1947, to comply with the provisions of Order 5, rule 19 of the Civil Procedure Code ; nor could he have been in a position to pass a valid order that the defendant had been duly served. That the returned summons purported to bear an endorsement, that summons had been tendered and refused even on 26th February, 1947, in no way affects the question at issue, whether the Court could, on the material before it on 5th March, 1947, come to the conclusion, that the defendant had been duly served. As the Court had no such basis, the Court was not entitled to proceed with the enquiry *ex parte* the defendant. The decree passed in such circumstances on 5th March, 1947, is certainly tainted with illegality and has to be set aside under section 25 of the Provincial Small Causes Courts Act.

The learned advocate for the respondent relied on *Badvel Chinna Asethu* v. *Vattipalli Kesavayya*[1] and urged that an application for the revision of the decree itself was not competent, as the defendant had availed himself of an alternative remedy by applying under Order 9, rule 13 of the Civil Procedure Code, to set aside the decree that had been passed *ex parte*. What was held in *Badvel Chinna Asethu* v. *Vattipalli Kesavayya*[1] was :

> " Where an application under Order 9, rule 13, Civil Procedure Code, to set aside an *ex parte* decree was made to the Court of first instance and rejected and the order rejecting the application was not contested by way of appeal from that order, it was not open to the defendant in the appeal against the *ex parte* decree to object to the decree on any of the grounds mentioned in Order 9, rule 13 of the Civil Procedure Code."

No doubt, the objector would be on a much stronger ground where it is an application for revision and not an appeal. Normally this Court would be reluctant to interfere in revision where an alternative remedy is provided by law, and particularly so where such a remedy has been availed of. But against the order rejecting the defendant's application under Order 9, rule 13, Civil Procedure Code, a petition has been filed to revise it, so that order of the Court of first instance has not become final. That should suffice to distinguish the facts of this case from those the learned Judges had to consider in *Badvel Chinna Asethu* v. *Vattipalli Kesavayya*[1]. One other point may be of interest. The principal ground on which the petitioner relied was that the summons was returned to court only on 6th March, 1947 and not before 5th March, 1947. That particular question was not presented for adjudication in the application, the petitioner filed under Order 9, rule 13, Civil Procedure Code. Apparently that fact came to the knowledge of the petitioner only subsequent to the institution of C.R.P. No. 1337 of 1947.

To retiterate, the Court should not have passed a decree *ex parte* on 5th March, 1947, before the Court had a sufficient legal basis to decide that the defendant had been duly served. As I have pointed out the subsequent intervention on an application under Order 9, rule 13 of the Civil Procedure Code in no way affects the petitioner's right in this case to have the decree wrongly passed *ex parte* set aside in revision.

1. (1920) 39 M.L.J. 697.

C. R. P. No. 1337 of 1947 is allowed, and the decree of the lower Court is set aside and the suit is remanded for disposal afresh. The defendant should be given at least 15 days' time from the date on which the suit is restored to file within which to file his written statement if he chooses to do so. Of course, all the defences open to him he will be entitled to put forward in such a written statement. The costs of the Civil Revision Petition will abide the result of the small cause suit.

In view of the order passed on C. R. P. No. 1337 of 1947, C. R. P. Nos. 387 and 388 of 1948 do not arise for consideration. These petitions are struck off. There will be no order as to costs in these two revision petitions.

V.P.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN.

K. E. M. Muhammad Ibrahim Maricar and others .. *Petitioners**

v.

O. S. M. Ahmed Maricar .. *Respondent.*

Civil Procedure Code (*V of* 1908), *Order* 8—*Additional written statement—Plea inconsistent with pleas in the original written statement—If can be allowed.*

The plea in a proposed additional written statement was that the defendant's father was a partner with the plaintiff, whereas in the original written statement it was that the defendant himself was the partner of the plaintiff. On a question whether the amendment should be allowed,

Held, such a plea can be allowed even if it is inconsistent with the original plea as if both the pleas had been put forward in the original written statement that would have been legally permissible and the Court would have been called upon to investigate them. All that the Court has to consider is whether it is expedient to permit the raising of the plea at the particular stage.

Vava Rowther v. *Sulaiman Rowther*, (1929) 32 L.W. 61, followed.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the judgment and order of the Subordinate Judge's Court of Cuddalore, dated 17th September, 1947, in I. A. No. 346 of 1947 in O. S. No. 18 of 1946.

K. E. Rajagopalachari for Petitioners.

K. C. Subramaniam Chettiar for Respondent.

The Court delivered the following

JUDGMENT.—The learned Subordinate Judge refused permission to file an additional written statement with a fresh plea mainly on the ground, that the proposed additional plea was inconsistent with the pleas already set out in the written statement. The substantial line of defence chalked out in the original written statement was that the first defendant was a partner of the plaintiff. The plea in the proposed additional written statement was that it was the first defendant's father, Muhammad Sultan Maricair, that was the partner. The decision in *Vava Rowther* v. *Sulaiman Rowther*[1] should suffice to hold that even if the plea is an inconsistent one, there is no legal bar to a consideration of such a plea. If both the pleas had been put forward in the written statement as originally filed, that would have been legally permissible, and the Court would have been called upon to investigate both the pleas, subject, of course, to the provisions of Order 6, rule 16 of the Civil Procedure Code, despite the fact that they were inconsistent pleas. Therefore the only question to consider, when an apparently inconsistent plea is put forward in an additional written statement is, whether it is expedient with reference to the circumstances of the case to permit such a plea being put forward at that stage. The suit has not come up for trial though it has been pending for some time. I am unable to see how the proposed additional plea, though inconsistent, would

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* C. R. P. No. 1444 of 1947. 16th September, 1948.

1. (1929) 32 L.W. 61.

embarrass the trial of the suit. The plaintiff would have to make out that he was the sole owner of the Panruti business. If the defendants are able to show whoever might be the partners the business was not the sole business of the plaintiff, that should suffice to non-suit the plaintiff in the action as he has framed it.

No doubt, as early as June, 1945, the admission on which the petitioners-defendants relied was made by the plaintiff in other proceedings. The first defendant waited for those proceedings to terminate before coming forward with his request for an additional written statement. There was delay, but that delay can be adequately compensated by award of costs.

The revision petition is allowed ; the order of the lower Court is set aside ; and the petitioner first defendant will be allowed to file the additional written statement on condition he deposits into Court within three weeks from this date a sum of Rs. 100 to be paid over to the plaintiff independent of the ultimate result of the litigation. The parties to these proceedings will bear their respective costs in both the Courts.

V.P.S. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

A. Ramachandra Naidu .. *Petitioner**

v.

Kandaswami Mudaliar .. *Respondent.*

Civil Procedure Code (V of 1908), *Order* 6, *rule* 17—*Plaint—Amendment—Permissibility—Plea of limitation intended to be got over—Amendment with a view to cure a defect—Statutory notice under section* 80, *Civil Procedure Code, not given—Refusal of amendment—If justified.*

The plaintiff whose father and brothers were alive brought a suit against the defendant, a village munsiff for recovery of damages to certain sugarcane crop during the period of its attachment by the village munsiff for non-payment of kist and for damages for personal reputation and mental suffering of the plaintiff caused by the attachment. The suit was filed in 1946 while the attachment which was effected in April 1945 had ceased in May 1945. The plaintiff filed an amendment petition in July 1947 praying to amend the plaint by describing himself as the manager of the joint family consisting of himself, his father and brothers instead of the suit being brought in his own personal capacity as plaintiff. It was shown that if the amendment were allowed it would amount to allowing a suit by the manager of the joint family which would have become barred by that date. It was also shown that the plaintiff had not sent the requisite notice under section 80, Civil Procedure Code, as manager.

Held, that the amendment should be refused as the object of the plaintiff was not merely to describe himself more fully and correctly, but to obviate the defendant's plea that the plaintiff, not being the pattadar, was not entitled to maintain the suit.

Held further, that the notice could not be construed as one by the manager of the joint family, and that the omission to give a proper notice could be treated as an additional ground for refusing the amendment prayed for.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the District Munsiff of Tirupattur, dated 25th August, 1947, in I. A. No. 657 of 1947, in O. S. No. 170 of 1946.

D. Munikanniah for Petitioner.

V. T. Rangaswami Aiyangar and *K. Kalyanasundaram* for Respondent.

The Court delivered the following

JUDGMENT.—The facts are briefly these. The plaintiff, whose father and brothers are alive, brought a suit against the defendant, a village munsiff, for recovering Rs. 2,000 as damages consisting of Rs. 500, the estimated damages to sugarcane crop during the period of its attachment by the village munsiff for non-payment of kist, and Rs. 1,500, damages for personal reputation and mental suffering of the plaintiff caused by the attachment. The suit itself was filed in 1946, the attachment in question having been effected in April, 1945, and having ceased about May 1945. The plaintiff filed an amendment petition on 26th July, 1947, praying to amend the plaint by describing himself as the manager of the joint

* C. R. P. No. 1518 of 1947. 10th September, 1948.

family consisting of himself, his father and brothers instead of the suit being brought only in his own personal capacity as plaintiff. The learned District Munsiff dismissed the amendment petition, holding that, if the amendment were allowed, it would amount to allowing a suit by the manager of the joint family which would have become normally barred in May 1947, to be filed on 26th July, 1947, and kept alive illegally. This petition is against that dismissal.

The lower Court committed no error in law in dismissing the petition. The learned counsel for the petitioner urged that really a suit by a person like the plaintiff, who happened to be the manager of the joint family at the time he filed the suit, would be a suit filed by him as manager, whether he described himself like that or not, as in the ordinary case of a Hindu family manager suing on a promissory note or even on a sale deed, that no question of limitation, or a fresh cause of action, would arise, and that the plaintiff's only intention in filing the amendment petition was to describe himself more fully and correctly, and to have an issue framed regarding his being the family manager or not on the date of the suit, and not to enlarge the scope of the claim in the suit or to defeat any limitation right accruing to the defendant. The short answer to this is, that if there was nothing else intended by the plaintiff by the amendment than to describe himself more fully and correctly, he can do so even in his own deposition, and I do not apprehend that the lower Court will prevent him from describing himself as he pleases subject to cross-examination. So, the amendment is virtually unnecessary, in that view. But my own feeling is that the real idea behind the amendment is to prevent the defendant from contending that the plaintiff had no right to sue, he being not the pattadar or the joint family manager, and that even if he had a right to sue, his damages, if any, would be restricted to the damages of one co-parcener among many. It was urged by the learned counsel for the petitioner that the plaintiff did not dream of asking for a pie more than the damages of Rs. 2,000 which he had originally asked for. Here again we must remember that an enlargement of the scope of a plaint need not necessarily mean asking for more, and that retaining what one has asked for, when one will be entitled to less, will also amount to an enlargement.

A further complication is introduced in this matter by the fact that the defendant is a village munsiff who can be sued only after issuing a notice under section 80 of the Civil Procedure Code. Such a notice was in fact issued by the plaintiff to the defendant on 1st February, 1946, without describing himself as the joint family manager and without claiming damages to the sugarcane crop as the damages done to the sugarcane crop of all the coparceners, and the damages to the reputation as the damages to the reputation of the manager of a big Hindu joint family. Several rulings, for example, *Bhagchand Dagdusa* v. *Secretary of State for India*[1] have held that where a notice under section 80 of the Civil Procedure Code has to be given it must be strictly in conformity with the provisions of section 80 without any material alteration of the judicial capacity of the person suing, or the relief claimed, or the other incidental circumstances. It is obvious that a notice issued by a person in his own name cannot be said to be the same as a notice issued by that person as the manager of a Hindu joint family, for the purpose of section 80, whatever weight it may have in a decree in a suit. No doubt, the lower Court has not urged this somewhat formidable objection to the amendment in its order as the learned counsel for the petitioner has urged before me. But that will not prevent this Court from taking notice of that fact when it is admitted on both sides that a notice under section 80, Civil Procedure Code, was required in this case and was issued by the plaintiff to defendant on 1st February, 1946. The learned counsel for the petitioner urged that that notice must be construed as a notice by the plaintiff as a joint family member, and, therefore, required no further notice, a contention with which I am wholly unable to agree. It follows that this petition deserves to be dismissed. It is accordingly dismissed with costs.

B.V.V. — *Petition dismissed.*

1. (1927) 53 M.L.J. 81 : L.R. 54 I.A. 338 : I.L.R. 51 Bom. 725 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Mikkilineni Raghavayya .. *Appellant**

v.

Mikkilineni Rangamma and another .. *Respondents.*

Decree—Construction—Compromise decree in suit by wife against husband—Provision for maintenance in case wife left her husband—Subsequent living with husband—Claim for maintenance—Whether lost—Wife living separately from husband—Revival of right to claim maintenance.

The wife brought a suit against her husband for recovery of some property which he had conveyed to her by gift and in the alternative for a half-share in some larger property. That suit was compromised and according to the terms of it the wife was to get the property claimed in the suit if she came back and continued to live with her husband. If she was unable to live with him she was to forfeit her right to the property itself, but she was to be given for her maintenance a certain quantity of paddy every year. It appeared that she had returned to her husband subsequently, but later on she once again separated from him and claimed maintenance.

Held, that the wife was entitled to recover the maintenance as provided in the decree notwithstanding the fact that she had temporarily lived with her husband during the interval.

Appeal against the order of the Court of the Subordinate Judge, Tenali, dated 26th February, 1946, in A. S. No 1 of 1946, preferred against the order of the Court of the District Munsiff, Repalle, dated 3rd September, 1945, in E. P. No. 257 of 1944, in O. S. No. 44 of 1935, District Munsiff Court, Tenali.

Ch. Raghava Rao for Appellant.

M. S. Ramachandra Rao for Respondents.

The Court delivered the following

JUDGMENT.—The appellant and the first respondent are husband and wife. She brought a suit against him for some property which he had conveyed to her by gift, and in the alternative for a half share in some larger property. That suit was compromised ; and according to the terms of it, the wife was to get the property that she had claimed in the suit (the B schedule property) if she came back and continued to live with her husband. If she was unable to live with him, she was to forfeit her right to the property itself ; but she was to be given for her maintenance 7 salakas of paddy a year. According to the husband's evidence, she came back to him three times ; but she would not admit returning more than once. The argument on behalf of the husband, which was accepted by the learned District Munsiff, was that since she had returned a second time, she had forfeited her right under the compromise decree. In appeal, the learned Subordinate Judge distinguished the cases relied on by the husband and held that she had not lost her right. He accordingly allowed the appeal and remanded the execution proceedings to the executing Court for taking further steps.

In both the Courts below the cases cited by the counsel on both sides related to maintenance suits where cruelty by the husband was alleged. It has been held in many cases that where a maintenance decree has been passed and the wife resumes cohabitation with the husband, her right to execute the decree has been lost, and that her only remedy in case of any fresh cruelty which necessitates her living apart from her husband is by way of a fresh suit. The learned counsel for the wife relied on some other cases in which the above cases were distinguished. It seems to me that these cases are not at all relevant to the matter under consideration. We are not here concerned with the wife's right to maintenance under the Hindu Law. She brought a suit for a specific item of property to which she claimed title ; and in the compromise resulting out of the suit she was given that property in one contingency and maintenance in another. So such right of maintenance as she has under the decree arose out of the contract embodied in the decree, which she cannot lose unless there is some provision in the contract for a forfeiture of that right.

* A. A. A. O. No. 323 of 1946. 15th September, 1948.

It has been argued that the plaintiff could return only once, and that if she left him after that, she would not be entitled to any maintenance. I am unable to find such a provision, for the relevant clause is :

"that in case after the plaintiff joins the first defendant . . . . . . the plaintiff has to live separately, the first defendant should pay maintenance to the plaintiff."

Finally, it has been argued that the plaintiff has not made out that she had to live apart from her husband, because she was unable to get on with him. Although the original Telugu does suggest that they should live separately only if they were unable to live together ; yet there can be little doubt in the circumstances of this case, where the parties had always great difficulty in getting on together, that the reason why the wife left the husband was that she was unable to live with him. She obviously tried to live with him and returned to him three times, presumably on the pressure, or at the suggestion, of relatives and well-wishers of both parties ; and if she finally left him and did not return, it must have been because she felt that she could no longer live with him. I therefore see no reason why the plaintiff should not receive the maintenance. It is no doubt true that she cannot continually return to the husband, live with him for a time, and then depart again. She was however presumably welcomed by her husband when she returned, or she would not have remained as long as she did. If the husband does not want her to come back and make further experiments in leading a conjugal life, he can easily stop her from returning. It is moreover unlikely after this litigation that she will make any further attempts to return to him.

The appeal is dismissed with the costs of the first respondent.

B.V.V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO.

J. F. Mathias .. *Petitioner.**

Motor Vehicles Act (IV of 1939), section 87 (1) (a)—Police officer signalling to stop vehicle—Failure to stop—Proof that police officer was in uniform—Necessity.

Where a motor cyclist was prosecuted for a violation of section 87 (1) (*a*) of the Motor Vehicles Act in that he failed to stop the vehicle when a stop signal was given by a police officer :

Held, it was the duty of the prosecution to adduce evidence to establish that the police officer concerned was in uniform at the time when the alleged offence was committed. The Legislature had purposely added the words in "uniform" in the 1939 Act. It is not permissible to ignore that ingredient of the offence. In the absence of proof that the officer was in uniform it has to be held that the offence has not been proved to have been committed.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the Sub-Divisional Magistrate of Mangalore, dated 14th November, 1947, in C. A. No. 57 of 1947, preferred against the judgment of the Court of the Stationary Sub-Magistrate, Mangalore, in C. C. No. 737 of 1947.

M. Santosh for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—The charge against the accused was that he on 20th June, 1947, at about 9-15 A.M., when he was riding his motor cycle M.D.X. 82 on the public road from Maidan road towards Balmatta side failed to stop the vehicle at the Hampankutta beat point No. 3 when a stop signal was given by a police officer in uniform at that traffic point thereby violating section 87 (1) (*a*) of the Motor Vehicles Act. The Stationary Sub-Magistrate believed the evidence of the police constable and convicted the accused under the said section and fined him a sum of five rupees. I have no reason to disbelieve the evidence of P. W. 1.

* Crl. R. C. No. 198 of 1948. (Crl. R. P. No. 189 of 1948). 17th September, 1948.

Mr. Santosh raised a point for the first time that the prosecution did not establish by evidence one of the important ingredients of the section, namely, that the police officer was in uniform at the time the offence is alleged to have been committed.

Section 87 (1) (*a*) of the Motor Vehicles Act, 1939, reads as follows :

"The driver of a motor vehicle shall cause the vehicle to stop and remain stationary so long as may reasonably be necessary (*a*) when required to do so by any police officer in uniform."

Section 4 of the Indian Motor Vehicles Act (VIII of 1914) reads as follows :

"The person in charge of a motor vehicle shall cause the vehicle to stop and to remain so long as may reasonably be necessary (*a*) when required to do by any police officer for the purpose of regulating traffic or of ascertaining his name and address with a view to prosecuting such person under this Act or for any purpose connected with the enforcement of the provisions of this Act or the rules thereunder."

It will therefore be seen that the Legislature purposely added in the amending Act the words "in uniform." It is not permissible to ignore that ingredient of the offence. It is the duty of the prosecution to adduce evidence to establish that the police officer concerned was in uniform at the time when the alleged offence was committed. In this case that evidence is not forthcoming, though in the charge it was stated, that the police officer was in uniform. This is a very important defect in the prosecution case. I therefore hold that the prosecution did not prove that the accused committed the offence within the meaning of section 87 (1) (*a*) of the Motor Vehicles Act. The revision petition is allowed and the conviction and sentence of the petitioner are set aside.

V.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE YAHYA ALI.

The Commissioner of Income-tax, Madras .. *Applicant**

v.

Messrs. Siddareddy Venkatasubba Reddy and Bros., Gudur .. *Respondents.*

Income-tax Act (XI of 1922), *section* 10 (2)—*Business of winning and selling mica—Money expended for the acquisition of mining rights in different plots of land for varying periods—Nature of expenditure—If allowable as a deduction under section* 10 (2).

Moneys expended for the acquisition of mining rights in different plots of land for varying periods by an assessee carrying on the business of winning and selling mica is capital expenditure in respect of which the assessee will not be entitled to any deduction under section 10 (2) of Income-tax Act.

Tests for determining nature of expenditure and the authorities discussed.

Case referred to the High Court by the Income-tax Appellate Tribunal, under section 66 (1) of the Indian Income-tax Act, 1922 (Act XI of 1922) as amended by section 92 of the Income-tax (Amendment) Act, 1939 (Act VII of 1939) in 66 R.A. No. 69 Madras of 1944-45 on its file for decision.

C. S. Rama Rao Sahib for Applicant.

M. Subbaraya Aiyar for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—The question referred to us by the Income-tax Appellate Tribunal for our decision, on the application of the Commissioner of Income-tax, Madras, is as follows :

"Whether the total sum of Rs. 4,090 paid by the respondents in the year 1937-38 under the documents dated 1st March, 1935, 19th May, 1937, 25th February, 1937, and 2nd October, 1936, is allowable as a deduction under section 10 (2) of the Indian Income-tax Act ?"

The respondents are a registered firm carrying on business at Gudur. According to the statement of the case their business was, "to win mica and sell it after refinement." They entered into four agreements in writing, bearing the dates mentioned in the question, with persons who owned certain patta lands in Nellore district,

* Case Referred No. 27 of 1946. 3rd September, 1948.

and who had also obtained what are described as patta land agreements from the Government for mica mining. The four documents relate to different mines, namely, the Kubera mine, the Lakshminarasimha mine, and the Deepadurga mine. The last mine does not appear to have been worked at any time before the dates of the agreements, but in the other two mines, work had been carried on but was suspended at the time of the execution of the agreements relating to them. Under these four documents, the assessees in consideration of payment of sums of money in instalments, were granted the mining rights in the respective mines. The periods for which the assessees were entitled to enjoy the mining rights vary from 5 to 9 years. The assessees claimed a deduction of the amounts paid by them under the four documents above-mentioned under section 10 (2) of the Indian Income-tax Act. Mr. Subbaraya Aiyar, learned counsel, stated to us that the deductions were claimed under clause (*xii*) of that sub-section (now clause *xv*). The amounts, however, were disallowed by the Income-tax Officer on the ground that they were paid for acquiring a right and the expenditure was therefore one of capital nature. On appeal, the Appellate Assistant Commissioner came to the same conclusion, relying upon three decisions of this Court to which reference will be made later. On further appeal, the Appellate Tribunal came to a different conclusion and allowed the amount to be deducted. The ground of the Tribunal's decision can be set out in their own words. They said,

"No doubt, the cases relied upon by the department *prima facie* lead to the conclusion that they are on all fours with the facts of the present case, but we think that those cases can be distinguished from the present one. One important fact about those cases are that a lump sum amount was fixed for the purpose of procuring the right to work a mine in those cases, which sum was allowed to be paid by instalments, whereas in the present case it was merely an annual sum fixed for the use and occupation of the land. Besides, the lessee could always exercise the option of terminating the lease at the end of any particular year by giving three months' notice to the lessor, which clause does not find place in the other leases. In the nature of the business the use and occupation may mean excavation of earth, putting in shafts and all that is necessary for the purpose of mica mining, but that to our mind cannot make the annual sum payable to the landlord, in the circumstances of this case, anything else but rent. We, therefore, allow this sum of Rs. 4,090 as a revenue expenditure."

This view of the Tribunal is challenged by the Commissioner of Income-tax.

The decision of the question referred depends upon the determination of the nature of the payments made by the assessees under the four documents mentioned in the question, whether they are capital expenditure or revenue expenditure. If capital expenditure, the amounts will not be admissible deductions.

There is no definition of "capital expenditure" in the Indian Act. In the English Statute, the phrase "capital expenditure" is not used, but the words used are:

"any capital withdrawn from or any sum employed or intended to be employed as a capital in such trade, business, profession, employment, or vocation."

But these words have always been understood to cover what is called "capital expenditure" in the Indian enactment. In the absence of a definition, attempts have been made in Britain to evolve tests, more or less definite, to be applied for the determination of the nature of a particular expenditure. As pointed out in Halsbury's Laws of England, Vol. 17, section 325:

"It is difficult to lay down a definite series of tests which will cover all cases."

But certain tests may be discovered in the decided cases which can be regarded as sufficiently accurate to form the basis of a working rule. Courts however are more interested in deriving assistance from decided cases on similar or analogous facts and circumstances rather than in an academic statement of a rule of thumb. The following passage from the speech of Lord Macmillon in *Van Den Berghs, Ltd.* v. *Clark*[1], represents the use which can be made of decided cases:

"My Lords, the problem of discriminating between an income receipt and a capital receipt and between an income disbursement and a capital disbursement is one which in recent years has frequently engaged your Lordships' attention. In general the distinction is well recognised and easily applied, but from time to time cases arise where the item lies on the borderline and the task of

1. (1935) A.C. 431 at 438.

assigning it to income or to capital becomes one of much refinement, as the decisions show. The Income-tax Acts nowhere define 'income' any more than they define 'capital'. . . . . . Consequently, it is to the decided cases that one must go in search of light. While each case is found to turn upon its own facts, and no infallible criterion emerges, nevertheless the decisions are useful as illustrations and as affording indications of the kind of considerations which may relevantly be borne in mind in approaching the problem."

We shall first refer to leading decisions of the English Courts, which enunciate principles directly or indirectly applicable to the present case. In the *City of London Contract Corporation, Ltd.* v. *Styles*[1], a deduction was claimed in respect of a portion of the sum paid by a company in purchasing the benefit of certain unexecuted contracts which the company was formed to take over and from executing which their profits were realised. It was contended that though the capital was used to purchase contracts it was used wholly and exclusively for the purposes of the concern. But the deduction was disallowed. Bowen, L.J., said:

" You do not use it ' for the purpose of ' your concern, which means, for the purpose of carrying on your concern, but you use it to acquire the concern."

This case supplies one of the tests often applied, namely, whether the expenditure is for the acquisition of a business or of rights essential to the carrying on of a business.

Another test was laid down by Lord Dunedin as Lord President of the Court of Session in *Vallambarosa Rubber Co., Ltd.* v. *Farmer*[2], namely, that

" capital expenditure is a thing that is going to be spent once, and for all and income expenditure is a thing that is going to recur every year."

But as the learned Lord himself indicated, it was a criterion which was not a bad criterion "in rather a rough way." It was not obviously intended to be a decisive one in every case. This was recognised by Viscount Cave, L.C., in *British Insulated and Helsby Cables, Ltd.* v. *Atherton*[3], the case generally recognised as the leading modern authority on the subject, though as Lord Macmillan points out, Romer, L.J.,

" was unduly optimistic when he said that it placed beyond the realms of controversy the law applicable to the matter."

The facts were these. The appellant company claimed to deduct in the computation of its trade profits a sum which it had provided to form the nucleus of a pension fund for its employees. It was held that the sum ought to be debited to capital and could not be deducted. The Lord Chancellor laid down the test in the following manner:

" But when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital."

The fact that the asset acquired is of a wasting nature cannot be taken into account and will not make any difference in the legal position that the expenditure for acquiring such an asset would be capital expenditure. (See *Alianza Co.* v. *Bell*[4]).

The following instances were given as illustrating the application of the rule, namely, monies expended by a brewing firm with a view to the acquisition of new licensed premises, expenses incurred in transferring a manufacturing business to a new premises, expenditure incurred by a ship building firm in deepening a channel, which had all been held to be in the nature of capital expendture and not to be deductible under the Income-tax Acts. Other illustrations are to be found in the speech of Lord Macmillan in *Van Den Berghs, Ltd.* v. *Clark*[5].

Another test which was adumbrated in *John Smith and Son* v. *Moore*,[6] depends on a differentiation between fixed and circulating capital. But this test has not been found to be helpful. (See *Van Den Berghs, Ltd.* v. *Clark*[5]).

These then are some of the well-established tests applied in English Courts and are tersely summed up in Halsbury's Laws of England, Volume 17, section 325 in the form of a working rule thus:

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1. 2 T.C. 239.
2. (1910) 5 T.C. 529.
3. (1926) A.C. 205.
4. (1904) 2 K.B. 666: (1905) 1 K.B. 184: (1906) A.C. 18.
5. (1935) A.C. 431 at 440 and 443.
6. (1921) 2 A.C. 13.

"Outgoings which result in the acquisition of a fixed capital asset, or which produce an advantage of a permanent and enduring nature are not allowable, but such advantage must be analogous to an asset."

Many cases are found in the reports of Tax Cases in Britain in which in applying the test whether the outgoing was for the acquisition of a business, an exception has been made as regards expenditure incurred for acquiring raw material for the purpose of the manufacturing business of an assessee, which has been held to be of the nature of revenue expenditure. The leading case on this subject is *Golden Horse Shoe (New), Ltd.* v. *Thurgood*[1]. In that case, a company which was formed for the purpose acquired the right to take away and re-treat very large dumps of residual deposits resulting from the working of a gold mine and called "tailings." These "tailings" were known to contain a certain amount of gold and by a new process of treatment some of this gold was recovered and sold. It was held that the amount expended in acquiring these "tailings" was in the nature of revenue expenditure, because it was to acquire the raw material of the company's trade and therefore the cost of the "tailings" was a proper deduction.

In this case, Lord Hanworth, M.R., points out how none of the tests suggested offered a strict rule of guidance and that the case had to be decided upon its own facts. He found that the facts seemed to point to a manufacturing business applied to raw material already "won and gotten." The following observation of his at page 561 is somewhat relevant to the present case:

"If the metaphor of working a mine be applied, it might be said that the purchase of the dumps was a capital outlay."

Romer, L.J., puts the question to be decided thus:

"Are the dumps the raw material of the appellant's business or do they merely provide the means of obtaining that raw material?"

and answers it that in his opinion they are the raw material itself.

Some of the other decisions cited to us in the course of argument by either counsel may be now dealt with. In *Bonner* v. *Basset Mines, Ltd.*[2], a mining company claimed to be allowed as a deduction the cost of deepening a main shaft. But the deduction was not allowed as it was held to be in the nature of a capital expenditure. The decision in this case turned on the evidence as to the nature of the extension of the shaft and having regard to the evidence, it was held that the assessee by lengthening the shaft to a considerable extent had in effect opened up a new mine, so to speak, in the same way as they would have opened up a new mine if they had started a fresh shaft. In *Robert Addie and Sons Collieries, Ltd.* v. *Commissioners of Inland Revenue*[3], under the terms of a mineral lease, a colliery company was obliged to restore to an arable state all ground occupied by it or damaged by its workings, or, at its option, to pay the lessor for all such ground not so restored, at the rate of thirty years' purchase of the agricultural value thereof. In the exercise of its option, the company paid the lessor a sum of £6,104 as representing the value of the damaged lands. It was held by the Court of Session of Scotland that such a payment was in the nature of capital expenditure and was not therefore a proper deduction in computing the company's liability to income-tax. The following passage from the Lord President's (Clyde) judgment is instructive:

"It is necessary accordingly to attend to the true nature of the expenditure, and to ask one's self the question, is it a part of the company's working expenses?—is it expenditure laid out as part of the process of profit earning?—or, on the other hand, is it a capital outlay?—is it expenditure necessary for the acquisition of property or of rights of a permanent character, the possession of which is a condition of carrying on its trade at all?"

In *Mallett* v. *The Stavelay Coal and Iron Co., Ltd.*[4], the assessee was a colliery company who held the right to work certain beds of coal under two leases, dated 1882 and 1919 for terms of 63 and 21 years respectively. In 1923, the company agreed

1. (1934) 1 K.B. 548.
2. (1912) 6 T.C. 146.
3. (1924) 8 T.C. 671.
4. (1227) 13 T.C. 772.

with the lessor for the surrender of a part of the seams demised by the lease of 1882 and of the whole of those demised by the lease of 1919, the company being absolved in the latter case from the obligation to restore the surface of the land. The consideration paid to the lessor was £3,500 in one case and £3,000 in the other. The assessee company claimed the total sum of £6,500 as a deduction in computing their profits but it was held that the payment for the surrender was an expenditure of capital and not an admissible deduction for income-tax purposes. Though the case dealt with a transaction of surrender of a mining lease, there are observations of Rowlatt, J. at page 778 which have a great bearing on the question in issue:

> "It is abundantly clear that when a colliery company acquires a lease the expense of acquiring the lease is the expense of acquiring a capital asset and is a capital expenditure, and it has frequently been remarked that it is very hard that there is no provision for allowing the company a sinking fund or anything of that sort to replace that capital expenditure. But there it is; it is a capital expenditure. If they sell the lease that they have acquired, or part of it, at an advantage, I cannot but think that that is a receipt on account of capital, and here what they have done is to get rid of some areas which they thought would be unremunerative; they thought it well to pay for it. In my judgment all the receipts and payments in connection with acquiring and disposing of leaseholds of minerals to be worked by collieries in this way are capital transactions for this purpose."

The three Madras decisions which were relied upon by the Income-tax Officer and the Appellate Assistant Commissioner may now be referred to. In *Commissioner of Income-tax* v. *Chengalraya Mudaliar*,[1] the assessee entered into an agreement with the Secretary of State for India in Council for the excavation of lime shells from certain Government lands. Under that agreement, he was to have the exclusive privilege of excavating lime shells within a specified area for a period of three years in consideration of a sum of Rs. 27,750 payable in 12 equal quarterly instalments. The assessee was described as a lessee, the document as a lease. It was held by Full Bench consisting of Beasley, C.J., Ramesam and Sundaram Chetti, JJ., that the sum of Rs. 27,750 was neither rent nor the purchase price of the shells lying upon and under the land which was to be excavated but that it was capital expenditure and therefore not a deductible item in computing the income derived by the assessee. Dealing with the contention that the amount was really the purchase price of the shells, the learned Chief Justice says:

> "I am clearly of the opinion that this cannot by any stretch of imagination be considered a purchase of lime shells. It might be different had the lime shells been previously excavated and heaped up in heaps upon the land. It might then have been argued that it was a purchase of so much raw material. Here the amount of shells won is entirely dependent upon the will or the efforts of the assessee."

The fact that the amount was paid by instalments did not make it in any sense rent. A distinction was drawn between payments made for the purpose of starting a particular venture and payments made in order to carry on an already existing business and to earn a profit out of it. But this distinction did not depend upon the fact that the assessee had previously entered into a number of similar engagements and the expenditure in question was an initial expenditure for that particular venture. In the *Commissioner of Income-tax, Madras* v. *Chengalvaraya Chettiar*[2], a transaction very similar to that in *Commissioner of Income-tax* v. *Chengalvaraya Mudaliar*[1], was the subject-matter of the reference. There the assessee got by a deed the exclusive right to excavate shells lying under Government property for three years for a payment of Rs. 30,450, payable by certain instalments and one-third of this amount was described therein as "the annual lease amount." It was held that the amount was a capital expenditure and not a revenue expenditure and the assessee could not claim a deduction in respect of such sum, following the ruling in *Commissioner of Income-tax* v. *Chengalvaraya Mudaliar*[1]. An attempt made by the learned counsel for the assessee to show that the words "the annual lease amount" appearing in the instrument in question there, made a material difference, completely failed. These two decisions were followed in *Abdul Kayam Sahib Hussain*

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1. (1934) 67 M.L.J. 350 : I.L.R. 58 Mad. 792 (S.B.).
2. (1937) 1 M.L.J. 182 : I.L.R. 1937 Mad. 1 (S.B.).
3. (1934) 67 M.L.J. 650 : I.L.R. 58 Mad. 1 (S.B.).

Sahib v. *Commissioner of Income-tax, Madras*[1], by another Full Bench of this Court. There, the assessee acquired the exclusive right for a certain period to collect chunks from chunk beds belonging to the Ramnad and Sivaganga Samasthanams and agreed to pay them a certain amount in instalments in consideration of the grant of the right. It was held that the amount paid was capital expenditure and was not therefore an admissible deduction. For the assessee, reliance was placed on the case of *Golden Horse Shoe (New), Ltd.* v. *Thurgood*[2]. But that case was distinguished thus :

" Now in the present case what the assessee paid for was the right to win conch shells. He was not purchasing the right to any specified quantity of conch shells. It was merely the right to win what he could from the beds where the conch shells were lying. What he got was the means of obtaining the material for his business, not the material itself."

Cases of other High Courts in India were also cited. In *Commissioner of Income-tax* v. *Tikaram & Sons Ltd.*[3], a Full Bench consisting of Sulaiman, C.J., Harries and Bajpai, JJ., held that where a company carrying on the business of manufacturing bricks was the proprietor of a part, and the lessee of the remainder, of a piece of land on which it carried on the business and from which it dug up the earth for making the bricks, the value of the earth dug up and utilised for the manufacture of bricks was of the nature of " capital expenditure " and should not be deducted from the total profits for the purpose of assessment to income-tax. The decision in that case proceeded on a distinction between a company purchasing merely raw materials for the purpose of manufacturing bricks and a company acquiring rights in immoveable property which included the right to dig out earth and use it for the purpose of manufacturing bricks. The learned Judges say :

" The company by taking this lease has not purchased so many maunds of earth for so many rupees but has acquired lessee's rights in the immoveable property which includes the right to dig out earth and use it for the purpose of manufacturing bricks. The position seems to be more analogous to that of a company which is working a quarry or mine rather than to an ordinary manufacturer who purchases raw materials for the purpose of his manufacturing business."

After discussing some of the leading decisions in English Courts their conclusion is stated thus :

" It therefore seems that the case of a brick field is very similar to that of a quarry or a mine and the proprietor of the land or the lessee is not a mere purchaser of raw materials but a person who has acquired certain rights in the land and the amount invested by him must therefore be treated as capital expenditure within the meaning of section 10 (2) (*ix*). . . . . He has really not purchased any raw materials for cash and he cannot be allowed to claim a deduction of the supposed value of the earth taken out of the land as part of the property."

This decision was followed by a Division Bench of the same High Court in In re *Ganeshilal Bhattawala*[4].

The case of *Sardar Singhar Singh & Sons* v. *Commissioner of Income-tax*[5], decided by the Oudh Chief Court also related to leases of plots of land for the purpose of excavating earth for the manufacture of bricks. The leases mentioned a certain rate per bigha as the cost of, or compensation for, the earth excavated. It was held that the price of or compensation for the earth mentioned in the deeds was akin to royalties on coal extracted from coal mines, and that the expenditure incurred was of a capital nature. The decision in *Commissioner of Income-tax* v. *Tikaram and Sons, Ltd.*[3], was approved and followed.

The facts in In re *Parmanand Haveliram*[6] decided by the Lahore High Court were as follows : The assessee was a manufacturer of potassium nitrate and sodium chloride. He manufactured his own crude saltpetre at different places and brought it to his refinery and analysed it into potassium nitrate and sodium chloride which are the finished products. Salt bearing land was acquired by the assessee in different villages from the proprietors on short term leases, the period of leases varying from one to two years. The assessee employed his own labourers on the sites who scraped and collected the salt bearing earth and by an elaborate process

1. 1939 I.T.R. 652.
2. (1934) 1 K.B. 548.
3. I.L.R. (1937) All. 908. (F.B.).
4. 6 I.T.R. 489.
5. (1944) I.T.R, 504.
6. (1945) 13 I.T.R. 157.

of evaporation obtained the crude saltpetre which was sent to the refinery. It was held that the sum expended by the assessee on the leases for acquiring the sites for the purpose of extracting crude saltpetre was not in the nature of capital expenditure as it was expended for the purpose of running the assessee's business and not in acquiring it. The judgment of the Full Bench was delivered by Munir, J. The learned Judge considered the following among other circumstances appearing from the statement of the case as having an important bearing on the decision of the question whether the expenditure was in the nature of capital expenditure; (1) that the dominant trait of the assessee's business was that of a manufacturing business, (2) that the assessee acquired for his manufacture his own raw material, (3) that the raw material was the crude saltpetre which may or may not be a marketable commodity, (4) that the assessee did not sell crude saltpetre but extracted it only for the purpose of subsequently being analysed into potassium nitrate and sodium chloride which were the finished products, (5) that in the extraction of crude saltpetre an elaborate process was employed and the raw material for its manufacture was *kallar* obtained from the sites acquired by the assessee under short term leases, the *kallar* itself not being a marketable commodity, and (6) that the money paid as consideration for the leases was an outlay from circulating capital, the leases themselves not being a fixed capital asset. The learned Judge considered the case as one of exceptional difficulty as no parallel case had been cited before them which could have assisted them in the decision of the precise point involved in the case, namely, that though the predominant character of the assessee's business was that of a manufacturing business, the assessee did not purchase his raw material in the ordinary way from the market but procured it by a process of collection and manufacture. According to him, the essential point was that crude saltpetre was not sold by the assessee in the market and was acquired by him for the sole purpose of converting it into the finished products, that is, potassium nitrate and sodium chloride. The assessee did not make any profit by selling the crude saltpetre. The learned Judge found that the money expended by the assessee in acquiring the sites for the purpose of extracting crude saltpetre was not expended in acquiring the assessee's business but for the purpose of running it. The period of the leases ranged from one year to two years and for that reason these leases according to him could not be said to bring into existence an asset or an advantage for the enduring benefit of the trade. The learned Judge, however, went on to observe :

"The result may perhaps be different where the land worked is the property of the assessee, or is acquired by him on a long term lease, because in such a case the rights in the land would be a fixed capital asset."

That the final conclusion of the learned Judge was greatly influenced by the fact that in the case before him the leases were for short periods is amply evident from the following passage at the end of his judgment :

"We have not been referred to any case where . . . . in the case of an annual lease or leases it has ever been held that the expenditure incurred in acquiring the leases is not a proper debit item to be charged against the incomings of the year. The case where the assessee owns a mine or acquires it under a long term lease is essentially different from that where he acquires yearly or short term leases, for the simple reason that whereas the former become fixed assets the latter represent circulating capital. What period would make a certain lease a short term lease or circulating capital and what period would make it an asset of a 'relatively permanent character' is difficult to determine and no general rule can be laid down on the point, but I have no doubt that where as here the asset acquired is not even a mine in the true sense and gets exhausted in the course of a year or so and is acquired with several other similar assets for the sole purpose of providing raw material for a manufacture and not for the purpose of producing a marketable commodity for sale, the expenditure incurred in acquiring the asset is not a capital expenditure but a revenue expenditure."

As the correctness of this decision was questioned in a later case before the same High Court, a Bench of five Judges was constituted to deal with it. In that case (In re *Benarsidas Jagannath*[1]), the assessee who was a manufacturer of bricks obtained certain lands on leases for the purpose of digging out earth for the manufacture of bricks. The periods of the leases varied from six months to three years. It

1. (1947) I.T.R. 185 (F.B.).

was held that the consideration paid for the leases represented the price of raw material and the assessee was therefore entitled to claim it as revenue expenditure under section 10 (2) (*xii*). The main object of the agreement was the procuring of earth for manufacturing bricks and not the acquisition of an advantage of a permanent nature or of an enduring character. The position would be different in the case of sums spent for obtaining leases for a substantially long period, say, varying from ten to twenty years, because they would amount to an acquisition of an asset of an enduring advantage to the lessee.

In *Income-tax Appellate Tribunal, Bombay* v. *Haji Subumiyan Haji Sirajuddin*[1], it was held that payments made by the assessee in consideration of leases of several forests for the right to take *harra* nut and lac from the forest trees was capital expenditure and could not be allowed as deduction under section 10 (2) (*xii*) of the Income-tax Act. The argument was that the assessees merely purchased the raw material under the several agreements and that the price of such material should be deducted. But the argument was not accepted. In this case, there is an exhaustive discussion of case-law, both in Britain and in India, by Sen, J.

In this state of the authorities, counsel took up the following positions. For the department, it was contended that the amounts in question which were paid under the four documents were capital expenditure, as they were expended as outlay for the initiation of the business. It was expenditure necessary for the acquisition of property, of rights of a permanent character, the possession of which was a condition of carrying on the business. The business of the assessee was to win mica and sell it. It was not the business of a manufacturer and the expenditure was not for the purchase of raw material for the manufacturing business. The mining rights which were obtained under the four documents would be in the nature of an asset or an advantage for the enduring benefit of the business, and it is not necessary, that the benefit should be everlasting. The three decisions of this Court and the decisions in In re *Ganeshilal Bhattawalar*[2], *Commissioner of Income-tax* v. *Tikaram & Sons, Ltd.*[3], and *Income-tax Appellate Tribunal, Bombay* v. *Haji Subumiyan Haji Sirajuddin*[4] were relied on, besides the observations in *Robert Addie & Sons Collieries, Ltd.* v. *Commissioners of Inland Revenue*[5] and *Mallet* v. *The Staveley Coal and Iron Co., Ltd.*[6], to which reference has already been made. For the assessee, Mr. Subbaraya Aiyar, his learned counsel, urged that there was no initiation of a business, as the assessee was doing business in mica even before the agreements in question, and that two of the mines had already been worked before the execution of the concerned agreements. His further contention was that the business of the assessee was of the nature of manufacture and the acquisition of any rights under the documents must be treated as purchase of raw material necessary for the carrying on of the manufacturing business. He placed great reliance on the judgment of the Lahore High Court in In re *Parmanand Haveli ram*[7], which he said was substantially approved in the later decision in In re *Banarsidas Jagannath*[8].

Mr. Subbaraya Aiyar attempted to distinguish the decisions in *Commissioner of Income-tax* v. *Chengalvaraya Mudaliar*[9], *Commissioner of Income-tax, Madras* v. *Chengalvaraya Chettiar*[10] and *Abdul Kayum Sahib Husain Sahib* v. *Commissioner of Income-tax, Madras*[11], on the ground that in those cases the expenditure was incurred for beginning the business, that it was outlay for the first time and not expenses for an already existing business. There is a slight fallacy in the way in which this attempt was made, namely, to treat the business of the assessee as mica mining, and because the assessee had been carrying on that business even prior to the execution of the agreements in question, to treat the said agreements as acts done in the course of the carrying

1. (1946) I.T.R. 447.
2. 6 I.T.R. 489.
3. I.L.R. (1937) All. 908 (F.B.).
4. (1946) I.T.R. 447.
5. (1924) 8 T.C. 671.
6. (1927) 13 T.C. 772.
7. (1945) I.T.R. 157.
8. (1947) I.T.R. 185.
9. (1934) 67 M.L.J. 350 : I.L.R. 58 Mad. 1 (S.B.).
10. (1937) 1 M.L.J. 182 : I.L.R. 1937 Mad. 792 (S.B.).
11. (1939) I.T.R. 652.

on of the business. The fallacy is this : In a broad sense, an assessee can be said to carry on a particular kind of business, but it may consist in several separate ventures. While carrying on an already existing business, there may be an extension of a business, there may be a substantial replacing of equipment. In all such cases, the expenditure incurred for starting new ventures, for extending the business and for replacing equipment cannot be treated as revenue expenditure. In *Commissioner of Income-tax* v. *Chengalvaraya Mudaliar*[1], the learned Chief Justice points out:

> " The payment to be made was merely for the purpose of starting that particular venture. . . . . I do not think that the fact that the assessee had previously entered into a number of similar agreements affects the question."

Nor does the fact that two of the mines had been worked before make any difference. The money paid by the assessee was for taking over such mines. It is exactly similar on principle to the case in the *City of London Contract Corporation, Ltd.* v. *Styles*[2], in which the assessees took over the business of another company which had a number of unexecuted contracts on hand and the assessees paid a lump sum of money to obtain the benefit of those contracts. Vide also *John Smith & Son* v. *Moore*[3], in which the price paid for similar forward coal contracts was held to be part of the assessee's fixed capital and not allowable as a revenue expenditure.

The point which learned counsel for the assessee most strenuously pressed was that here was a case of a manufacturing business for which the assessee was making provision for raw material. The process of manufacture, according to him, was refining the mica which was won and gotten from the mine just as the assessee in the case of In re *Parmanand Haveliram*[4], took short term leases to collect the crude saltpetre to serve as raw material for manufacturing the finished products, potassium nitrate and sodium chloride. In this case, the assessee had taken the agreements in question to obtain the " raw mica " to manufacture the refined mica which is the finished product. The flaw in the argument is that the business of the assessee can in no sense be described as a manufacturing business. The following observations of Channel, J., in the case of *Alianza & Co.* v. *Bell*[5] are extremely useful in considering this point :

> " The question in this case which we have to consider is what is the nature of the adventure or concern which this particular company is carrying on. If it is merely a manufacturing business, then the procuring of the raw material would not be a capital expenditure. But if it is like the working of a particular mine or bed of brick earth, and converting the stuff worked into a marketable commodity, then the money paid for the prime cost of the stuff so dealt with is just as much capital as the money sunk in machinery or buildings."

The decision of Munir, J., in In re *Parmanand Haveliram*[4], must be read along with the later decision of the Full Bench of five Judges in In re *Benarsidas Jagannath*[6]. There are different passages in the judgment of Munir, J., which it is difficult to reconcile. The duration of the leases to which Munir, J., appears to attach great weight is not certainly a valuable or correct test. In *Income-tax Tribunal, Bombay* v. *Haji Subumiyan Haji Sirajuddin*[7], Mahajan, J., refused to assent to the *obiter dicta* of Munir, J., in the concluding portion of his judgment relating to the duration of the lease. He says :

> " With great respect to my learned brother Munir, J., I cannot assent to the obiter observations that His Lordship made in the concluding portion of the passage cited above. If according to ordinary principles of the trade, the crude saltpetre obtained from the leased land is merely raw material, then whether the raw material is obtained for a number of years or only for a year or so cannot affect the decision of the case and alter the nature of the revenue expenditure into capital expenditure."

The judgment of the Fuller Bench of five Judges in In re *Benarsidas Jagannath*[6] was delivered by Mahajan, J., and the learned Judge states the question in controversy in that case thus :

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1. (1934)) 67 M.L.J. 350 : I.L.R. 58 Mad. 1 (S.B.).
2. 2 T.C. 239.
3. (1921) 2 A.C. 13.
4. (1945) 13 I.T.R. 157.
5. (1904) 2 K.B. 666 at 673.
6. (1947) 15 I.T.R. 185 (F.B.).
7. (1946) 14 I.T.R. 447.

"The question in controversy, however, is that when in the course of a business and in order to produce bricks expeditiously and economically (and not when the business is being started for the first time) a manufacturer makes certain of the supply of earth (which would be the raw material for his finished product) by taking a plot of land on lease, either of short or moderate duration but not such as to amount to a conveyance of land, can the expenses incurred in entering into such a transaction be classed as those of a capital nature?"

He answered the question thus :

". . . . . . in the present case privileges acquired to excavate a specified quantity of earth from a certain area of land during a period of six months to three years cannot be held to amount to the establishment of a source of supply of raw material of any stable character to the manufacturers of bricks. The transactions amount to the mere purchase of unloosened earth from the land and to no more."

It is impossible to find any analogy between the facts in In re *Parmanand Haveliram*[1] or In re *Benarsidas Jagannath*[2], and the facts of the present case. Here is a simple case of an assessee carrying on the business of winning mica and selling it, and acquiring mining rights in different plots of land. This is not a case like that, for instance, of the *Golden Horse Shoe Case*[3], in which after the mineral had been won and gotten it was dumped on the surface. This is not a case of sale of any raw material as such. The business consists in winning mica. In the case of an agreement under which an assessee is entitled to excavate all earth to a particular depth to be used as raw material for the manufacture of bricks, it can be said that there is a sale of all that quantity of earth. You can with some trouble give even the exact cubic contents of the earth sold in that way. But in the case of an acquisition of mining rights under an agreement like the agreements in question, it is impossible to say that there is a sale of so much mica. The winning of mica depends upon many uncertain factors. The mine may prove disappointing in that it may not yield much mica. It will be opposed to common sense to say that an acquisition of rights to win mica is a sale of mica as raw material. On the facts of this case, it is abundantly clear that there is no manufacturing business and there is no sale of any raw material. The assessee carries on the business of winning and selling mica and for the business acquire mining rights in various places. Money expended for the acquisition of such rights must be held to be capital expenditure.

The answer to the question is in the negative. The respondent will pay to the applicant costs of this reference—Rs. 250.

K.S. ——— *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

R. Thimmappa and another .. *Appellants**

v.

Lingutla Balayya and others .. *Respondents.*

Provincial Insolvency Act (V of 1920), section 43—Annulment of adjudication and property ordered to continue to vest in Official Receiver—Alienation by insolvent set aside in the meantime—Alienees depositing sufficient money to pay all creditors—Insolvent also depositing sufficient money to pay off creditors and the alienees—Person entitled to the property under the set aside alienation.

On 22nd June, 1937, *B*, then in insolvent circumstances alienated his property in favour of *N* and others. On 13th August, 1938, the alienee sold some of the property to *R* and on 10th August, 1944, *R* transferred some of his rights to *T*. *B* was adjudicated insolvent on 8th March, 1938. At the instance of the Official Receiver the alienations of 22nd June, 1937, and the consequent alienations were set aside. On 9th February, 1940, the adjudication was annulled under section 43 of the Provincial Insolvency Act; but the property was ordered to continue to vest in the Official Receiver. Subsequently the alienees deposited in Court a sufficient sum of money to pay off all the creditors and asked that the property be delivered to them. The insolvent also subsequently deposited money sufficient to pay off the creditors as well and to pay the alienees what was due to them under the deed of 22nd June, 1937.

On a question whether *B*, the insolvent or his alienees were entitled to the properties,

1. (1945) 13 I.T.R. 157.
2. (1947) 15 I.T.R. 185 (F.B.).
3. (1934) 1 K.B. 548.

* A. A. O. No. 439 of 1946, etc. 17th September, 1948.

Held, the alienees should be given possession of the property since it was not necessary to sell them for meeting the debts of the creditors despite the fact that the alienation had to be set aside in its entirety. The insolvent should be allowed to withdraw the amount deposited by him.

An insolvency Court administers the assets of the insolvent in equity for the benefit of the creditors and restores it to the person to whom it is properly due, if the claims of the creditors do not necessitate the sale of the property.

Appeals against the orders of the District Court of Bellary dated 9th August, 1946, 19th August, 1946 and 18th September, 1946, respectively and made in I.A. No. 60 of 1946 in I.P. No. 21 of 1937 and I.A. No. 9 of 1946 in I.P. No. 21 of 1937 and I.A. No. 241 of 1946 in O.S. No. 51 of 1945 respectively.

Ch. Raghava Rao for Appellants.

P. Chandra Reddi, *A. Bhujanga Rao*, *D.R. Krishna Rao*, *O. Chinnappa Reddi* and *C. Kondiah* for Respondents.

The Court delivered the following

JUDGMENT.—On 22nd June, 1937, the first respondent, Balayya, who was then in insolvent circumstances, alienated his property in favour of one Nagappa and others. On 13th August, 1938, the alienees sold some of the property to Rami Reddi, and on 10th August, 1944, Rami Reddi transferred some of his rights to Thimmappa. Balayya was adjudicated an insolvent on 8th March, 1938. At the instance of the Official Receiver, the alienations of 22nd June, 1937, and the consequent alienations were set aside. On 9th February, 1940, the adjudication was annulled under section 43 of the Provincial Insolvency Act; but the property was ordered to continue to vest in the Official Receiver. Subsequently, the alienees deposited in Court a sufficient sum of money to pay off all the creditors and asked that the property be delivered to them. The insolvent subsequently also deposited money sufficient to pay off the creditors as well and to pay the alienees what was due to them under the deed of 22nd June, 1937.

The question that arise in these three appeals is whether the insolvent, Balayya, is now entitled to have the property or the alienees.

I have no doubt that the learned advocate for the insolvent is right in his contention that the alienation was set aside for all purposes and not to a limited extent or for a limited purpose. In other words, after the alienation was set aside the alienees had no rights whatsoever. Nevertheless, it has always been recognised in insolvency proceedings that where a portion of the property alienated is sufficient to meet the debts of the creditors, the alienee should be given possession of the remaining property; because the object of setting aside the alienation was to satisfy the debts of the creditors. If that purpose could be fulfilled by a sale of only a portion of the property, then the alienees should be allowed to retain the property which it was not necessary to sell, despite the fact that the alienation had to be set aside in its entirety. It seems to me that the same principle would apply where it was not necessary to sell any of the property, because the alienees had deposited in Court a sufficient sum of money to pay off the creditors. No decision bearing directly on the rights of the alienees in such circumstances has been cited; but reference may be had to *Dharmasamarajayya* v. *Sankamma*[1], a decision of King, J. Referring to certain English cases, he said:

"As it was unnecessary to dispose of the property covered by Exhibit II in order to meet the claims of the insolvent's creditors it seems to me that the effect of the annulment of Exhibit II must automatically disappear at the conclusion of the insolvency proceedings."

Referring to In re *Parry*: Ex parte *Salaman*[2], the learned Judge said:

"The annulment of an alienation of this kind is solely in the interests of an insolvent's creditors and to the extent that those interests do not require the annulment, the annulment is automatically cancelled. I would hold therefore that from March, 1928, onwards any rights which had accrued under Exhibit II are automatically restored, and this appeal must be decided upon an examination of the gift deed, Exhibit II."

1. (1943) 1 M.L.J. 166.
2. (1904) 1 K.B. 129.

There is some substance in the contention of Mr. Chandra Reddi for the insolvent that since the alienation was set aside by an order of the Court, the setting aside of the alienation cannot be automatically cancelled upon the paying off of the creditors ; but the decisions referred to would show that the ordinary course to be adopted, where it is not necessary to sell the property which was the subject of the alienation in order to pay the creditors, is that it should be restored, if not automatically, at any rate by an order of the Court, to the persons from whom it was taken. An insolvency Court administers the assets of the insolvent in equity for the benefit of the creditors and restores it to the person to whom it is properly due, if the claims of the creditors do not necessitate the sale of the property.

It is argued that since the order of the Court is one passed in equity the property should not be restored to the alienees, but rather to the alienors; because the property was found in Letters Patent Appeal No. 24 of 1944 to have been sold for a very inadequate sum. That however is the concern of the alienors. If they chose, in order to defraud their creditors, to sell valuable property for much less than what it was worth, they cannot complain at having to suffer the consequences of their fraud.

The alienees have not only asked that the property should be restored to them, but also that the payment of the creditors out of the sum deposited by the insolvent in Court should stand ; in other words, that the money that they have deposited in Court should be allowed to be withdrawn by them and that the property should also be given to them. That would be a most inequitable course. It is unlikely that the insolvent had himself the money which he deposited in Court. He had presumably to enter into some arrangement, whereby those who financed him were to be reimbursed after the insolvent re-obtained possession of the property. Moreover, the deposit made by the insolvent must be regarded as a conditional one, that if the Court found that it was unable to grant the insolvent's request to restore the property to him, the money should be given back.

The property should therefore be restored to the alienees ; but the money deposited by them in the Anantapur Court and subsequently transferred to the Bellary Court should be utilised for the payment of creditors, the insolvent being allowed to withdraw from the Court the amount deposited by him.

The appeals are allowed ; but in view of the fact that the appellants have asked for more than what could reasonably be given to them and the arguments put forward by them were not those which have been accepted, there will be no order as to costs. If the money deposited by the insolvent, or any part of it, has been already distributed to creditors, the insolvent should be reimbursed from the amount deposited in I.A. No. 9 of 1946 and any amount remaining over of the sum deposited in I.A. No. 9 of 1946, after all the creditors have been paid should be refunded to the petitioner in I.A. No. 9 of 1946.

K.S. —————— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

The Madura Sri Meenakshi Sundareswaral, etc., Devasthanams, through its xecutive officer .. *Appellant**

v.

Sellathayee .. *Respondent.*

Madras Estates Land Act (I of 1908), sections 24 and 26 (3)—Remission granted by plaintiff's predecessors-in-title to defendants' predecessors-in-title—Reason for the grant unknown—Claim by plaintiff for enhanced rent—Burden on defendant to show remission enures permanently for his benefit—Section 26 (3), if could be applied to Devasthanams

In a suit for arrears of rent claimed at the rate of full taram assessment, the defendant resisted the claim and asserted that his predecessors-in-title had been paying rent at only one-fifth of the taram assessment and that any demand for an enhanced rent would be illegal. From the evidence

* Second Appeal No. 52 of 1946. 14th September, 1948.

it could be assumed that for some reason a remission of rent was granted by the plaintiff's predecessors-in-title at some time, presumably based upon some lawful contract, the terms of which are however unknown.

Held. (*i*) As the burden is upon the defendant of proving that the remission once granted to him enures for all time and for the benefit of all persons who may occupy the land, even though they were not the persons to whom the concessions were originally granted, in the absence of evidence as to the nature of the contract, the plaintiff is entitled to charge the full taram rent. The provisions of section 24 of the Madras Estates Land Act do not apply to cases where a right to remission does not continue.

(*ii*) Section 26 (3) of the Act could be applied to a Devasthanam as a trustee is a landholder within the meaning of section 3 (5) of the Act and whenever there is a change of trustee there is technically a change of landholder, so that the present trustee has a right to invoke section 26 (3) and claim that he is not bound by any remission granted by his predecessors.

Appeal against the decree of the District Court, Madura, in A.S. No. 27 of 1945 preferred against the decree of the Court of the Deputy Collector, Melur division at Madura in O.S. No. 53 of 1944.

K. Kuttikrishna Menon and *K. Veeraswami* for Appellant.

K. S. Desikan for Respondent.

The Court delivered the following

JUDGMENT.—The suit out of which this appeal arises was one against the defendant for arrears of rent, claiming at the rate of the full taram assessment on the defendant's lands. The defendant resisted the claim and asserted that his predecessors-in-title from time immemorial had been paying rent at only one-fifth of the taram assessment and that any demand for an enhanced rent such as is claimed in the suit would be an illegal one. A further question was raised whether the defendant is a ryot. It was conceded in the lower appellate Court—and is here—that she is. The learned Deputy Collector, after giving a finding that the defendant is a ryot, went on to analyse the documents; and concluding very briefly with a summary of section 24 of the Madras Estates Land Act, which prevents the landholder from enhancing the rent, held that the plaintiff was not entitled to claim rent at the full taram assessment. The evidence let in afforded very little material upon which the Courts could judge the reasonableness or otherwise of the plaintiff's claim. The defendant had been paying rent at the full taram assessment from 1930 onwards; but from 1904-1905, his predecessors-in-title had been paying only at about one-fifth of the taram rate. There is no evidence to show why the predecessors-in-title of the defendant had been paying such a low rate of rent, and so it is not surprising that the Deputy Collector did not devote very much attention to discussing the conclusions that had to be drawn from such meagre evidence. The learned District Judge felt that same difficulty; and his judgment is a very short one. He, too, briefly analysed the evidence, pointing out that the lower rate of rent had been paid from 1930. He then went on to say:

"The Devasthanam cannot invoke section 26 (3) of the Madras Estates Land Act. Section 24 lays down that the rent of a ryot shall not be enhanced except as provided by this Act. That one-fifth of the taram assessment was the rent lawfully payable cannot be denied."

He therefore agreed with the trial Court and dismissed the appeal.

It seems to me that since there was no reason to doubt that the taram assessment on the land was what it was stated to be in Ex. P-6 and which it was assumed to be in the Courts below, one must conclude that for some reason or other now unknown a remission of rent was granted by the plaintiff at some time or other. The question is whether we must assume that the reason for remission was one that precludes the Devasthanam from ever demanding more than the reduced rate.

The learned District Judge seems to be wrong in saying that section 26 (3) could not be applied to a Devasthanam, on the ground that the Devasthanam has always been, and still is, the landholder. A landholder, according to section 3 (5) includes,

"every person entitled to collect the rents . . . . of the estate by virtue of . . . . . . any provision of law."

A trustee is therefore a landholder; and whenever there is a change of trustee, there is technically a change of landholder; so that the present trustee has a right to invoke section 26 (3) of the Madras Estates Land Act and to claim that he is not bound by any remission granted by his predecessors.

It may be reasonable to presume, as contended on behalf of the defendant, that the remission was based on some lawful contract, but assuming that that is so, we do now know what the contract was. The burden lies upon the defendant of proving that the remission once granted to him enures for all time and for the benefit of all persons who may occupy the land, even though they were not the persons to whom the concessions were originally granted. It seems to me that we cannot make these assumptions; and that in the absence of some evidence as to the nature of the contract entered into, the plaintiff is entitled to charge the full taram rent. The provisions of section 24, prohibiting an enhancement of rent, do not apply to cases where a right to remission does not continue.

The second appeal is allowed and the suit decreed with the costs of the plaintiff in this Court and in the Courts below.

V.P.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE YAHYA ALI.

Narahari Balaji Parkhi .. *Petitioner.**

Madras Maintenance of Public Order Act (I of 1947), *sections* 3 *and* 16—*Order of detention—Scope of the power of Court to examine the circumstances—Communication of the Provincial Government—Only ground that detenue was member of a banned organisation—Nothing to show that he was a member after the organisation was banned or that he committed or was about to commit acts prejudicial to public safety—Essential requirement to section* 3 (1) *not satisfied.*

If the jurisdiction of the Court is to be excluded in regard to questioning the reasons for the detention under Madras Act I of 1947, it would be necessary for the Court to examine whether, the Executive has acted under the enactment with perfect *bona fides* and whether it has acted within the limitations imposed by the Act and conformably to the procedure prescribed thereunder.

The only ground given in the communication of the Provincial Government to a detenu under Act I of 1947 was that he was a member of the R.S.S.S. which has been banned and that he was holding the important post of Provincial organiser in the Andhra branch. It did not state whether he continued to be a member or held the post of Provincial organiser after the R.S.S.S. was banned, nor that there were any acts committed or about to be committed by the detenu from which the Provincial Government was entitled to make the deduction that his being at large would be prejudicial to the public safety and the maintenance of public order. On the other hand the affidavit filed in support of the petition under section 491, Criminal Procedure Code, disclosed that the petitioner severed his connection with the organisation and had settled down in Nagpur in connection with business.

Held, under sub-section (*i*) of section 3 of Act I of 1947 the Provincial Government should communicate to the person concerned not only the grounds on which the order has been made against him but also such other particulars as are, in their opinion, sufficient to enable him to make, if he wishes, a representation against the order. The present communication did not satisfy that requirement in any manner whatsoever and the detenu must be released forthwith.

Petition under section 491, Criminal Procedure Code, praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue directions in the nature of Habeas Corpus that the petitioner herein be brought before this Court and dealt with according to law and, if no case is made out for his detention by the Government, to set him at liberty.

K. Sanjiva Kamath for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—This is an application under section 491, Criminal Procedure Code. The petitioner, Narahari Balaji Parkhi, belongs to the Central Provinces. He

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* Cr.M.P. No. 878 of 1948. 4th May, 1948.

used to have some business connections with the firm at Vijayawada. He was arrested at 5-30 P.M. on 4th February, 1948, at Vijayawada railway station when he was leaving for Nagpur. An order of detention was actually passed against him on 5th February, 1948, by the District Magistrate of Kistna purporting to be under section 15 of Act I of 1947. On the 6th February, 1948, the District Magistrate intimated to the Government the fact of the issue of the order of detention. The Provincial Government communicated to the detenu the following grounds of detention on the 7th April, 1948 :

"He is a member of the R.S.S.S. an organisation which has been banned by this Government under the Criminal Law Amendment Act, 1908, and he was holding the important post of Provincial Organiser in the Andhra Branch of this organisation."

Then followed the statement that his being at large was considered prejudicial to the public safety and the maintenance of public order. This communication was received by the detenu in the jail on the 7th April, 1948.

It is argued by Mr. Sanjiva Kamath that there was failure on the part of both the District Magistrate and the Government in the matter of complying with the mandatory requirements of the Act. Under section 2 (1) (*a*), the Provincial Government, if satisfied with respect to any particular person that he is acting or about to act in any manner prejudicial to the public safety, or the maintenance of public order and with a view to preventing him, it is necessary so to do, may make an order that he be detained. This power was delegated under section 15 of the Act by the Provincial Government to District Magistrates and the Commissioner of Police in their respective jurisdictions (*vide* G.O. Ms. No. 907 Public (General E) dated 21st March 1947). Under sub-section (2) of section 2, when any order is made by the District Magistrate or the Commissioner of Police under section 15,

"that officer should forthwith report the fact to the Provincial Government together with the grounds on which the order has been made and such other particulars as, in the opinion of such officer or authority, have a bearing on the necessity for or expediency of the order."

Under section 3 (1) the Provincial Government, on receipt of any such communication from the detaining authority,

"shall communicate to the person affected by the order, so far as such communication can be made without disclosing the facts which they consider it would be against the public interest to disclose, the grounds on which the order has been made against him and such other particulars as are in their opinion sufficient to enable him to make, if he wishes, a representation against the order."

From the scheme of the various provisions cited above, it is clear that the Legislature has provided certain necessary safeguards to be observed in the exercise of the extensive powers conferred thereunder upon the Executive. Under modern conditions the existence of forces of internal disruption may be as great, or even a greater menace to a country than the presence of an external enemy on its frontiers. It is for that reason obviously that the Legislature has seen fit to delegate to the Executive the power to detain persons without trial and to debar the Judiciary from examining into the reasons for their detention and pronouncing on their propriety. This power, as will appear, has been enacted in section 16 (1), which says,

"No order made in exercise of any power conferred by or under this Act or deemed to have been made under this Act by virtue of section 19 shall be called in question in any Court."

Thus, if the jurisdiction of the Court is to be excluded, it would be necessary for the Court to examine whether, in making an order of detention calculated to deprive the subject of his liberty, the Executive has acted under the enactment with perfect *bona fides* and whether it has acted within the limitations imposed by the Act and conformably to the procedure prescribed thereunder. As it has been laid down in various cases, the action should not be in the nature of a fraud on the Act, or a misuse of the powers conferred by the Act, or should not be a colourable exercise of those powers. It should not serve any ulterior purpose which is alien to the scope and ambit of the enactment. If the action of the authority concerned is free from these infirmities, then it is clear on the authorities that the Court, in view of the bar imposed by the Act, cannot examine whether there was sufficient material to order the detention of the subject and whether the satisfaction contemplated

in section 2 or section 15, as the case may be, was based on proper and sufficient reasons. These, in my opinion, being the correct principles applicable to proceedings or orders of detention passed by the respective authorities under Act I of 1947, it remains to be seen whether so far as the facts of the present case are concerned, the order of detention is open to any objection.

The only ground, if it can be called a ground, that is given in the communication of the Provincial Government is that the detenu is a member of the R.S.S.S., which has been banned and that he was holding the important post of the Provincial organiser in the Andhra branch. Under sub-section (1) of section 3, the Provincial Government should communicate to the person concerned not only the grounds on which the order has been made against him, but also such other particulars as are, in their opinion, sufficient to enable him to make, if he wishes, a representation against the order. It is therefore essential, in my view, that the communication of the Government to the detenu should contain the grounds of the order as also particulars of such a nature as would serve the prescribed purpose of enabling the detenu to make a representation as to why he should not be kept under detention. The present communication does not appear to me to satisfy that requirement in any manner whatsoever. It does not state whether he continues to be a member of the organisation even after it was banned on the 4th February 1948, and whether he holds the post of Provincial Organiser after that crucial date. It does not, therefore, appear from the communication that there were any acts committed or about to be committed by the detenu after the organisation was declared to be unlawful from which the Provincial Government was entitled to make the deduction that his being at large would be prejudicial to the public safety and the maintenance of public order. In the affidavit filed in support of the petition by a friend of the petitioner it is stated that the petitioner had severed his connection with the organisation in February, 1947, and had settled down at Nagpur confining his sole attention to his business, *viz.*, the promotion of the business of the Andhra Engineering Co., at Nagpur.

For these reasons I am of opinion that the essential requirement of section 3 (1) of the Act has not been satisfied in this case. I therefore direct that the detenu, Narahari Balaji Parkhi, be released forthwith.

V.P.S. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

Kommineni Kotiah .. *Petitioner**

v.

Muvva Narasimham .. *Respondent.*

Civil Procedure Code (V of 1908), Order 9, rule 13—Petition for setting aside ex parte *decree—Order allowing petition on payment of costs of suit and day costs before a certain date and providing that in default of compliance with any of the conditions the petition should stand dismissed automatically—Default—Rejection of request to furnish security—'Final order' for purposes of appealing.*

On a petition to set aside an *ex parte* decree an order passed on 3rd July, 1946, setting aside the *ex parte* decree on condition that the petitioner deposited the costs of the suit and the day costs before 2nd August, 1946, concluded with these words " in default of the one or other of the two conditions, the petition stands dismissed automatically." By 2nd August, 1946, the petitioner had paid only the day costs and the costs of the suit were not deposited. On his application for permission to furnish security for the costs of the suit being rejected, he filed an appeal on 24th August, 1946, to the District Judge. On a question as to the " final order " in the case for purposes of appealing,

Held: The order of the 3rd July, 1946, was an all-comprehensive one and was the " final order " for the purposes of appeal and should have been appealed against within 30 days. It cannot be said that the order of 3rd July was only a conditional order and became a final order rejecting the petition only on 2nd August when the condition was not fulfilled.

Ramayya v. *Lakshmayya.* (1944) 1 M.L.J. 381 : I.L.R. 1945 Mad. 203, relied on.

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* C.R.P. No. 1466 of 1946. 7th October, 1948.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the District Court, Guntur, dated 14th September, 1946, and passed in (S. R. No. 3958 of 1946) appeal sought to be preferred against the order of the Court of the District Munsiff, Guntur, in C. M. P. No. 785 of 1946 in O. S. No. 796 of 1945.

B. V. Ramanarasu for Petitioner.

P. Somasundaram and *P. Suryanarayana* for Respondent.

The Court delivered the following

JUDGMENT.—The facts are briefly these. The petitioner put in a petition, under Order 9, rule 13, Civil Procedure Code, praying that the *ex parte* decree passed against him, on 18th February, 1946, in O. S. No. 796 of 1945 on the file of the District Munsiff's Court, Guntur, be set aside and the suit restored to file. The learned District Munsiff passed an order dated 3rd July, 1946, the material portion of which runs as follows :

> "This Court doth order and decree that the *ex parte* decree passed on 18th February, 1946, against the petitioner be set aside on condition of petitioner depositing the costs of suit Rs. 128-4-0 on or before 2nd August, 1946, and also paying Rs. 10 as day costs to the respondent's (plaintiff's) vakil on or before that date and (2) that in default of the one or other of the two conditions, the petition stands dismissed automatically."

By 2nd August, 1946, the petitioner, admittedly, paid only Rs. 10, the day costs, to the respondent's vakil. He did not deposit the Rs. 128-4-0, the costs of suit. He put in a petition to allow him to furnish immoveable property as security for that amount. That petition was rejected. So, he filed an appeal against the order of the District Munsiff in the Court of the District Judge, Guntur, on 24th August, 1946. The learned District Judge rejected that appeal on the ground that the order of the learned District Munsiff dated 3rd July, 1946, was the final order in the case and that the appeal had been filed 41 days after that date, excluding the time required for obtaining the copies of the decree and judgment and was thus barred by limitation. He rejected the contention of the petitioner's counsel that the order of the District Munsiff dated 3rd July, 1946, was only a conditional order and not a final one. Hence this petition.

The learned counsel for the petitioner urged that the learned District Judge had erred in law. He relied on the rulings in *Venkatasami Naidu* v. *Shanmugham Pillai*[1] and *Rajagopalachari* v. *Thathachariar*[2], for the position that the order of the learned District Munsiff, dated 3rd July, 1946, would be only a conditional order, and it became a *final* order, rejecting the petition for setting aside the *ex parte* decree, only on 2nd August, 1946, when the condition was not fulfilled, and that the petitioner had, therefore, 30 days' time from 2nd August, 1946, to file the appeal, and that the lower Court went wrong in law in holding to the contrary. I am unable to agree. The learned counsel for the respondent relied on the ruling in *Ramayya* v. *Lakshmayya*[3] where the two rulings relied on by the learned counsel for the petitioner have been considered and distinguished, and it has been definitely held that in the case of an all-comprehensive order, like the one passed by the District Munsiff on 3rd July, 1946, where the petitioner had to do certain things, namely, to deposit costs, etc., into Court, to get the *ex parte* order set aside, with a direction that if he did not do so, the petition was to stand dismissed with costs, the order would be a final one and the appeal should be filed within thirty days. The Bench decision in *Venkatasami Naidu* v. *Shanmugham Pillai*[1] was distinguished on the ground that the exact terms of the order appealed against in that case, were not available, and, so, the Bench case was of little assistance, since the order in that case must have been presumably in terms which required a second order. The decision of Madhavan Nair, J., in *Rajagopalachari* v. *Thathachariar*[2] was distinguished by the fact that in spite of the clause in the order appealed against that if he did not pay, the petition would stand dismissed with costs, the petition

1. (1917) M.W.N. 815.
2. A.I.R. 1925 Mad. 1182.
3. (1944) 1 M.L.J. 381 : I.L.R. 1945 Mad. 203.

was posted for further hearing and consideration and dismissed on a later date, thus treating the original order as a conditional one and making the order of rejection on the later date the last and final order.

In the present case, there was no further order of the District Munsiff after the final two-headed order passed on 3rd July, 1946. So, I am of opinion that the learned District Judge's order was right in law, in view of the ruling in *Ramayya* v. *Lakshmayya*[1] and should not be disturbed. It was urged that this would cause hardship to parties made subject to a two-headed order like the one in question, as they could not both try to fulfil the condition within the time fixed, and appeal in case they found themselves unable to fulfil the condition within that time. But mere hardship to parties is no valid reason to deviate from settled law ; that is a matter for the Legislature, and not for Courts. Besides, once the law is known, parties who are careful will appeal against such orders in time, while trying also to fulfil the conditions meanwhile, as there is nothing to prevent them from withdrawing their appeals, which cost but little, in case they fulfil the conditions. This petition deserves to be, and it is hereby dismissed, but without costs, seeing that the petitioner has evidently filed this petition relying on the two rulings cited by him, and not being aware of the later ruling in *Ramayya* v. *Lakshmayya*[1] which has given the quietus to such contentions.

V.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO.

Angamuthu and others .. *Petitioners.**

Madras City Police Act (III of 1888), section 75—Gist of offence under—Disorderly behaviour and drunkenness—If necessary to warrant a conviction under the section.

To sustain a conviction under section 75 of the Madras City Police Act, it is enough if the accused are found guilty of riotous or disorderly behaviour. It cannot be said that the accused should also be found to be drunk to warrant the conviction under the section.

Kanniya Rao v. *Emperor*, (1944) 2 M.L.J. 322, followed, though doubted.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order passed by the Court of the Chief Presidency Magistrate, Madras, dated 4th June, 1948, in M. C. No. 26995 of 1948.

B. T. Sundararajan for *S. Krishnamurthi* for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) as Crown Prosecutor for the Crown.

The Court made the following

ORDER.—The 73 accused, who are petitioners before me, were convicted under sections 41 and 75 of the City Police Act and sentenced to varying terms of imprisonment. In addition they were also fined. The accused, who included women, went in a procession of Fort St. George to demonstrate before the Minister of Law for getting the release of their relatives who were at that time imprisoned in Vellore Jail. They pushed past the sentry at the gate and entered the premises of the Fort. When the police officer arrested three of the ring-leaders, they made a forcible attempt to extricate them from their custody. They also raised slogans against the Ministry in power. The learned Chief Presidency Magistrate, on a consideration of the entire evidence, held that they were guilty of disorderly behaviour. The Chief Presidency Magistrate also found that there was an order of the Commissioner of Police under section 41 of the City Police Act prohibiting

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1. (1944) 1 M.L.J. 381 : I.L.R. 1945 Mad. 203.

* Crl.R.C. No. 615 of 1948.] 7th October, 1948.
(Crl.R.P. No. 578 of 1948).

the holding of any meeting, gathering, procession or demonstration in any public place, street, or thoroughfare within the limits of the Madras city except under a licence issued by him. It was found that the accused did not take the licence so prescribed and thus contravened the express terms of that order.

Mr. Sundararajan, learned counsel for the accused argued, that on the evidence the Chief Presidency Magistrate should not have held that his clients were guilty of disorderly behaviour. It is impossible to accept this argument. There is clear evidence in this case,—and there is no reason to reject it,—that the accused gathered in the Fort St. George premises and behaved in a disorderly manner. I accept the finding of the Chief Presidency Magistrate that the accused were guilty of disorderly behaviour. Even so he argued that under section 75 of the City Police Act the petitioner could not be convicted unless they were also found drunk in addition to their disorderly behaviour. I was inclined to accept this argument on a construction of the provision of section 75 ; but it has been brought to my notice by the learned Public Prosecutor that this interpretation had not been accepted to his knowledge for about 25 years. Learned counsel for the petitioners also does not deny this statement. In the Index of cases prepared by this Court a summary of a judgment of Wallace, J., delivered on 3rd April, 1925, is given. In dealing with the construction of section 75, the learned Judge says :

> " The section is unhappily worded. But the idea that the Legislature was deliberately aiming only at such riotous or disorderly persons as are also drunk and incapable of taking care of themselves and not riotous and disorderly persons who are sober and able to take care of themselves is almost ludicrous when viewed along with the general intention and scope of the Act. Therefore being 'guilty of any riotous, disorderly or indecent behaviour' is a separate offence."

I should have thought that this reasoning was a good ground for amending the section ; but, whatever it might be, as early as 1925 this interpretation was accepted by Wallace, J. I understand that this judgment has been followed in many other cases. The latest is that of Horwill, J., in *Kannaya Rao* v. *Emperor*[1]. The learned Judge accepts the construction put upon the section by Wallace, J., no doubt without reference to that judgment. Though I still have my doubts on the construction of section 75, on the principle of *stare decisis* I follow the construction accepted by so many judges of this Court for so long a period. If that construction is accepted and on the finding the accused were guilty of disorderly behaviour, the conviction under section 75 by the Chief Presidency Magistrate is correct.

Though Mr. Sundararajan raised the point that Fort St. George is not a public place within the meaning of section 75, he did not pursue the matter and expressed his inability to substantiate that argument in view of some decisions which, he said, took a different view.

Coming to section 41, as there was an order of the Commissioner in the terms stated already and as no permit was taken as required by that section, the accused were guilty thereunder. I therefore agree with the Chief Presidency Magistrate and hold that the conviction is correct and the fines imposed on the accused are reasonable. But in the circumstances of the case and in view of the fact that the accused started to proceed to Fort St. George with a legitimate object, though they subsequently became unruly having regard to some circumstances that happened there, the sentences of imprisonment are reduced to the terms already undergone by them. With this modification the revision petition is dismissed.

V.S. *Petition dismissed.*

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1. (1944) 2 M.L.J. 322.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

Ponnambalam Pillai .. *Petitioner**

v.

Panjaksharam Pillai and others .. *Respondents.*

Civil Procedure Code (V of 1908), *Order* 33, *rule* (1) (b) (*Madras*)—*Leave to sue as pauper to set aside compromise decree—Portion of property admitted to belong to applicant under the compromise decree.—If can be taken into account in deciding the question of pauperism.*

Where a person wants to sue as a pauper to set aside a compromise decree, the subject-matter of the suit is the compromise decree one and entire. For the purpose of deciding the question of the pauperism of the plaintiff, it cannot be said that the plaintiff applicant could take advantage of the portion of the property admitted to belong to him under the compromise decree. What the applicant seeks to set aside is the entire decree and it cannot be cut up into various divisible parts.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the District Munsiff of Chidambaram, in O. P. No. 63 of 1946.

S. Ramachandra Aiyar for Petitioner.

K. Srinivasan for Respondents.

The Court delivered the following

JUDGMENT.—The view of the lower Court that the petitioner could take advantage of the 1¼ cawnies admitted to belong to him according to the compromise decree, which he now wants to set aside and claim more, overlooks the provisions of explanation (1) (*b*) to Order 33, rule 1 of the Code of Civil Procedure. The subject-matter of the suit is the compromise decree one and entire. What the petitioner seeks to set aside is that decree and the same cannot be cut up into various divisible parts. Explanation (11) makes the position clear. If the respondents had placed 1¼ cawnies at the immediate disposal of the plaintiff then probably they could have contested that the plaintiff was possessed of means. On the other hand their counter-affidavit in lower Court stated that even in the 1¼ cawnies the plaintiff is now entitled to a vested right after the death of the respondents.

As observed by Madhavan Nair, J., in *Ramaswami Naidu* v. *Vaiyapuri Nadar*[1] in a suit where the plaintiff got a decree for partition of certain properties saddled with debts, it cannot be said for the purpose of opposing an appeal *in forma pauperis* by the plaintiff against the liability for debts that the subject-matter of the appeal is not the entire decree.

I would therefore hold that the lower Court failed to exercise the jurisdiction vested on it by law in not allowing the application to sue as a pauper. The order of the lower Court is set aside and the revision allowed with costs in this Court.

V.S. *Petition allowed.*

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* C. R. P. No. 792 of 1947. 6th August, 1948.

1. (1934) 67 M.L.J. 581 at 583.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE MACK.

Penukonda Rathakrishnamurthy .. *Appellant**

v.

Balasubramania & Co. and others .. *Respondents.*

Arbitration Act (X of 1940), section 37 (1) and (3)—Arbitration bye-laws of Madras Yarn Merchants' Association incorporated in the arbitration clause in contract between members—Bye-law providing for invocation of arbitration by application accompanied by plaint and documents along with fee of Rs. 25—Computation of limitation for claim—If date of application or service of notice on defendant.—Award—When liable to be set aside as invalid.

Where the arbitration bye-laws of the Madras Yarn Merchants' Association are incorporated in an arbitration clause providing for the settlement of disputes between its members and a bye-law provided for invocation of arbitration by an application accompanied by a plaint and documents, etc., along with a fee of Rs. 25 the arbitration must be " deemed to have commenced " within the meaning of section 37 (3) of the Arbitration Act on that date which constitutes the material date for limitation. If the claim for damages for breach of contract is within 3 years from the date of such commencement the claim is not barred by limitation.

A mere error on a point of law whether specifically referred to the arbitrators or not will not by itself justify the Court setting aside the award. No hard and fast rule can be laid down as to the type of cases in which an award may be remitted under section 16 (*c*) or set aside under section 30 (*c*) of the Arbitration Act. All objections to the legality of the award that are on the ground of any error in law apparent on the face of the award are governed by section 16 (*c*) and not by section 30 (*c*). Even to justify a remission of the award on the ground of an illegality apparent on its face, it must be one of such a nature as to permit of no argument, and to be patent on its face and if permitted to pass unrectified would do substantial injustice in both law and equity to the parties concerned.

Appeal against the order of the Hon'ble Mr. Justice Kunhi Raman, dated 18th March, 1947, and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in O.P. Nos. 153 and 197 of 1946.

P. Somasundaram and *A. K. Muthuswami Aiyar* for Appellant.

V. Radhakrishniah and *B. Venkataramiah* for 1st Respondent.

The Court delivered the following

JUDGMENTS: *Mack, J.*—This is an appeal against the judgment of Kunhi Raman, J., on the Original Side in two petitions filed under the Arbitration Act, one to make the award a decree of the Court and the other to set it aside on the ground that the arbitrators had wrongly decided a point of law regarding limitation in holding that the claim of the appellant, P. Rathakrishnamurthy, was in time.

The facts are these : The appellant and Balasubramania & Co. (the first respondent) are both yarn merchants and members of the Madras Yarn Merchants' Association. They have admittedly subjected themselves as members to a set of arbitration bye-laws which have laid down a rather elaborate procedure for the reference of disputes arising between the members out of forward and other contracts to arbitration. Rule 4 (*a*) of the Arbitration bye-laws is as follows :—

" In the forward (Vaida) F.O.R., or Ex-godown contract forms supplied by the Association, the following arbitration clause shall be inserted and it shall read thus : 'Any dispute arising out of this contract shall be referred to arbitration through the Madras Yarn Merchants' Association according to the rules that are in force or hereafter come in force."

Rule 5 prescribes the first step for the invocation of arbitration and runs as follows :

" Any party to a dispute shall apply in writing to the Secretary of the Association filling up the form prescribed by the Association. Such application shall be accompanied by a plaint and necessary papers, letters and documents relating to the dispute along with a fee of Rs. 25."

It is common ground that under the provisions of rule 5 the appellant filed a plaint in the office of the Secretary of the Association on 29th March, 1945, claiming Rs. 13,052-4-0 as damages from Balasubramania & Co., and nominated

* O.S. Appeal No. 49 of 1947. 13th August, 1948.

Sri T. N. K. Govindarajulu Chetty, the second respondent, as his arbitrator. It is also common ground that under rule 7 notice was issued by the Secretary on 31st March, 1945, to the known address of Balasubramania & Co., as recorded in the association office. It was re-directed by the postal authorities and received only by the first respondent on 3rd April, 1945. He refused to nominate an arbitrator and filed O.P. No. 202 of 1945 in the High Court challenging the validity of the arbitration reference. He, however, subsequently withdrew this by consent and then nominated his own arbitrator, Beechar Bhai, the third respondent. The arbitrators passed an unanimous award giving the appellant a decree for Rs. 9,682-8-0 overruling a request by the first respondent to refer the point of limitation to the Court under section 13 (*b*) of the Arbitration Act. It is also common ground that the date of breach of the alleged contract was 31st March, 1942. The arbitrators held that as the appellant had invoked arbitration under rule 5 by filing a plaint in the association office on 29th March, 1945, his claim was in time. A brief finding on this point in their award is as follows :

"We hold that it is quite reasonable that the date of filing of the case in the Association shall be taken to determine the limitation."

The learned Judge took the view, however, that under section 37 (3) of the Arbitration Act, the criterion date for limitation was the date on which the first respondent was served with the notice through the Secretary. He held the claim to be time-barred and that there was an error of law on the face of the award which he accordingly set aside. As 1st April, 1945, was a Sunday there was a delay of one day according to the finding of the learned Judge, who for purposes of service applied section 42 of the Arbitration Act, read with section 27 of the General Clauses Act (X of 1897). It is not necessary to consider that portion of his judgment as I am of the opinion that assuming section 37 (3) applies to this case the arbitrators were correct in their finding of law that the invocation of the arbitration under rule 5 of the arbitration bye-laws by the undisputed filing of a plaint on the 29th of March must be held to be the date on which the arbitration must be "deemed to have commenced" within the meaning of section 37 (3) and to constitute the criterion date of limitation.

Section 37 (3) reads as follows :

"For the purposes of this section and of the Indian Limitation Act, 1908, an arbitration shall be deemed to be commenced when one party to the arbitration agreement serves on the other parties thereto a notice requiring the appointment of an arbitrator . . . . . ."

Two points immediately arise for determination in the present case.

(1) What was the arbitration agreement?

(2) Who were the other parties thereto?

The dispute was referred to arbitration under rule 4 of the bye-laws. Mr. Radhakrishniah for the respondent endeavoured to restrict the arbitration agreement in the present case to the two parties concerned in the dispute in order strictly to apply section 37 (3) to support his contention that it is service of notice on the first respondent which commences the arbitration and is the criterion date of limitation. The arbitration agreement in this case cannot however be restricted only to the two disputing members of the Yarn Merchants' Association, as in an ordinary arbitration agreement by which two persons in a case agree to refer any dispute arising for arbitration.

"Arbitration agreement" is defined in section 2 (*a*) of the Act as

"a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not."

In *Chaitram Ram Bilas* v. *Bridhichand Kesrichand*[1], in which a dispute was referred to arbitration to the Bengal Chamber of Commerce, it was held that its Association rules were imported into the contract and were binding on the parties. I have no doubt that the arbitration agreement contemplated by section 37 (3) of the Arbitration Act in the present case is the entire set of arbitration bye-laws in which

1. (1915) I.L.R. 42 Cal. 1140.

the specific arbitration clause in rule 4 is embodied and which all the members of the association have bound themselves to follow. These rules prescribed certain procedure for the invocation of arbitration, namely, an application to the Secretary of the Association notifying the Association as a whole of the invocation of arbitration accompanied by a plaint, and the arbitration must be deemed to have commenced under section 37 (3) on that date. Mr. Radhakrishniah has stressed service " on the other parties " under section 37 (3) as being imperative but the other parties to the arbitration agreement are all the members of the association and not merely the two disputants themselves.

I am unable to accept Mr. Radhakrishniah's contention that under section 37 (3) the appellant had to see that the first respondent was served within the ordinary limitation period and that it was open to him, as we understood his argument, to serve the first respondent directly and quite independently of rule 7 of the arbitration bye-laws to ensure that his claim was not time-barred. Had he sought to serve the first respondent direct he would have been adopting procedure in violation of the arbitration bye-laws of the association to which he had bound himself when he joined the association. There is another obvious infirmity if this contention is upheld, namely, that the appellant would place himself in a difficult position and run the risk of his claim being time-barred, if for any reason his application and plaint were bottled up by a slack and inefficient Secretary for several days without the issue of any notice to the other party affected. I have, therefore, no hesitation in finding, in disagreement with the learned Judge, and in agreement with the arbitrators. that the plaintiff's claim was not time barred when he made his application accompanied by a plaint on the 29th March in the office of the Secretary. On this finding it follows that this appeal must succeed.

We have been taken during the arguments in this case, through several English decisions which the learned Judge has traversed in his judgment and the differentiation English Judge-made law has made in those cases. The position has been summed up in *F. R. Absalom, Limited* v. *Great Western London Garden Village Society, Ltd.*[1], a decision of the House of Lords which settled a conflict of judicial opinion arising out of the scope of such differentiation. The position in English law may be summed up in the words of Lord Russel of Killowen in this decision :

> " It is, I think, essential to keep the case where disputes are referred to an arbitrator in the decision of which a question of law becomes material distinct from the case in which a specific question of law has been referred to him for decision. I am not sure that the Court of Appeal has done so. The authorities make a clear distinction between these two cases, and, as they appear to me, they decide that in the former case the Court can interfere if and when any error of law appears on the face of the award, but that in the latter case no such interference is possible upon the ground that it so appears that the decision upon the question of law is an erroneous one."

We are not bound to follow that differentiation made in English Judge-made law which has led to much conflict of judicial decisions in interpreting the Indian Arbitration Act, by which we are bound. That Act makes no such differentiation. The only provision under which an award can be set aside is section 30 where the arbitrator has misconducted himself, or when an award has been made after supersession of the arbitration or has become invalid under section 35, or an award has been improperly procured *or is otherwise invalid*. It is very rarely that a specific point of law is referred to arbitration in this country. In the generality of cases the whole dispute is referred to arbitration and points of law naturally will arise for determination.

In *Durga Prosad* v. *Anardevi*[2], a Bench of the Calcutta High Court exhaustively considered the differentiation made in English Judge-made law, and as I read that decision, it cuts a Gordian knot of complication by holding that a joint reference to arbitration of all outstanding matters in a suit was a reference to the arbitrators to decide all specific issues and that decisions by the arbitrators even though manifestly wrong cannot be challenged. It would be unduly complicating arbitrations in

1. (1933) A.C. (H.L.) 592.
2. (1946) 50 C.W.N. 880.

this country if we were to accept and attempt to apply the differentiation attempted in English Judge-made law. The simple statute which we have to interpret and apply recognises no such differentiation, but gives Courts a very wide discretion to set aside an award if it has been improperly procured *or is otherwise invalid.* In fact, errors of law appearing on the face of the award are dealt with under a separate section (section 16 of the Arbitration Act), by which the Court may from time to time remit the award for reconsideration *inter alia* where an objection to the legality of the award is apparent upon the face of it. The present case is one which is, on the basis of the learned Judge's finding, covered by section 16 (*c*) and the course contemplated by the Statute was a remission of the award to the arbitrators for reconsideration. The learned Judge did not, however, adopt this course as the arbitrators had discharged their duties and had become *functus officio.* His finding that the whole claim of the appellant was barred by limitation meant of course that the arbitrators, in case the award was remitted to them would have been left with no option but to dismiss the plaintiff's claim *in toto.* The learned Judge in fact must be deemed in the present case to have set aside the award only under section 30 (*c*) within the ambit of the words *or is otherwise invalid.* I am of the opinion that a mere error on a point of law whether specifically referred to the arbitrators or not will not by itself justify the Court setting aside the award.

There may be many cases in which the arbitrators though aware of the strict law on the subject may in order to do substantial justice on principles of equity decide to deviate from it. An example of this is furnished in *Madepalli Venkataswami* v. *Madepalli Suranna*[1]. The plaintiff in that case was born blind and strictly not entitled to a share under Hindu Law. After the issues were framed the dispute was referred to arbitrators who awarded to the plaintiff a life interest in a one-fourth share. It was held that the award, the legality of which was questioned on this short ground, was not patently illegal as to come within the mischief of clause (*c*), paragraph 14, Schedule II of the Code of Civil Procedure, corresponding to section 16 (*c*) of the Arbitration Act and could not be remitted for reconsideration. No hard and fast rule can be laid down as to the type of cases in which an award may be remitted under section 16 (*c*) or set aside under section 30 (*c*). All objections as to the legality of the award that is on the ground of any error in law appearing on the face of the award appear to be governed by section 16 (*c*) and not by section 30 (*c*). Even to justify a remission of the award on the ground of an illegality apparent on its face, it must, I think be one of such a nature as to permit of no argument, and to be patent on its face and if permitted to pass unrectified would do substantial injustice in both law and equity to the parties concerned. It is not sufficient that there should be merely an arguable case on a point of law determined by the arbitrators. The words *or is otherwise invalid* in section 30 (*c*) of the Act similarly would apply to very exceptional cases if for instance principles of natural justice had been violated by the award and in cases where it is found to be perverse and unconscionable. It is quite impossible to lay down all cases which can come within the scope of section 30 (*c*), nor am I endeavouring to do so.

In view of our finding that the arbitrators were correct in their finding on the question of limitation, the appeal is allowed with costs against the first respondent throughout, and same Advocate's fee as in the trial Court. The order of the learned Judge is set aside and there will instead be a decree in terms of the award.

The Chief Justice.—I agree with my learned brother that the appeal must be allowed.

Kunhi Raman, J., held that the claim was clearly barred by limitation in view of the provisions of section 37 (3) of the Indian Arbitration Act, 1940. In my opinion, that section has no application whatever to this case. Obviously, it cannot apply to several arbitrations in which there would be no necessity for one party to

1. (1917) 34 M.L.J. 323: I.L.R. 41 Mad. 1022.

the arbitration agreement serving on the other party any notice requiring the appointment of an arbitrator. Take, for instance, the case where there is a submission to arbitration duly signed by both the parties at the same time. It cannot be said in such a case that in spite of an agreed submission there should be service of notice by one party on the other. This position was conceded by Mr. Radhakrishniah, the learned advocate for the respondent. Section 37 (3) must, in my view, be read with the provisions of section 8 (1) which runs thus :

"In any of the following cases—

(*a*) where an arbitration agreement provides that the reference shall be to one or more arbitrators to be appointed by consent of the parties, and all parties do not, after differences have arisen, concur in the appointment or appointments ; or (*b*) if any appointed arbitrator or umpire neglects or refuses to act, or is incapable of acting, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied, and the parties or the arbitrators, as the case may be, do not supply the vacancy ; or (*c*) where the parties or the arbitrators are required to appoint an umpire and do not appoint him ; any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in the appointment or appointments or in supplying the vacancy."

Now, what are the terms of the arbitration agreement in this case ? Being members of the Madras Yarn Merchants' Association, both parties are bound by the Arbitration bye-laws of the Association. Under bye-law 4, every contract, either expressly shall include, or impliedly shall be deemed to include the following arbitration clause :—

"Any dispute arising out of this contract shall be referred to arbitration through the Madras Yarn Merchants' Association according to the rules that are in force or hereafter come in force and not otherwise."

This by itself does not provide that the reference shall be to one or more arbitrators to be appointed by consent of parties. There is provision in the bye-laws even for a sole arbitrator who may be nominated by the president, or in his absence, the Secretary. I do not think that the notice sent by the secretary on receipt of an application for arbitration from any member under bye-law 7 is a notice falling within section 8 (1) or section 37 (3) of the Arbitration Act.

If section 37 (3) of the Arbitration Act does not apply, then the only other provision is that contained in section 37 (1) which is as follows :—

"All the provisions of the Indian Limitation Act, 1908, shall apply to arbitrations as they apply to proceedings in Court."

In the case of proceedings in Court like a suit or an application, the Explanation to section 3 of the Limitation Act declares that

"a suit is instituted, in ordinary cases, when the plaint is presented to the proper officer ; in the case of a pauper, when his application for leave to sue as pauper is made ; and in the case of claim against a company which is being wound up by the Court, when the claimant first sends in his claim to the official liquidator."

Obviously, this explanation does not directly apply to an arbitration. We are herefore constrained to apply the principles underlying this Explanation to arbitration proceedings. It is reasonable in doing so to hold that the date on which the arbitration proceedings can be deemed to commence must be taken to be the material date for computing time. Section 37 (3), as already mentioned, provides for a particular contingency. In other cases, the date on which it can be said that a party has taken the first unequivocal step to obtain relief by arbitration is the material date corresponding to the date of filing of a plaint in Civil Court or a complaint in a Criminal Court. In *Board of Trade* v. *Cayze, Irwine and Co.*[1] Viscount Cave, L.C., in referring to section 16 of the English Arbitration Act of 1889 which is practically identical with the provision in the Indian Arbitration Act, put the question thus :—

"...... but the only question which survives for your Lordships' determination to-day is whether the arbitrator should have found that the claim of the respondents was barred by the statute of limitation .... by reason of the fact that the first step in the arbitration—namely, the appointment of the arbitrator—was not taken within six years after the date of the loss of the steamship."

1. (1927) A. C. 610.

This furnishes the right clue. If there appears from the facts of a particular case when the first step in the arbitration is taken, then the date of that step would be the material date.

The bye-laws make provision for any party to a dispute applying in writing to the secretary of the Association. Such application must be accompanied by a plaint and necessary documents relating to the disupte and a fee of Rs. 25. These provisions are binding on the parties who are members of the Association. The only way to initiate arbitration proceedings under these bye-laws is by the filing of an application in writing with the secretary of the Association. I think it reasonable to hold that the filing of such an application accompanied by the plaint is the first step in the arbitration under the bye-laws of the Madras Yarn Merchants' Association. It is a definite date, that is, the date of commencement of the arbitration proceedings. As the application in this case was made on 29th March, 1945, the claim was not barred by limitation even assuming that the date of the breach was 31st March, 1942. As the learned Judge set aside the award only on the ground that the claim was barred by limitation, it follows that the appeal must be allowed and the application filed by the respondent for setting aside the award must be dismissed with costs in the trial Court and here.

In this view, I think it unnecessary to express any opinion on the other questions argued before us.

K.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction.)

PRESENT :—MR. JUSTICE KUNHI RAMAN.

P. Gannu Rao .. *Applicant**

v.

P. Thiagaraja Rao and another .. *Respondents.*

Arbitration Act (X of 1940), section 34—"Steps in the proceedings"—What would amount to.

If something is done by the party applying under section 34 of the Arbitration Act which is in the nature of an application to the Court, it will necessarily come under the category of a "step in the proceedings" within the meaning of that section so as to disentitle that party from applying for stay under that section.

A partnership contract provided for the settlement by arbitration of any disputes between the partners. One of the partners filed on 27th February, 1947, a suit for dissolution of the partnership and for accounts. On the next day he filed an interlocutory application for an interim injunction restraining the defendant from drawing certain amounts, for the appointment of a commissioner to take an inventory, etc. An *ex parte* order granting interim injunction was made and the notice in respect of it was made returnable on 3rd March, 1947. On that date the defendant appeared by his advocate and asked for 10 days' time for filing a counter which was granted and by consent of parties the interim injunction order was also modified. On the adjourned date the defendant's advocate mentioned for the first time that he intended filing an application for referring the dispute to arbitration and that therefore he did not file a counter. The interim order was directed to continue. On an application under section 34 of the Arbitration Act by that defendant,

Held, that in the circumstances the applicant did take a step in the proceedings within the meaning of section 34 on both the dates when the interlocutory application of the plaintiff came on for hearing and further, by his conduct in that application he was precluded from applying for stay of proceedings and for reference of the disputes between the parties to arbitration.

The fact that on the second hearing the defendant's advocate mentioned that he was going to apply under section 34 of the Act will not affect the position so far as section 34 was concerned.

V. Ramaswami Aiyar and *D. B. Jagannath Rao* for Applicant.

V. Radhakrishnayya for *A. K. Balakrishnan* and *V. Srinivasan* for Respondents.

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* Application No. 797 of 1947 in C.S. No. 89 of 1947. 2nd April, 1947.

The Court delivered the following

JUDGMENT :—This application is made on behalf of the first defendant is C.S. No. 89 of 1947 under section 34 of the Indian Arbitration Act of 1940 (which will hereafter be referred to as the Act in the course of this judgment) and for stay of proceedings in the suit in view of an agreement alleged to have been entered into between the parties that disputes between them should be referred to arbitration. The application is resisted on behalf of the plaintiff and the 2nd defendant. The main contention urged on behalf of the respondents is that it is too late now for the applicant to ask for stay of proceedings under section 34 of the Act inasmuch as he has already taken " other steps in the proceedings " within the meaning of section 34.

To appreciate these contentions it is necessary to state the facts very briefly. There was a partnership contract between the plaintiff and the defendants, the date of the deed of partnership being the 15th September, 1943. According to clause (1) of that contract, in the event of any dispute between the partners regarding the partnership the same shall be settled by arbitration under the Indian Arbitration Act. The suit was filed by P. Thiagaraja Rao one of the parties to this contract against the other two partners for dissolution of partnership and for accounts, the date of the suit being 27th February, 1947. On the day following, the plaintiff filed an interlocutory application—Application No. 631 of 1947—in which he prayed for the following reliefs : an interim injunction pending disposal of the suit restraining the 1st defendant from drawing certain amounts, for the appointment of a commissioner to take an inventory of all documents, account books and vouchers in the premises mentioned in the application and to initial them, or in the alternative for attachment before judgment of the properties mentioned in Schedules A and B to the application, and for the appointment of a Receiver to take possession of all the assests of the firm. On this application, an *ex parte* order was made on the 28th February, 1947, directing notice to the respondents, granting interim injunction as prayed in clause (*a*) of the notice of motion and appointing a commissioner for preparing an inventory and initialling the account books and documents. The notice in respect of the order for interim injunction was made returnable on the 3rd of March, 1947. On that date, the 1st respondent to that application who is the applicant here appeared by Mr. V. Ramaswami Aiyar. What transpired on the date on which he so appeared before the Court is to be found in the following order made on the 3rd of March :

> " The first defendant appears by Mr. Ramaswami Aiyar and wants ten days' time for filing counter affidavit. File counter affidavit and reply affidavit within ten days. With regard to prayer (*a*) Mr. Srinivasan for the plaintiff consents to the following modification, of the order of interim injunction in respect of item 3 of schedule A of the summons. It is stated by Mr. Ramaswami Iyer that the 1st respondent has been permitted to overdraw from the Indian Bank on the security of the fixed deposit of Rs. 72,000 mentioned as item 3 in schedule A. Mr. Srinivasan agreed that the fixed deposit may be used as security for future overdrafts and that the order of interim injunction will not be enforced to the prejudice of the first respondent in respect of such overdrafts. Adjourned to the 14th March, 1947."

It is clear from this order that what happened on that date was that the present applicant through his learned counsel asked for ten days' time for filing a counter affidavit and for modification of the order of interim injunction issued in respect of the prayer incorporated in clause (*a*) of the notice of motion. By consent of the plaintiff's advocate this request was granted and the order of interim injunction was modified in the manner in which the present applicant wanted it to be modified. There was not a word said on that date that the applicant contemplated filing a petition under section 34 of the Act for stay of proceedings in the suit and for reference to arbitration of the disputes involved in it. On the adjourned date, the present applicant appeared again by Mr. Ramaswami Iyer and stated for the first time that he intended filing an application for referring the dispute to arbitration. It was represented on his behalf that in view of this decision arrived at by him he had not yet filed a counter affidavit. The order made on the 14th of March after recording these facts proceeds to say,

"He also states that all the account books and vouchers have come back to the respondent from the auditors and that the commissioner already appointed may see those books and documents and prepare a list and also initial them."

The interim order of injunction as modified on the previous date of hearing was directed to continue and the application was ordered to be posted with the present application which Mr. Ramaswami Iyer said his client contemplated filing.

According to the provisions of section 34 of the Act,

"an application to stay proceedings and to refer the disputes to arbitration can be made only at any time before filing the written statement or taking any other steps in the proceedings."

The written statement in the suit has not yet been filed, but the respondents' learned counsel contends that the applicant has taken "other steps in the proceedings" in view of the part taken by him in the prosecution of Application No. 631 of 1947. Mr. Ramaswami Aiyar on behalf of the applicant states that his client by participating in the manner already pointed out in Application No. 631 of 1947 cannot, in view of the authorities both English and Indian, be regarded as having taken a step in the proceedings by so doing. The question for determination therefore is whether he had taken a step in the proceedings which precludes him from maintaining this application.

Learned counsel appearing on both sides have quoted English and Indian decisions in support of their respective contentions. In England the law relating to the subject as laid down in the English Arbitration Act of 1889, 52 and 53 Vict., Chapter 49 is to be found in section 4 of the Act and the wording of the relevant part of the section is similar to that of the Indian Act of 1940.

"An application for stay of proceedings can be taken out by a party before delivering any pleadings or taking any other steps in the proceedings."

It will thus be seen that the Indian Act has adopted the identical words with regard to the participation of the party concerned in the proceedings pending in the Court by laying down that it is only before he has taken any other steps in the proceedings that he can apply for stay of the suit.

Mr. Ramaswami Aiyar places reliance upon the following summary of the law as laid down in Halsbury's Laws of England, Hailsham Edn., volume 1 at page 639, paragraph 1087, and on the cases given in the foot-notes in support of the summary. The passage may be read in full :

"The applicant must have taken no step in the proceedings after appearance. A party who makes any application whatsoever to the Court, even though it be merely an application for time, takes a step in the proceedings.

Delivering of a defence, application to the Court for leave to interrogate or for a stay pending the giving of security for costs or the extension of time for delivery of defence, are steps in the proceedings. Even attendance at an ordinary summons for directions issued by the plaintiff and permitting an order to be made thereon without objection amounts to taking a step in the action. On the other hand, neither a notice requiring a statement of claim nor a request by letter for extension of time for pleading nor the filing of affidavits in answer to an application by the plaintiff for the appointment of Receiver amount to taking a step for in the proceedings."

According to Mr. Ramaswami Aiyar the participation of the applicant in the proceedings in the interlocutory application is analogous to the conduct of a party who merely files affidavits in answer to an application by the plaintiff for the appointment of a receiver and therefore on the authority of the English decisions quoted in the foot-notes to the passage read above, the applicant's conduct did not amount to taking a step in the proceedings.

In the English decision relied on by Mr. Ramaswami Iyer are *Ives and Barker* v. *Willans*[1] and *Zalinoff* v. *Hammond*[2]. In the first of these cases Lindley, L.J., stated the law in the following words :

"The authorities shew that a step in the proceedings means something in the nature of an application to the Court, and not mere talk between solicitors or solicitors' clerks, nor the writing of letters, but the taking of some step, such as taking out a summons or something of that kind, which is, in the technical sense, a step in the proceedings."

This passage is quoted in the decision in *Zalinoff* v. *Hammond*[2] by Stirling, J. That was the case in which there was an application made by the plaintiff for the

1. (1894) 2 Ch. 478, 484. 2. (1898) 2 Ch.D. 92.

appointment of a receiver in support of which he filed certain affidavits and all that the defendants did was to file affidavits in answer to these. After quoting the observations of Lindley, L.J., in *Ives and Barker* v. *Willans*[1], the learned Judge states as follows in his judgment :—

"It seems to me that the mere filing of affidavits in defence to a motion for a receiver is not in the nature of an application to the Court and consequently not a 'step in the proceedings' within the meaning of the section. By such a step is meant a substantive step taken by a party. It may be that a very limited application to the Court—such as taking out a summons for extension of time —would be enough. That has been so decided in *Ford's Hotel Co.* v. *Bartlett*[2]. In *Brighton Marine Palace and Pier, Ltd.* v. *Woodhouse*[3], before North, J., the motion was ordered to stand over to the trial and it does not appear whether affidavits had been filed or not.

But I do not think in this case the defendant has taken a 'step in the proceedings' within the meaning of the Act, and therefore I think I ought to make an order in accordance with the application. That being so, the motion for a receiver will stand over, for it may be useful hereafter, until after the arbitrator has decided all questions in the action, of which this may be one."

It will be seen from the extracts read above that if something is done by the party concerned which is in the nature of an application to the Court, it will necessarily come under the category of a step in the proceedings. There is authority for this position both in England and in India. But mere writing of letters or the filing of affidavits in the office of the Court to resist the appointment of a receiver without making an application to the Court either orally or in writting cannot, according to judicial authority, amount to taking a step in the proceedings. In *Bhowanidas Ramgobind* v. *Pannachand Luchmipat*[4], Page, J., took the view that applying for a copy is merely to seek information in order that the defendant may ascertain the nature of the plaintiff's claim. Until he knows that he will not be in a position to check whether he would proceed by way of arbitration or take part in the litigation which has been commenced against him. In *Joylal and Co.* v. *Gopiram Bhotica*[5] the defendant asked for security for costs. That was held to be taking a step in the proceedings, because it disclosed his willingness to proceed in the action after security was given. In *Ford's Hotel Co.* v. *Bartlett*[2], a summons was taken out for extension of time to file the written statement. That was held to be a step in the proceedings. In *Sarat Kumar Roy* v. *Corporation of Calcutta*[6], a similar view was taken although an attempt was made to distinguish it from the English case on the ground that the defendant when applying for time clearly expressed the intention of enforcing the clause to refer the dispute to arbitration. *The Karnani Industrial Bank, Ltd.* v. *Satya Niranjan Shaw*[7] is authority for the view that it is immaterial whether a written application is made for extension of time to file a written statement or it is done verbally by the defendant's lawyer. In *County Theatres and Hotels, Ltd.* v. *Knowles*[8], an action was brought for breach of a written contract which contained an agreement to refer matters in dispute between the parties. The defendant attended at Chambers on the hearing of a summons for directions taken out by the plaintiffs, on which an order was made that the plaintiff and defendant should respectively make discovery of documents. The defendan subsequently applied under section 4 of the Arbitration Act, 1889, for stay of proceedings. It was held that the defendant had taken a step in the proceedings, and was therefore not entitled to a stay. In *Richardson* v. *Le Maitro*[9], attendance by a defendant before the Master on a summons for directions taken out by the plaintiff and acquiescence without protest in a common form order for delivery of pleadings was held to be taking a step in the proceedings within the meaning of section 4 of the Arbitration Act of 1889 and the defendant was held to be precluded from moving to stay proceedings under that section. In *Ochs* v. *Ochs Bros.*[10], the defendants attended before a Master on the usual summons for directions taken out by the plaintiff, which the Master proposed to treat as a summons for an account and the defendants gave an undertaking to furnish an account as a term of the

1. (1894) 2 Ch. 478, 484.
2. (1896) A.C. 1, 4.
3. (1893) 2 Ch.D. 486.
4. (1924) I.L.R. 52 Cal. 453.
5. (1920) I.L.R. 47 Cal. 611.
6. (1907) I.L.R. 34 Cal. 443.
7. (1924) 28 C.W.N. 771.
8. (1902) 1 K.B.D. 481.
9. (1903) 2 Ch.D. 222.
10. (1909) 2 Ch.D. 121.

summons standing over. This was held to be taking a step in the proceedings under section 4 of the Arbitration Act which precluded the defendants from obtaining a stay of proceedings under that section. It was also held that in such a case it was not necessary that an order should have actually been made. In the case reported in *Subal Chandra Bhar* v. *Mahomed Ibrahim*[1], the case-law on the subject is discussed and the view expressed is that a defendant can be said to have taken a step in the proceedings within the meaning of section 34, if an application is made to the Court by or on his behalf orally or in writing or something in the nature of such application and an acquiescence on the part of the defendant is to be inferred from the application in the Court deciding the dispute between him and the plaintiff. There the application was by the plaintiff for appointment of a receiver. The defendants' counsel applied to the Court orally and obtained an adjournment of the hearing of the plaintiff's application and also obtained certain directions relating to inspection of the books and documents of the firm. Subsequently the defendant applied under section 34 of the Act of 1940 for a stay of the suit on the ground that the suit was in respect of a matter agreed to be referred to arbitration. It was held that by applying for an adjournment and for directions the defendant had taken a step in the proceedings within the meaning of section 34 and was not entitled to a stay of the suit. The learned Judge set forth the acts done on behalf of the defendant as appeared from the Court minutes made by the Assistant Registrar on the date the events took place. This record showed that an application was made for an adjournment on behalf of the defendant. The Court granted the adjournment for three weeks and directed that an affidavit for possession should be filed within a fortnight and reply by a certain date following. The Court also directed,

" Interim order to continue. Liberty to either party to have inspection of the books and documents of the office of the S. D. O., Ranchi, on two days' notice to one another's solicitors."

In the present case, as pointed out by Mr. Radhakrishnayya something more than this did take place. Not only did the defendants' learned counsel apply for an adjournment for filing counter-affidavit which application was granted, but he also got the terms of the interim order of injunction modified. On the next adjourned date, he stated that his account books and vouchers were all open for inspection and scrutiny by the Commissioner appointed by the Court, since they were got back from the auditors. The fact that on that occasion he mentioned that he was going to apply for stay of proceedings under section 34 will not affect the position so far as section 34 of the Act is concerned. On the authorities discussed above I have no doubt that the defendant in this case who now applies for stay of proceeding in the suit did take a step in the proceedings within the meaning of section 34 both on 3rd March, 1947, and on 14th March, 1947, when application No. 631 of 1947 in C.S. No. 89 of 1947 came on for hearing. The wording of the section is general inasmuch as reference is made to a step in the " proceedings " and not a step in the " suit." The interlocutory application in the suit will certainly come under the category of proceedings and since the defendant did take a step in the proceedings he is precluded from applying under section 34 of the Act for stay of the suit.

This is sufficient for dismissing the application, but Mr. Radhakrishnayya also refers to the fact that in the suit questions of fraud are raised and consequently the Court should exercise its discretion in refusing the stay asked for.

The questions of granting a stay is left by the section to the discretion of the Court. There is no doubt that this discretion must be judicially exercised. In the English Act there is express provision made in section 14 (2) for meeting such cases. According to that provision, where an agreement between any parties provides that disputes which may arise in future between them should be referred to arbitration and the disputes which so arise involve the question whether any such party has been guilty of fraud, the Court shall, so far as may be necessary to

1. I.L.R. (1943) 2 Cal. 298.

enable that question to be determined by Court, have power to order that the agreement shall cease to have effect, and power to give leave to revoke any submission made thereunder. There is no such corresponding provision in the Indian Arbitration Act of 1940, to order that the agreement shall cease to have effect and that the submission should be revoked, but in exercising a discretion to stay proceedings, the Court can in effect, in suitable cases, exercise a similar power. Here, however, such an occasion has not arisen, because there has been no reference made to arbitration and there is no application for revoking the submission to arbitration.

In view of the conduct of the applicant in Application No. 631 of 1947 he is precluded from applying for stay of proceedings and for reference of the disputes between the parties to arbitration.

The application must therefore be dismissed with costs of the plaintiff and the 2nd defendant. The advocate's fee for the plaintiff is fixed at Rs. 100 and for the second defendant at Rs. 35.

V.S. *Application dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

V. Venkataraman (Advocate) .. *Petitioner.**

Madras Maintenance of Public Order Act (I of 1947), sections 2 (1) and 15—Commissioner of Police as the authority to whom powers under the Act are delegated—Oral order for detention—Validity—" Make " in section 2 (1)—Writing not essential—Act extended for subsequent year—Delegation previously made under section 15—If continues.

The legal as well as the natural effect of the extension of the duration of the Madras Maintenance of Public Order for one year beyond 12th March, 1948 (by G.O. No. 446 dated 27th February, 1948), is automatically to extend the duration of the delegation made under the terms of section 15 of the Act and such authority to whom powers have been delegated can make a valid order for detention. The absence of a written order by the authority to whom powers under the Act have been delegated for the detention of a person does not render such detention illegal. The words "To make" in section 2 (1) involves a conscious act on the part of the maker but does not necessarily connote that there should be a formal act of writing.

The purpose and scheme of the Act and the principles on which the Court will interfere with orders of detention under the Act reviewed.

Petition under section 491 of the Code of Criminal Procedure, 1898, praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to issue directions in the nature of *Habeas Corpus* for the production of the petitioner herein before the Court for being dealt with according to law and for setting him at liberty.

A. K. Pillai for *N. S. Mani* and *Messrs. Row and Reddy* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown Prosecutor on behalf of the Crown.

The Court made the following

ORDER.—This is an application by V. Venkataraman, an advocate of this Court who has been working in the office of Messrs. Row and Reddy, advocates, Madras, under section 491, Criminal Procedure Code, for his release from detention. The application is supported by an affidavit from Mr. V. G. Row, senior partner of the advocates' firm, and it is stated therein that the detenu was arrested at his residence at Thyagarayanagar at about 6 A.M., on the 1st April, 1948 and was now being detained in the Vellore Central Jail. It is also alleged in that affidavit that from his house he was first taken to the Saidapet police lock-up and kept there until 6 P.M., on 1st April, and it was only at 6-30 P.M., on that day that he was removed to the Madras Penitentiary where he was detained until 8th April, when he was transferred to the Vellore Sub-Jail. When he was at the Saidapet police lock-up it would appear that he asked for the arrest and search warrants to be

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* Crl.M.P. No. 883 of 1948. 19th May, 1948.

shown to him, under whose authority he was arrested and his house searched. No such document was shown to him, but he was informed that those acts were done under the provisions of the Madras Maintenance of Public Order Act, 1947. A similar request was repeated when the detenu was in the Penitentiary, and the Superintendent read out the order of detention which was signed by the Commissioner of Police and dated 1st April, 1948. It is emphatically averred by Mr. Row in his affidavit that since August, 1947, the detenu has not been an office bearer or a member of any Trade Union or in any way connected with such organisations and that he has been doing exclusively professional work in the various Courts in the city, and has not been doing anything prejudicial to the maintenance of public order in any way. A definite suggestion was made by the deponent in that affidavit that the Commissioner of Police, Madras, passed the order only on 1st April, 1948, and after the arrest of the petitioner and not before, and that the Commissioner could not have had any reasonable grounds for suspecting that the detenu was acting in a manner prejudicial to the maintenance of public order.

An affidavit has been filed on behalf of the Provincial Government which states that the petitioner is a leading communist of Madras, that the order of detention was issued by the Commissioner on 1st April, 1948, and that on the same day he intimated to Government the fact of issue of the order of detention along with the grounds for detention. These grounds were despatched on 24th April, 1948, to the Central Jail, Vellore, for service on the detenu. The grounds set out in that communication are as follows :

" He is a member of the District Committee of the Communist Party of India, Madras. He has been prominently associating himself with all Communist activities. He was the President of the Corporation Labour Union and organised a strike of the Conservancy workers in August. 1946. He induced the workers to make exaggerated demands and was responsible for the rejection of the reasonable terms offered by the Corporation for the settlement of the strike. When the strike was launched at his instigation the strikers committed acts of intimidation and violence and obstructed loyal workers. A number of persons were arrested and prosecuted by the police in this connection. He organised a number of meetings and processions, also issued leaflets and handbills which contained false propaganda and which were calculated to incite violence towards the Police and resistance to their authority. He organised a general strike in sympathy with the conservancy workers on strike on 22nd August, 1946, and a prohibitory order was issued on that day. In defiance of the ban he organised a meeting in Triplicane Beach which was dispersed by the Police by the use of tear smoke. He takes a keen interest in the party activities.

His being at large is considered prejudicial to the public safety and the maintenance of public order."

This application was heard by me on the 4th and 5th May, and in view of the contentions put forward on behalf of the detenu I considered it necessary to examine the Commissioner of Police on certain points materially connected with the circumstances in which the order of detention was issued. The case came up this day for the examination of the Commissioner, but in the meantime some additional grounds were served by the Provincial Government on the detenu which are dated 8th May, 1948, and they are to the following effect :

" He attended secret communist classes for the Leader Cadre in September 1947, during which written instructions were distributed to all the leaders who attended, Arrangements were made for intensive propaganda for the increase of wages of workers in factories and workshops, to fix their hours of work and also to see that workers do only that much of work whieh is required of them according to their pay and designation. This class also decided to do intensive propaganda among the muslims and gather as much support from them as possible. The position on the railways was considered and measures thought out to bring the impending strikes to a successful conclusion.

By virtue of his position as office secretary of the Assembly Front, he has had the opportunity of working behind the scenes and co-ordinating the work of the party M.L.As. and given necessary publicity to the party. This probably accounts for his not coming to outside notice.

He is an important member of the party which is now out for violence and is engaged in subversive activities."

I may before proceeding further state that Mr. Row also filed a reply affidavit which does not materially add to the relevant averments contained in the first affidavit.

The main contentions put forward on behalf of the petitioner are the following: It is argued that in the present case the arrest and detention of the petitioner preceded the statutory satisfaction that is contemplated in section 2 of the Act. Next it is urged, so far as the earlier grounds are concerned, that a scrutiny thereof would show that all of them related to past acts, and that in view of the categorical statement made by Mr. Row, the senior partner of the firm, that the detenu had ceased all his connections with the Trade Union and was wholly devoting himself to professional work, there is nothing to show that there was any continuity in the prejudicial conduct of the detenu so as to attract the application of the Act. Yet another ground put forward is that the various acts referred to in the communication of the Government formed part of certain previous proceedings under the corresponding ordinance and those proceedings having subsequently been dropped and the detenu released, there is no justification to base a fresh action upon the same grounds. Lastly two objections of a technical nature were also put forward that the order containing the grounds was not signed by the Chief Secretary and that the Act having been first passed to be in effect for one year and having been subsequently under powers vested in that behalf extended for another year, the original delegation of powers of the Provincial Government to the Commissioner did not remain in force and that during the extended period of the Act in the absence of a further notification extending the period of the delegation, the Commissioner had no power to make an order of detention.

I may immediately dispose of the last two technical objections. It would appear that the copy of the grounds which was served through the Superintendent of the Central Jail on the detenu was signed by some other officer for the Chief Secretary. A copy of the order actually passed by the Provincial Government and placed before me purports to have been signed by the Chief Secretary himself. Even in the absence of any proof that the actual individual who signed the copy which was served on the detenu had the authority to do so, I must hold applying the maxim *omnia præsumuntur rite et solenniter esse acta* that it must be presumed in the absence of specific evidence to the contrary that the Chief Secretary who under the business rules is the competent authority to sign orders did so in the present case.

Under sub-section (4) of section 1 of the Madras Maintenance of Public Order Act, 1947, it is provided that the Act shall remain in force for a period of one year, but power is given to the Provincial Government by notification from time to time to extend the continuance of the Act for a further period or periods not exceeding one year in the aggregate, if in their opinion it is expedient so to do. The Act came into force on 12th May, 1947, and was extended for a further period of one year from 12th March, 1948, by G. O. Ms. No. 446, Public, General, dated 27th February, 1948, published in the *Fort St. George Gazette*, dated 3rd March, 1948. Under section 15 of the Act:

> "The Provincial Government may, by order, direct that any power or duty which is conferre or imposed on them shall in such circumstances and under such conditions, if any, as may be specified in that direction, be exercised or discharged by any officer or authority subordinate to the Provincial Government."

In exercise of this power the Provincial Government by G. O. Ms. No. 907 Public, General, dated 21st March, 1947, directed that the powers conferred on the Provincial Government by section 2 (1) (*a*) of the Act shall be exercised also by all the District Magistrates and by the Commissioner of Police, Madras, within their respective jurisdictions. It has to be noted that the delegation is not confined to any specified period; it is co-extensive with the duration of the Act. The legal as well as the natural effect of the extension of the duration of the Act for one year beyond 12th March, 1948, is automatically to extend the duration of the delegation made under the terms of section 15. Both the technical objections therefore fail.

Of the three general objections, the first to my mind is of some importance. Before considering it, it is necessary to set out the material provisions of the Act. The purpose of the Act as set out in the preamble is that:

"for the maintenance of public safety and to prevent and put down disorders involving menace to the peace and tranquillity of the Province, it is necessary to provide for preventive detention . . . . ."

The pivotal provision of the Act so far as is material to the point at issue in this case is contained in section 2 (1) (*a*) :

"2. (1) The Provincial Government, if satisfied with respect to any particular person that he is acting or about to act in any manner prejudicial to the public safety or the maintenance of public order, and with a view to preventing him, it is necessary so to do, may make an order—

(*a*) directing that he be detained ;"

I have already referred to section 15 under which these powers can be delegated to certain officers and to the notification issued under that section. Sub-section (2) of section 2 provides that whenever any such officer in exercise of the delegated power makes an order of detention he should forthwith report the fact to the Provincial Government and should send with it the grounds on which the Order was made and other particulars which, in his opinion, have a bearing on the necessity for or expediency of the order. Section 3 (1) is important and may be fully set out:

"Where an order in respect of any person is made by the Provincial Government under sub-section (1) of section 2 or where any such order is made by any officer or authority subordinate to them, after receipt of the report specified in sub-section (2) of that section, the Provincial Government, shall communicate to the person affected by the order, so far as such communication can be made without disclosing the facts which they consider it would be against the public interest to disclose, the grounds on which the order has been made against him and such other particulars as are in their opinion sufficient to enable him to make, if he wishes, a representation against the order ; and such person may, within such time as may be specified by the Provincial Government, make a representation in writing to them against the order and it shall be the duty of the Provincial Government to inform such person of his right of making such representation and to afford him opportunity of doing so."

After the procedure embodied in this sub-section is adopted, it is open to the detenu to submit a representation to the Provincial Government who must place it before the Advisory Council constituted under sub-section (3) of section 3 and the Advisory Council is empowered to examine the records and submit its report to the Provincial Government. After receiving the report and considering it, the Provincial Government may confirm, modify or cancel the order made by them under sub-section (1) of section 2.

To go back again to the precise language of section 2 (1) (*a*) it is important to consider that the fundamental basis upon which the exercise of power by the Provincial Government under this Act rests is that the Provincial Government should be satisfied with respect to the particular person that he is acting or about to act in any manner prejudicial to the public safety or the maintenance of public order and that it is necessary to detain him for the purpose of preventing him from so doing. It is only when these two conditions are satisfied that the Provincial Government, or, under the delegated power, the respective authority may make an order directing that a particular person may be detained. It has been held in an earlier decision given by a Bench of this Court under this Act that the word "satisfied" in sub-section (1) of section 2 must be read as meaning "reasonably satisfied." It cannot import an arbitrary or irrational state of being satisfied. If further authority were needed for such a position there is the dictum of Lord Wright in *Liversidge* v. *Sir John Anderson*[1]. *Vide* also In re-Ex parte *Greene*[2], and *Sacksteder*, Ex parte[3]. It means, as has been again laid down in a number of decisions which is hardly necessary to refer to, which have recently been delivered under the corresponding Provincial Acts, that the satisfaction must be honest, careful and deliberate, arrived by the detaining authority after exercising due care and caution. The most important limitation upon the essential jurisdiction of the executive in exercising the powers under such a sweeping enactment is that there should be no fraud or abusive exercise of the power conferred thereby and that the powers should not, to any extent, be exceeded. In other words, the power

1. (1942) A.C. 206 at 271. 3. (1918) 1 K.B. 578.
2. (1942) 1 K.B. 87.

should be exercised for the purpose contemplated by the Act and should come strictly within the limits, scope and ambit of the enactment. It has to be remembered that the Act avowedly commits tremendous inroads upon the liberty of the subject, and commensurate with that authority it is essential on the part of the executive that they should realise that it is, in essence and in substance, a preventive and not a punitive jurisdiction, and that detention should not be ordered or continued for the purpose of punishing a person for acts done in the past but wholly and solely for the purpose set out at the forefront of the act of preventing him from acting in any manner prejudicial to the public safety or the maintenance of public order.

Having said this, it is also necessary for me to set out that if these fundamentals are satisfied, the next question for the Court is to see whether the requisite procedure and formalities embodied in section 3 and other provisions of the Act in the matter of furnishing the grounds and particulars and of the nature of those grounds and particulars have been duly observed within a reasonable time. In several cases that have come to my notice I have found that until an application was made in Court no grounds had been given at all, and only after notice of the application went to the concerned authorities the grounds were despatched. In yet another case I found that on the Court observing that the grounds were not sufficient, adjournments were taken and in the meantime additional grounds were served. When the existence of *bona fides* was the *sine qua non* of such a powerful jurisdiction as the Act confers, it is necessary, that such inordinate delays in the discharge of the primary duty of serving grounds are to the utmost extent possible avoided.

I have in the preceding paragraph indicated the scope of limitations within which the executive can act under this enactment; but if those restrictions are duly observed by the Provincial Government or the delegated authority, the function of the Court is extremely limited. Under section 16 (1) of the Act it is specifically provided that no order made in exercise of any power conferred by or under this Act or deemed to have been made under this Act shall be called in question in any Court. If, therefore, the order made is one that can be said to have been duly made under the Act and the requirements of section 2 (1) are scrupulously carried out and the procedure in section 3 is properly observed, then the function of the Court virtually ceases, because it is not left to the Court either to question the truth of the grounds upon which the detention was ordered or to judge their reasonableness or sufficiency. These are matters vested by the Act exclusively in the authority which is empowered to make the order of detention. The only function of the Court in such cases is to examine the records, and if grounds have been served, to scrutinise those grounds to ascertain the exact state of mind of the officer who made the order of detention with a view to ascertain whether he was in truth reasonably satisfied in the manner required under the Act. The only purpose of the enquiry by the Court in such matters can be to make, so to speak, a subjective analysis of the mind of the officer at the time and not to probe into the validity or correctness or adequacy of the reasons which impelled him to direct the detention of the particular individual. It is not necessary to refer to the decided cases which have dealt with the various problems arising under such enactments, but the principles that I have summarised in the preceding paragraphs in my opinion, represent the effect of the respective provisions of the Act and the respective interpretations placed thereon by the various High Courts in this country.

Having set out the principles governing the application of the Act to individual cases, it remains for me to consider how far the various objections taken on behalf of the detenu in this case can be upheld. The main contention is that the authority who directed the detention of the petitioner did not satisfy himself as required under the Act before the actual detention was effected, but, that he did so subsequently. As I have already stated, Venkataraman was arrested at 6 A.M., on the 1st day of April, 1948, at his residence and was taken immediately to the Saidapet Police Station where he was kept until the evening when he was removed to the Madras Penitentiary. It was manifest from the start that no written order of

detention had been issued before or by the time of his arrest. For the purpose of clarifying this position and also to ascertain whether the detaining authority was satisfied that it was necessary to direct Venkataraman's detention for the purpose of preventing danger to public security, I required the presence of the Commissioner of Police and he was examined before me yesterday. He has stated that at 11-30 P.M., on the night of 31st March—1st April, he examined the records concerning the detenu and was satisfied that unless he was detained, there would be danger to public safety. He stated that he issued oral orders of detention at four in the morning, some two hours before the actual arrest was made. He however frankly conceded that the written order of detention was only drawn up by him at 11 A.M., in his office and forthwith communicated to the Provincial Government with the grounds as required under section 2 (1) of the Act. Upon these facts the question arises whether the absence of a written order of detention at the time of arrest vitiates the detention and renders it illegal. After having bestowed the most thoughtful consideration upon this matter, I am of opinion that the absence of a written order does not have the effect contended for. Stress is laid upon the word 'make' occurring in section 2 (1), and the argument is that when the statute requires the authority to make an order it is implicit that the order should be made in writing and not orally. It is not in every instance that the expression 'make' carries by implication the concept of writing formally recorded. That would depend entirely upon the context in which the word is used. For an illustration, if the expression is "make a promissory note" or "make a conveyance" the necessary implication must be that the promissory note or the conveyance should be in writing, because there cannot be an oral promissory note or conveyance. In another context the word "make" may likewise involve the idea of oral making. As would appear from Stroud's Judicial Dictionary "to make" involves a conscious act on the part of the maker, but it does not necessarily connote that there should be a formal act of writing. Under the scheme of the Act there can be no doubt that it is not primarily concerned with orders but with the preventive detention of persons whose detention in the view of the Provincial Government is necessary in order to prevent them from acting in any manner prejudicial to the public safety and the maintenance of public order. The order required to be made under section 2 (1) (*a*) is a mere machinery through which the object of the Act, namely the detention of the person concerned, is carried out, and as has been held by a Full Bench of the Patna High Court in *Murat Patwa* v. *Province of Bihar*[1], it is that detention that becomes illegal if any of the vitiating circumstances exist. In any event, there cannot be any objection so far as the detention order made at 11 A.M. on 1st April, 1948, is concerned.

The most substantial part of the detenu's case is that the Commissioner of Police was not, in fact, or in truth, satisfied as required under the Act before he made the order of detention. Such a contention is not now open to the detenu in view of the categorical statement made by the Commissioner of Police that he examined the records before he made the order and that on such examination he was satisfied that it was necessary to direct the detention of the particular person for preventive purposes. I find therefore no substance in the objection that in the present case the pre-requisite of detention, namely, "satisfaction" did not exist and that it came into existence after the detention had, in fact, been effected. As already stated, the principle is clear that when the authority nominated by the Legislature is satisfied it is not for the Court to examine the grounds to determine whether they are adequate to support the order of detention. It cannot be contended that there was a colourable exercise of the power on the part of the executive in this case or that it was exercised for an ulterior purpose unconnected with the public security or order.

The next objection is that the order is based exclusively upon the past acts, there being nothing to show that there was any continuity of those acts upto the time of detention. Here again, the principle is perfectly clear and the

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1. I.L.R. 26 Pat. 628 : A.I.R. 1948 Pat. 135.

evidence is also perfectly clear. The Commissioner has stated definitely that he examined the records and was satisfied from events leading up to the date of detention. It is essential in my view, that there should be such continuity. Otherwise, the detention would become vindictive, if not punitive, which is not the legitimate purpose of the Act. In the present case there can be no doubt that so far as the Commissioner was concerned he was satisfied that upto the time of detention the activities of the detenu were such that it was necessary to keep him in detention in the interests of public safety. The acts which established the continuity must have occurred after the date line which in this case is the date when the act came into force. From a perusal of the original as well as the supplemental grounds I am not in a position to discard the statement of the Commissioner that there was continuous activity on the part of the detenu. In the original grounds no doubt the only concrete incidents that were referred to were the events of August, 1946, although there were general statements to the effect that he was a member of the District Committee of the Communist party and that he had been prominently associating himself with all communist activities and was taking keen interest in the party activities. That matter has been amplified in the grounds subsequently served where it is stated that in September, 1947, he attended secret communist classes for the Leader Cadre during which written instructions were distributed to all the leaders who attended. This is after the Act came into force. It is also stated in that connection that certain arrangements were made for intensive propaganda among the Muslims in order to gather as much support from them as possible. Measures were thought out to bring about strikes in the railways and by virtue of his position as office secretary on the Assembly Front he had also opportunities of working behind the scenes and co-ordinating with the Party M.L.As.

It was strenuously argued with regard to the additional grounds firstly, that though it cannot be said that the Provincial Government had no right to file supplemental grounds it was not fair on their part to do so after the petition had been heard in part and secondly that at the worst, the additional grounds only showed that the detenu had opportunities to act, or was likely to act, and they did not show as required under the Act that he was acting or was about to act. With reference to the first objection I entirely agree with the learned counsel for the petitioner that it is not ordinarily desirable that after a case is heard and the infirmities are exposed, an authority in the position of the Provincial Government should try to make up the defects by serving supplemental grounds ; but *ex concessis* it is not illegal. With regard to the second objection, I see no substance whatever in it. The expression " about to act " necessarily connotes the having of an opportunity to act and having the necessary inclination and tendency to act in a particular manner. Whether a person is about to act or not has to be determined with reference to his general attitude, his previous record and his tendency at the moment and the supplemental grounds provide the necessary material for holding that even though the incidents of 1946 have no direct bearing they show that the attitude then conceived was continuously held and was manifested on several occasions and that the same attitude persisted even at the time of detention.

The only other point that remains is as regards similar orders having been served in 1947 on the detenu and having subsequently been withdrawn against him. The doctrine of *autrefois acquit* does not apply to this case, and it is not the contention that there is any estoppel arising in connection with the general amnesty when the detenu was once released. The real point for decision is whether from his behaviour before and about the time of detention there was reason for the authority concerned to reach the conclusion that he was about to act in a prejudicial manner. I cannot say in this case, especially in view of the definite evidence given by the Commissioner, that that satisfaction did not either exist or that, if it existed, it was not reasonable.

The application is dismissed.

K.S. ——— *Aplication dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE PANCHAPAKESA AYYAR.

Koduru Kamalamma and others .. *Appellants**

v.

Koduru Pitchamma and others .. *Respondents.*

Co-sharers—One co-sharer in exclusive possession of joint land in excess of his share—Liability to pay compensation to the other co-sharers—Extent.

A co-sharer in exclusive possession of joint land in excess of his share is liable to pay compensation to the other co-sharers for his exclusive use and benefit of the common land, although the other co-sharers are not entitled in the absence of an ouster to an account of the profits or to a share therein from the co-sharer in occupation of the common land.

Such compensation must be for the entire period from the date of the exclusive occupation by the co-sharer and not merely for the period subsequent to the date of the suit by the other co-sharers.

Case-law discussed.

Appeal against the decree of the Court of the Subordinate Judge, Nellore, in A. S. No. 281 of 1943, preferred against the decree of the Court of the District Munsiff, Nellore, in O.S. No. 259 of 1939.

C. V. Narasimha Rao for Appellants.

P. Chandra Reddi, O. Chinnappa Reddi and *R. Rajagopala Aiyar* for Respondents.

The Court delivered the following

JUDGMENT :—This second appeal arises out of a suit for partition and separate possession of lands set out in schedule A to the plaint. The dispute relates to a casuarina plantation which was in existence on about 100 acres of the suit land on the date of the institution of the suit. Plaintiffs 1 to 5 and 8th defendant who are the appellants here claimed 43½ shares out of 77 shares in the lands in schedule A, including the casuarina trees standing on a portion of the lands. The first defendant was entitled to 21⅓ shares, while the family of defendants 2 to 6 was entitled to 12 shares. We are not concerned in this second appeal with the seventh defendant, who claimed a half share in one of the items. The first defendant, who is the main contesting respondent, pleaded that there was an oral partition between the predecessors-in-interest of the plaintiffs and the 8th defendant on the one hand and defendants 1 to 6 on the other, at which the lands on which the casuarina plantations were raised had been allotted to him and defendants 2 to 6 and that he raised the plantation at his own expense with the consent of defendants 2 to 6. The case of the plaintiffs, on the other hand, was that no partition had taken place before the institution of the suit, and that the first defendant raised the plantation on behalf of all the sharers. The learned District Munsiff of Nellore who tried the suit held that the case set up by the first defendant of an oral partition was not true ; but he held that it was the first defendant who was the sole person who raised the plantation. He then discussed the question of adjusting equities between the co-sharers, having regard to the fact that the plantation had been raised by the first defendant alone at his expense and with his labour. He was not, however, prepared to accept the suggestion on behalf of the first defendant that the lands covered by the plantations should be allotted to his share. In his opinion, the proper course was to treat the plantation and the income realised by the sale of the trees as the joint property of all the sharers and to direct the other sharers to pay the first defendant the actual cost of cultivation together with the interest on the amount spent by him, subject to the condition that if it was found that the amount due to the first defendant exceeded the amount actually realised by the sale of the trees, the first defendant should have no claim to recover the balance from the other sharers.

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* S. A. No. 268 of 1946. 7th October, 1948.

There were appeals to the Court of the Subordinate Judge both by the first defendant and by the plaintiffs and the 8th defendant. Both the appeals were heard together and disposed of by the learned Subordinate Judge of Nellore by a common judgment. He took a different view from the learned District Munsiff as to the manner in which the equities had to be adjusted. After the decree of the lower Court, the casuarina trees were sold away by a commissioner appointed by the Court, and the sale proceeds which amounted to a considerable sum were deposited into Court to the credit of the suit. The only question that had to be determined was who was entitled to the money in Court, and to what extent. He came to the conclusion that the only right which the plaintiffs would be entitled to was a right to compensation in respect of their share of the lands on which casuarina plantations had been raised for the period commencing from the date of the plaint till the date when the trees were cut and removed. As the parties could not agree on the compensation for this period, he merely declared that the plaintiffs would be entitled to compensation for the period and directed that it should be determined in the final decree proceedings. The plaintiffs and the 8th defendant have preferred this second appeal against the said decree and judgment of the learned Subordinate Judge, while the first defendant's legal representative (the first defendant having died pending the appeal in the lower Court) has preferred a memorandum of cross-objections.

The two contesting parties took up extreme positions. For the first respondent, it was contended that the appellants were not entitled to anything at all in respect of the casuarina plantations while the appellants wanted the entire sale proceeds of the casuarina to be treated as joint property to be divided among all the sharers according to their respective shares and the only concession which they were prepared to grant to the first defendant was a deduction for the expenses incurred by him in raising the plantation.

Neither of the parties attempted to challenge the findings of fact arrived at by the lower Courts, namely, that there had been no oral partition before the date of the suit, and that the first defendant was the person who solely expended time, trouble and money to raise the plantation. On these admitted facts, the rights of the parties fall to be considered.

The rights of co-tenants or co-sharers who hold a large extent of undivided property jointly, *inter se*, while they continue to be undivided, are often difficult of determination. Undoubtedly, any sharer has got a right to demand and obtain a partition by metes and bounds of the joint property. But till that is done, and it cannot be that any of the sharers has got an exclusive right to any part of the joint land, what are the rights and obligations of the several sharers to each other? In theory, each co-tenant is entitled to be in possession and to use every part of the common property, so long as he does not exclude his co-tenant. A co-sharer is not an agent of the other sharers, apart from any specific contract. In the case of land capable of enjoyment by cultivation, it is clear that unless there is joint cultivation or community farming, the theoretical right of every co-sharer to enter upon and hold exclusive possession of the common property cannot be enjoyed in practice. Supposing, on a part of the common property, which is not in the actual possession of any other sharer, one of the sharers expends his skill and labour and money and raises valuable produce, is he under a liability to account to the other co-sharers for the profits realised by him? Are crops raised by one of the co-tenants on any part of the common lands (in the absence of an agreement to that effect) held in co-tenancy? The preponderance of the authorities both in England and America appear to confirm the right of each co-tenant

> "to enter upon and hold exclusive possession of the common property and to make such profit as he can by proper cultivation or by other usual means of acquiring benefit therefrom and to retain the whole of such benefits, provided that in having such possession and in making such profits he has not been guilty of an ouster of his co-tenant nor hindered the latter from entering upon the premises and enjoying them as he had a right to do."

(*See* Freeman on Co-tenancy and Partition, 2nd edition, S. 258). The reason of this rule is that it would be inequitable to compel a co-tenant in possession to account for the profits realised out of his skill, labour and business enterprise, when he has no right to call upon his co-tenant to contribute anything towards the production of these profits, nor to bear his proportion of the loss which may result on account of failure of crops or other unavoidable causes. More or less the same rule has been applied to India.

In *Watson and Co.* v. *Ramchund Dutt*[1], a case decided by the Privy Council, the facts were as follows : One of two co-sharers was in actual occupation of part of the common property, cultivating it exclusively. The other co-sharer attempted to enter upon the same land in order to carry on operations therein inconsistent with the work already being carried on by the former, who resisted and prevented the attempted entry. It was held that the resistance being made by the co-sharer in occupation simply with the object of protecting himself in the profitable use of the land and not in denial of the other's title, such resistance was no ground for the grant of a decree for joint possession or for damages or for the grant of an injunction. Their Lordships did not accept the contention on the part of the plaintiffs that the acts of the resisting co-sharer amounted to what in England would be called an actual ouster and therefore the plaintiffs were entitled to a decree for joint possession, and observed as follows :

> " In India a large proportion of the lands, including many very large estates, is held in undivided shares, and if one share-holder can restrain another from cultivating a portion of the estate in a proper and husband-like manner, the whole estate may, by means of cross-injunctions, have to remain altogether without cultivation until all the shareholders can agree upon a mode of cultivation to be adopted, or until a partition by metes and bounds can be effected, a work which, in ordinary course, in large estates would probably occupy a period including many seasons. In such a case, in a climate like that of India, land which had been brought into cultivation would probably become waste or jungle, and greatly deteriorated in value. In Bengal the Courts of Justice, in cases where no specific rule exists, are to act according to justice, equity and good conscience, and if, in a case of share-holders holding lands in common, it should be found that one shareholder is in the act of cultivating a portion of the lands which is not being actually used by another, it would scarcely be consistent with the rule above indicated to restrain him from proceeding with his work, or to allow any other shareholder to appropriate to himself the fruits of the other's labour or capital."

The only order which their Lordships made in favour of the plaintiffs was that they do recover from the defendants a sum of money calculated at a certain rate " as compensation in respect of the exclusive use and benefit by the defendant No. 1 " of the common land.

The rule thus laid down came up for further discussion in another case before the Privy Council in *Lachmeswar Singh* v. *Manowar Hossain*[2]. In that case, the defendant, a co-sharer in village lands, without claiming any monopoly, set up a ferry within the limits of the village over a river which ran through it and collected tolls from strangers for its use. The other co-sharers brought a suit for a declaration of their rights to the profits of the ferry proportionate to their shares in the village. The High Court made a declaration with respect to the possession and profits of the ferry and directed an account of the profits accordingly. Their Lordships set aside the decision of the High Court and dismissed the suit. The *ratio decidendi* was that joint property being used consistently with the continuance of the joint ownership and possession without exclusion of the co-sharers who had not joined in the work, there was no encroachment on the rights of any of them as regards common enjoyment, so as to give ground for a suit. It was not alleged that the defendant had used the river for passage in any such way as to interfere with the passage of other people. It ws not alleged that the defendant's action in any way prevented any one else from setting up a boat for himself or his men or from even carrying strangers for payment. Their Lordships referred to the earlier case in *Watson and Co.* v. *Ramchund Dutt*[1], as throwing light on the subject. After citing the passage which has been quoted above, their Lordships pointed out that the facts of that case were very different from the facts of the case before

1 (1890) L.R. 17 I.A. 110 : I.L.R. 18 Cal. 10 (P.C.).

2. (1891) L.R. 19 I.A. 48 : I.L.R. 19 Cal. 253 (P.C.).

them and that no profits had been earned by the defendant by the exclusion of the plaintiffs from possession as was done by the Watsons, the defendants in the earlier case.

The decision of the Privy Council in *Midnapore Zemindary Co., Ltd.* v. *Naresh Narayan Roy*[1], throws considerable light on the subject. In a suit for partition brought in 1912, the defendants-co-sharers contended that they had rights of permanent occupancy in the land and resisted partition. They also pleaded that the suit was barred by Article 142 of schedule I to the Limitation Act. Both their pleas were negatived and the suit for partition was decreed. In addition to the reliefs of partition, their Lordships also granted to the plaintiff a decree directing the defendants to pay compensation to him for their exclusive use of the lands from the time of such exclusive occupation. Their Lordships laid down the following general propositions in dealing with the facts of the case before them :

" Where lands in India are so held in common by co-sharers, each co-sharer is entitled to cultivate in his own interests in a proper and husband-like manner any part of the lands which is not being cultivated by another of his co-sharers, but he is liable to pay to his co-sharers compensation in respect of such exclusive use of the lands. Such an exclusive use of the lands held in common by a co-sharer is not an ouster of his co-sharers from their proprietary right as co-sharers in the lands. When co-sharers cannot agree as to how any lands held by them in common may be used, the remedy of any co-sharer who objects to the exclusive use by another co-sharer of lands held in common is to obtain partition of the lands."

Their Lordships referred to the prior decision of the Board in *Watson and Co.* v. *Ramchund Dutt*[2] and to the declaration made therein that the plaintiffs should recover from the defendant a sum of money as compensation for the exclusive use by the defendant of the land which had been occupied by him.

Counsel for both sides addressed us arguments for which they tried to find support from the above decisions of the Privy Council, each in his own way. Mr. Konda Kotayya contended for the appellants that the occupation by the first defendant and his raising casuarina plantation were acts amounting to an ouster of the appellants and their predecessors. To make good this contention, the learned advocate referred us to certain proceedings under the Madras Land Encroachment Act in which the Revenue authorities sought to levy penal assessment for encroaching on Government land adjoining the private land of the parties and planting the same with casuarina. The notice issued under section 7 of the Act was addressed to all the co-sharers (Ex. XII). But in reply to this notice, the first defendant filed an application before the Sub-Collector, Gudur division on 17th March, 1932, (Ex. XIII) in which he definitely stated that he alone had raised the casuarina trees on the land alleged to have been encroached upon and that the other co-sharers had nothing to do with the unauthorised occupation. He requested the Sub-Collector to remove the names of the other co-sharers who had not occupied the land. He then made the following statement :

" As this encroached land is adjoining my lands, I have at my own expense raised casuarina trees and occupied the land. If this land is valued along with neighbouring lands and a patta is granted, I will take the same."

Mr. Kotayya particularly relied on the first defendant's description of the encroached land as adjoining " my lands," as evidence of the assertion of an exclusive title in denial of the title of the other co-sharers. The inference appears to be far fetched. There is no manifestation of an intention to deny the title of the co-sharers. The first defendant's sole interest was to plead with the Revenue authorities for the grant of patta for the land encroached upon. It was only in extenuation of his unauthorised action that he mentioned the fact that the encroached land adjoined his lands. The occasion did not call for any assertion relating to the title *inter se* between the first defendant and other co-sharers. Mr. Kotayya was unable to refer us to any other piece of evidence to support his plea that long before the institution of the suit the first defendant had been asserting a title hostile

1. (1924) 47 M.L.J. 23 : L.R. 51 I.A. 293 : I.L.R. 51 Cal. 631 (P.C.).

2. (1890) L.R. 17 I.A. 110 : I.L.R. 18 Cal. 10 (P.C.).

to the appellants and that he had ousted them from joint possession. On the other hand, their own case in the plaint was that the first defendant on behalf of the appellants' predecessor and the remaining sharers planted and reared casuarina trees for the joint benefit of all the sharers (*vide* paragraph 5 of the plaint). In the face of this allegation in the plaint and the statement of the appellants' predecessor Veeraraghavayya, in his evidence that the first defendant was planting the trees on the land on their behalf, it is impossible to sustain the contention of the appellants on this point. It is only in reply to the plaintiffs' case, now held to be false by both the Courts, that the casuarina plantation had been raised by all the sharers jointly, that the first defendant put forward a case of exclusive title based on oral partition. We agree with the learned Subordinate Judge that till the date of the suit, the first defendant did not assert any hostile or exclusive title on his part and till the date of the suit, the plaintiffs did not object to the first defendant's user of the land in question.

Mr. Chandra Reddy, on the other hand, argued that the appellants were not entitled to any relief at all (except of course partition) on account of the first defendant's occupation and the raising of the casuarina plantation by him on joint land, because the first defendant had not set up a hostile title, or done any act which would amount to an ouster in law. According to him, the appellants were not entitled even to any compensation. He tried to explain away the Privy Council cases in *Watson and Co.* v. *Ramchund Dutt*[1] and *Midnapore Zemindari Co., Ltd.* v. *Naresh Narayan Roy*[2] as cases in which there was ouster, and he also relied on the decision of the Calcutta High Court in *Chandra Kishore Chakravarthi* v. *Biseswar Pal*[3].

In our opinion, Mr. Chandra Reddi's contention is based on a wrong understanding of the *ratio decidendi* of the two decisions in *Watson and Co.* v. *Ramchund Dutt*[1], and *Midnapore Zemindari Co., Ltd.* v. *Naresh Narayan Roy*[2]. It is not accurate to say, that compensation was awarded to the plaintiffs in *Watson and Co.* v. *Ramchund Dutt*[1], because of an actual ouster. A careful reading of the judgment of Sir Barnes Peacock clearly shows that if their Lordships had accepted the contention on the part of the plaintiffs that the acts of the defendants amounted to what in England is called an actual ouster, then they would have granted a decree for joint possession. It is true that there was some resistance by the defendants, but their Lordships pointed out that the resistance was not in denial of the title of the other sharers, but simply with the object of protecting himself in the profitable enjoyment of the land. Though, therefore, there was no ouster, the Privy Council granted the compensation because of " the exclusive use and benefit " by the defendant of joint land. In *Midnapore Zamindari Co., Ltd.* v. *Naresh Narayan Roy*[2], there is a clear pronouncement which is opposed to the contention of Mr. Chandra Reddi. Their Lordships point out that a sharer of joint property is liable to pay to his co-sharers compensation for exclusive use of the lands held in common, and add the following important statement :

> " Such an exclusive use of lands held in common by a co-sharer is not an oust er of his co-sharers from their proprietary right as co-sharers in the land."

With great respect to the learned Judges who decided the case in *Chandra Kishore Chakravarthi* v. *Biseswar Pal*[3], we think there is a difference between an exclusive use of lands held in common by a co-sharer and an ouster by one sharer of his co-sharers. In that case, the learned Judges found that the plaintiffs had not asserted a claim to joint occupation, nor had they objected to the defendant being in occupation of the land in dispute, and the plaintiffs had neither been excluded nor ousted from possession of the land by the defendant. All that they claimed was a share of the profits which had resulted from the defendant's occupation of the land. It may be, when there is no exclusion or ouster but merely an exclusive

1. (1890) L.R. 17 I.A. 110 : I.L.R. 18 Cal. 10 (P.C.)
2. (1924) 47 M.L.J. 23 : L.R. 51 I.A. 293 : I.L.R. 51 Cal. 631 (P.C.).
3. (1927) I.L.R. 55 Cal. 396.

occupation of a part of the entirety of the common land, the co-sharer in such possession is not liable to account for the profits made by him from such occupation. But it is one thing to say that the other co-sharers are not entitled to an account of the profits or to a share therein ; it is quite another thing to say that the co-sharer in occupation of common land far in excess of his legitimate share, is not liable to pay compensation to the other co-sharers for such exclusive occupation by him. The decisions of the Judicial Committee in *Watson and Co.* v. *Ramchund Dutt*[1] and *Midnapore Zemindari Co.* v. *Naresh Narayan Roy*[2] are direct authorities for the position that even when there is no ouster in law, a co-sharer in possession of joint land in excess of his share is liable to pay compensation to the other co-sharers for his exclusive use and benefit of the common land. The other decisions cited by Mr. Chandra Reddi, namely, *Shivanarain* v. *Chandrasekhar*[3], *Raj Ranjan Prasad Sinha* v. *Khobari Lal*[4] and *Ramakrishnarao* v. *Subbarao*[5] do not carry the matter further. We hold that the plaintiffs are entitled to some compensation from the first defendant for his sole and exclusive occupation and use of the joint lands in excess of the extent to which he would be properly entitled in accordance with his share. While we agree with the learned Subordinate Judge that there should be a decree for compensation in favour of the plaintiffs, we do not agree with him that the compensation must be for the period subsequent to the date of the suit. On principle, the compensation must be for the entire period from the date of the first defendant's exclusive occupation.

As the learned Subordinate Judge found it is difficult to exactly assess this compensation. To avoid a prolongation of the litigation, we called upon the parties to agree to a reasonable compensation on this basis. If there is no agreement possible, the only course is to direct the compensation to be determined in the final decree proceedings.

The second appeal is allowed in part to the extent indicated above, but dismissed otherwise. There will be no order as to costs. The memorandum of objections is dismissed with costs.

The parties are unable to agree on the amount of compensation. It will therefore be determined in the final decree proceedings.

K.S. *Appeal allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

Vyja Eswaramma .. *Petitioner**

v.

Dappili Chinna Kota Reddi and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 33—Pauper application—Objection as to pecuniary jurisdiction of the Court—Competency of the Court to decide it.

When in a pauper application an objection is raised by the respondent as to the competency of the Court to entertain the suit pecuniarily, it is the bounden duty of the Court to get rid of that objection, by deciding that the suit was within its pecuniary jurisdiction, before proceeding to consider the question of pauperism, both on general principles and the question of convenience of parties. Further, the only power the Court has, under the law, in a suit beyond its pecuniary jurisdiction, is to return the plaint for presentation to the proper Court, and it has no power to hold any enquiry into pauperism, mesne profits or any other matter whatsoever.

Periasami Padayachi v. *Minor Ulaganathan*, (1948) 2 M.L.J. 152, followed.

Sudarsana Venkatacharyulu v. *Sri Venugopalaswami Vari*, (1948) 2 M.L.J. 570, dissented from.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the District Munsiff, Markapur, in O. S. No. 56 of 1947.

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1. (1890) L.R. 17 I.A. 110 : I.L.R. 18 Cal. 10 (P.C.).
2. (1924) 47 M.L.J. 23 : L.R. 51 I.A. 293 : I.L.R. 51 Cal. 631 (P.C.).
3. A.I.R. 1933 Pat. 616.
4. (1940) I.L.R. 20 Pat. 162.
5. (1937) 1 M.L.J. 501.

* C. R. P. No. 838 of 1948. 29th October, 1948.

T. S. Vaidyanatha Aiyar for Petitioner.

W. Kothandaramiah for Respondents.

The Court delivered the following

JUDGMENT.—The short point for determination in this petition is whether the lower Court erred in law in not determining the question of pecuniary jurisdiction, and of its competency to entertain the suit pecuniarily, before it decided the question of the pauperism of the petitioner. I am of opinion that it did err in law. When the respondents raised the objection that the suit, which was one for partition and recovery of the plaintiff's alleged two-fifths share, was beyond the pecuniary jurisdiction of the Court, it was the bounden duty of the lower Court to get rid of that objection, by deciding that the suit was within its pecuniary jurisdiction, before proceeding to consider the question of pauperism, both on general principles and the question of convenience of parties. The learned counsel for the respondents, who had raised the question of want of pecuniary jurisdiction before the lower Court, now wants to support the lower Court's postponement of its finding regarding jurisdiction, obviously because the lower Court has found against the pauperism of the petitioner, and the respondent's purpose has been well served, and they did not see why they should not cause further inconvenience to the petitioner. The inconvenience will arise like this. Supposing the lower Court, without deciding the question of jurisdiction, decides against the pauperism, and the petitioner sells whatever properties she has, and pays court-fee, based upon the valuation of the plaint, and the lower Court, later on, hears the question about the pecuniary jurisdiction, and decides that it has no pecuniary jurisdiction, and returns the plaint for presentation in the proper Court, then the petitioner would have to file the plaint in the Sub-Court, paying additional court-fees, and may not have enough to pay, and may be driven to file another pauper application there, and will not recover the court-fee she has already paid, and may be thus incapacitated in the conduct of her suit there. If, once for all, she is told that the pecuniary jurisdiction is with the Sub-Court, and her pauper petition is returned to her, she can approach the Sub-Court with the pauper petition and will not have spent away her scanty funds in paying any court-fee. The Sub-Court, while deciding her petition, would also consider it with reference to the suit in a Sub-Court, and the court-fee payable thereon and she will not have the above inconvenience of having wasted her scanty funds unnecessarily.

It was urged by the learned counsel for the respondents that there is no provision, under Order 33, rule 5, of the Civil Procedure Code, to enquire into the question of pecuniary jurisdiction in a pauper petition. I cannot agree with this contention. For one thing, it appears to me that Order 33, rule 5 (*d*-1) may give such jurisdiction, as a suit above Rs. 3,000 cannot be filed in the District Munsiff's Court, and the law may be held to bar the filing of such a suit there. Even apart from that, the question of jurisdiction is a general question. Supposing the pauper petition was valued at more than Rs. 3,000, the District Munsiff will at once return it for presentation to the proper Court, despite the alleged want of a provision under Order 33, rule 5, Civil Procedure Code. The ruling in *Tulshi Mahatani* v. *Gajadar Marwari*[1] relied on by the learned counsel for the respondents, will have no application to the facts of the present case, as a Court is not given, under our law, power to *reduce* the valuation given in the plaint, whereas every day power to *enhance* the valuation on an enquiry about the real value of the plaint is exercised, primarily in the interests of court-fees, and incidentally also for purposes of pecuniary jurisdiction.

The learned counsel for the petitioner relied on a direct ruling on the point now in question by my learned brother Yahya Ali, J., in *Periasami Padayachi* v. *Minor Ulaganathan*[2]. I respectfully agree with that ruling. A ruling to the contrary, given by my learned brother Mack, J., in *Sudarsana Venkatacharyulu* v. *Sri Venugopalaswami Varu*[3] was relied on by the learned counsel for the respondents. I am

1. (1921) 61 I.C. 891 (Patna).
2. (1948) 2 M.L.J. 150.
3. (1948) 2 M.L.J. 570.

unable to agree with that view, for the reasons already stated, and also because the only power the Court has, under our law, in a suit beyond its pecuniary jurisdiction, is to return the plaint for presentation to the proper Court, and it has no power to hold any enquiry into pauperism, mesne profits or any other matter whatsoever. This petition is accordingly allowed, and the lower Court's order set aside, and the lower Court is directed to go into the question of jurisdiction and give a finding on it before proceeding with the question of pauperism and the other matters in dispute. In these circumstances and as the lower Court itself was responsible for refusing to decide the question of jurisdiction, after having referred to it, I direct all the parties to this petition to bear their own costs.

V.S. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO.

Wahid .. *Petitioner.**

Madras City Police Act (III of 1888), *section* 75—*Conviction under—Order to be bound over under section* 106, *Criminal Procedure Code, in addition—If cannot be passed—Criminal Procedure Code* (*V of* 1898), *section* 511—*Proof of previous convictions—Necessity—Admission by accused of such convictions.*

It cannot be said that in a case where the accused is convicted under section 75 of the Madras City Police Act he should not be also bound over under section 106, Criminal Procedure Code.

Arumugha Thevar v. *Emperor*, (1942) 2 M.L.J. 613, explained.

Though the provisions of section 511, Criminal Procedure Code, have to be strictly complied with in regard to the proof of previous convictions, where the accused himself admits his previous convictions, it would not be wrong to treat it as sufficient proof.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order passed by the Court of the Honorary Presidency Magistrates, Egmore, Madras, dated 10th February, 1948, in N. C. No. 43311 of 1947.

M. Srinivasagopalan for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown Prosecutor for the Crown.

The Court made the following

ORDER.—The Honorary Presidency Magistrates convicted the first accused under section 75 of the City Police Act and sentenced him to pay a fine of Rs. 25 or in default to one week's rigorous imprisonment. In addition, the Court directed him to be bound over under section 106 of the Criminal Procedure Code.

The learned counsel for the accused argued that the order under section 106 of the Criminal Procedure Code was bad inasmuch as the provisions of section 511, Criminal Procedure Code, had not been complied with. Under section 511, Criminal Procedure Code, particular procedure has been prescribed for proving the previous convictions, and that procedure admittedly has not been followed in this case. Dealing with section 511, Criminal Procedure Code, the learned Judges of the Calcutta High Court in *Emperor* v. *Sheikh Abdul*[1] observed as follows :

"With regard to the statement of the learned Magistrate as to the procedure adopted in the Police Court for the proof of previous convictions, we may say at once that we cannot accept the learned Magistrate's suggestion that Presidency Magistrates are absolved from the ordinary rules of evidence in taking proof of such previous convictions. Whenever it is required to prove a previous conviction against a man, whether it be for the purpose of enhancement of punishment under section 75, Indian Penal Code or in proceedings under Chapter VIII, Criminal Procedure Code, such previous convictions must be proved strictly and in accordance with law. Unless they are so proved, no Court—whether it be that of a Presidency Magistrate or not—can properly take such previous convictions into consideration against an accused person."

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* Crl. R. C. No. 734 of 1948. 7th October, 1948.
(Cr. R. P. No. 691 of 1948).

1. (1916) I.L.R. 43 Cal. 1128.

These are weighty observations and must be followed strictly whenever the question arose in regard to the proof of previous convictions. But in this case a perusal of the judgment shows that the accused admitted that they had previous convictions. It is very likely that the accused did not think of denying such convictions, as, if denied, they could have been easily proved.

The learned counsel also relied upon a judgment of Horwill, J., in *Arumugha Thevar* v. *Emperor*[1] in support of his argument that in a case where the accused is sentenced under section 75 of the City Police Act he should not be also bound over under section 106, Criminal Procedure Code. That judgment does not support this argument. In that case except the solitary instance of disorderliness of which he was convicted there was no other material before the Magistrate for binding over the accused under section 106, Criminal Procedure Code. Further the order in this case was passed on 10th February, 1948, and practically the period of one year is running out. In the circumstances, I think it is not a fit case for interference.

The revision is dismissed.

V.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

The Indo Commercial Bank, Ltd., Madras .. *Appellant**

v.

The Corporation of Madras .. *Respondent.*

The Madras City Municipal Act (IV of 1919), *section* 110—*Professions Tax Limitation Act* (*XX of* 1941 *as amended by Act V of* 1946) *and Government of India Act, section* 142-*A*—*Effect on power to levy tax on companies.*

A reading of section 142-A of the Government of India Act and of section 2 of the Professions Tax Limitation Act shows that they are intended to hit at taxes such as are leviable under section 111 of the City Municipal Act which enables a Municipal Council to levy a tax on any person or company which 'exercises a profession, art or calling or transacts business or holds any appointment, public or private,' and not to affect in any way the rights of Municipalities to levy a tax under section 110 of the City Municipal Act. Act V of 1946 was introduced out of abundant caution to remove any doubt that might have existed, but even without it, Municipalities would have the right to levy taxes under section 110.

Even if the companies would not be liable under section 110, but for the Amending Act of 1946 to any tax exceeding Rs. 50, the plaintiff-appellant would be liable for the amount assessed during the half years which are the subject-matter of the suit as the Act of 1946 was given retrospective effect to the date of Act XX of 1941. The Federal Legislature had the undoubted power to amend its own Act and by giving it retrospective operation, it had the effect of eliminating the interval between Act XX of 1941 and Act V of 1946, so that the two Acts operated together as from 1st April, 1942.

Appeal against the decree of the Principal Judge of the City Civil Court, Madras, dated 27th December, 1946, in O.S. No. 620 of 1945.

T. M. Kasturi and *G. Vasanta Pai* for Appellant.

John and Row for Respondent.

The Court delivered the following

JUDGMENT.—The plaintiff company has been paying company tax levied under section 110 of the City Municipal Act at the rate of Rs. 500 a half year and education tax at the rate of Rs. 75 a half year. Claiming that from 1st April, 1942, onwards the legitimate tax which could be demanded of it was Rs. 25 a half year and an education tax of Rs. 2-8-0, it has brought this suit for the recovery of the excess amount paid during the seven half years immediately preceding the suit. The amount due on this basis was Rs. 3,392-8-0. It, however, claimed on what is now admitted to be a mistaken basis, a further Rs. 75, which brought the suit claim up to Rs. 3,467-8-0. The Corporation contended that their assessment was correct and that the amount payable was what the plaintiff had been paying. They also claimed that the suit should be dismissed for the additional reasons that a claim for a refund of the first payment was barred by time, it having been made

1. (1942) 2 M.L.J. 613.

* C. C. C. A. No. 40 of 1947. 10th September, 1948.

more than three years before suit, and that since the other payments were made voluntarily, they could not be claimed back again. The learned Principal Judge, City Civil Court, did not go into the question whether the taxes were properly levied; but accepted the contentions of the Corporation with regard to limitation and voluntary payments, and so dismissed the suit. The plaintiff appeals.

In 1940, by the India and Burma (Miscellaneous Amendments) Act, 1940, a new section was introduced in the Government of India Act and numbered as 142-A. According to that section,

> " the total amount payable in respect of any one person to the Province or to any one Municipality . . . . . by way of taxes on professions, trades, callings and employments shall not, after the 31st day of March, 1939, exceed fifty rupees per annum."

The Act then proceeded to enact a proviso similar to that found in section 143 of the Government of India Act, which is roughly to the effect that if any Municipality or local authority had been already lawfully levying a tax, then they could continue to do so, until provision to the contrary was made by the Federal Legislature. By Act XX of 1941, the Federal Legislature made a provision for the limitation of the profession tax to Rs. 50 per annum which ran in these words,

> " Notwithstanding, the provisions of any law for the time being in force, any taxes payable in respect of any one person to . . . . any one Municipality . . . . . by way of tax on professions, trades, callings or employments, shall from and after the commencement of this Act cease to be levied to the extent to which such taxes exceed fifty rupees per annum."

A reading of section 142-A of the Government of India Act and of section 2 of the Professions Tax Limitation Act, 1941 (Act XX of 1941) shows that they are intended to hit at taxes such as are leviable under section 111 of the City Municipal Act, which enables a Municipal Council to levy a tax on any person or company which

> " exercises a profession, art or calling or transacts business or holds any appointment, public or private,"

and not to affect in any way the right of Municipalities to levy a tax under section 110 of the City Municipal Act.

As companies seem to have been contending that they were entitled to the benefits of Act XX of 1941, an amendment of the Act was made by Act V of 1946. There were certain exceptions to the general rule laid down in section 2 of Act XX of 1941 ; and by Act V of 1946, this additional exception was made :

> " the tax on companies, imposed under section 110 of the Madras City Municipal Act, 1919."

This naturally suggests that but for this additional exception, companies would not be liable under section 110 of the City Municipal Act to any tax exceeding Rs. 50 per annum. It however seems to me that this enactment of 1946 was introduced out of abundant caution to remove any doubt that might have existed, and that even without it Municipalities would have had the right to levy taxes under section 110.

Even if companies would not be liable under section 110 but for the Amending Act of 1946 to any tax exceeding Rs. 50, I should still hold that the plaintiff was liable for the amount assessed during the half years which were the subject of the suit ; because the 1946 Act was given retrospective effect to the date of Act XX of 1941. It is argued that since by an Imperial Act (India and Burma (Miscellaneous Amendments) Act, 1940), Municipalities were given the right to collect taxes only until the Federal Legislature introduced legislation taking away that power, the Municipalities lost that power from the date that Act XX of 1941 came into force, and that it was not within the powers of the Federal Legislature to restore the power to levy such taxes to Corporations and Municipalities. This argument however overlooks the effect of retrospective legislation. The Federal Legislature had the undoubted power to amend its own Act ; and by giving it retrospective operation, it had the effect of eliminating the interval between Act

XX of 1941 and Act V of 1946, so that the two Acts operated together as from 1st April, 1942.

In view of my finding that the tax was properly levied, the questions of limitation and the effect of the voluntary payments of the plaintiff do not arise. It is therefore unnecessary for me to consider the able arguments of the learned counsel for the appellant on these points on the footing that the taxes paid were collected illegally.

The appeal is dismissed with costs.

V.P.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE SATYANARAYANA RAO.

W. Kanniah Lal by his Agent N. Narasinga Prasad .. *Appellant.**

The Madras City Municipal Act (IV of 1919), sections 301, 304 and 304-B—Licence to owner—Owner granting lease to contractors to manage and collect fees and pay a fixed sum to the owner—Liability of owner to pay licence fees on gross income—Gross income—Meaning—If can refer to amount paid by contractors.

The appellant is the owner of a private market and was granted under section 304 of the Madras City Municipal Act a licence permitting him to levy a fee or fees of the nature specified in sub-section (2) of section 301 of the Act. The licence fee which such person is liable to pay is a fee not exceeding 15 per cent. of his gross income from the market, *i.e.*, from the income derived by the levy of the fees from the stall holders and this the Corporation demanded. The appellant who had granted a lease of the market to contractors, who, under its terms, had to pay him a fixed sum per month, contended that he is liable to pay a licence fee only on the amount which he so received from his contractors.

Held, as the licence is granted to the owner and it is only the licensee that can levy the fee it follows that the gross income really is the income derived by the levy of the fees from the stall holders, and the fact that under a contract between the appellant and the contractors the latter actually collect such fees from the stall holders and appropriate the surplus if any remaining after meeting all expenses and paying a fixed sum to the appellant does not make any difference in the legal position.

Obiter : The owner in section 304-B can only refer to the owner of the market to whom a licence has been granted under section 304 and it is doubtful if a person who has been permitted to collect the fees which are leviable under the licence can be said to be a person entitled to receive the rents and profits of the property.

Appeal against the decree of the Hon'ble Mr. Justice Horwill, dated 20th February, 1948, and passed in C.C.C.A. No. 17 of 1947 preferred against the decree of the City Civil Court of Madras in O.S. No. 665 of 1945.

V. Rajagopala Mudaliar for Appellant.

The Judgment of the Court was delivered by

The Chief Justice.—The decision of the only question which arises in this Letters Patent Appeal turns on a construction of section 304-B of the Madras City Municipal Act (IV of 1919). The appellant is admittedly the owner of a private market at Mylapore. Under section 304 of the Act,

"no person shall without or otherwise than in conformity with an annual licence granted by the Commissioner in this behalf continue to keep open a private market."

The appellant admits that in accordance with this section, he has to obtain a licence before he can keep open his private market. The licence so granted under section 304 may permit the licensee to levy a fee or fees of the nature specified in sub-section (2) of section 301 of the Act. The appellant purported to grant a lease of the market to contractors who, under its terms, had to pay him a fixed sum of Rs. 225 a month. The transaction was really an arrangement by which the contractors were allowed to collect the fee or fees which the owner could levy in accordance with the terms of the licence granted to him. The Corporation demanded from the plaintiff a licence fee equal to 15 per cent. of the gross income from the market which they assessed at a particular figure. The plaintiff protested against that demand and claimed that he was only liable to pay a licence fee calculated on the amount of Rs. 225 which he received from his contractors. There

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* L. P. A. No. 51 of 1948. 9th September, 1948.

were criminal proceedings against the plaintiff on account of his failure to obtain a licence after paying the proper licence fee. The plaintiff thereupon filed the suit out of which the present appeal arises for a declaration that the licence fee payable by him to the Corporation for the suit market is only Rs. 405, that is to say, calculated on the amount of Rs. 225 payable to him monthly by the contractors. The learned Additional Judge of the City Civil Court dismissed the suit. He held that the fee collected from the various stall holders is the "gross income" of the plaintiff "from the market", within the meaning of section 304-B of the Act and the Corporation was not wrong in basing the licence fee on such income. By using the term, "gross income," he was of opinion that what was meant was the income which was derived from the market without deducting the expenses of collection, management, etc., and by the alleged lease the plaintiff had only transferred the right of management, etc., to the contractors and the contractors must be deemed to be agents of the plaintiff. The plaintiff appealed to this Court. Horwill, J., dismissed the appeal. But the learned Judge, however, was not inclined to agree with the conclusion of the trial Judge that "the gross income of the owner" mentioned in section 304-B is the income derived from the various stall holders in the market. This is what the learned Judge says :—

"We are not concerned with the legal relationship between the plaintiff and his contractor. Suffice it to say that the plaintiff was not entitled to receive from the contractor anything more than the sum of Rs. 225 agreed upon, however great or however little the gross income from the stalls might have been. So that there was no relation between the amount received by the plaintiff and the gross income from the stalls. The sum received by the plaintiff as a result of his contract cannot therefore be regarded as the gross income *minus* some sum allowed for the expenses of collection. The argument of the learned Additional City Civil Judge therefore seems fallacious."

The City Civil Judge did not hold that the sum received by the plaintiff as a result of the contract was the gross income *minus* a sum allowed for expenses of collection. On the other hand, he held that it was the income derived from the various stall holders that must be regarded as the gross income of the plaintiff as owner, though for purposes of convenience of management the contractors were entrusted with the task of running the market and they were permitted to appropriate the surplus, if any, remaining after meeting all expenses and paying a sum of Rs. 225 to the plaintiff. In our opinion, the language of section 304-B is clear. The licence is granted to the owner. It is the person to whom licence is granted that can levy the fee or fees of the nature specified in sub-section (2) of section 301. The licence fee which such person is liable to pay is a fee not exceeding 15 per cent. of his gross income from the market. If the fact that it is only the licensee that can levy the fee is sufficiently borne in mind, then it follows that the gross income really is the income derived by the levy of the fees from the stall holders. The fact that under a contract between the plaintiff and the contractors the latter actually collect such fees from the stall holders cannot make any difference in the legal position. The words used are "gross income." If the words used had been "net income", it might have been arguable that Rs. 225 must be considered to be the net income of the owner. But having regard to the use of the word "gross income" and to the fact that it is the owner who has been granted a licence and he alone can levy the fee, it is clear that the "gross income" there refers to the total fees collected from the stall holders in the market. In this view, it is unnecessary to deal with another question discussed by Horwill, J., in his judgment which turns on the language employed in the definition of "owner" in section 3 (17) of the Act, which says, that "owner" includes

"the person for the time being receiving or entitled to receive the rent or profits of the property in connection with which the word is used."

We think that the owner in section 304-B can only refer to the owner of the market to whom a licence has been granted under section 304. It is also doubtful if a person who has been permitted to collect the fees which are leviable under the licence can be said to be a person entitled to receive the rents and profits of the property.

The Letters Patent Appeal is dismissed.

V.P.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO AND MR. JUSTICE MACK.

The Public Prosecutor .. *Appellant**

v.

Nagappa Pujary and others .. *Respondents.*

Madras Borstal Schools Act (V of 1926), *section* 8—'*Criminal tendencies*'—*Meaning of.*

The word ' criminal tendencies ' occurring in section 8 of the Madras Borstal Schools Act should not be given a narrow interpretation. The section should be interpreted to mean that whenever an adolescent was convicted of an offence ordinarily he should be given the advantage of being put in the Borstal School so that by long association and training he would come out after the termination of the stay as a useful citizen of the country.

Per *Mack, J.*—A criminal tendency does not manifest itself only in acts involving dishonesty such as theft or cheating. A person who, owing to lack of self-control or as a result of his environment, is unable to control himself and commits an offence of either grievous hurt or homicide by using a deadly weapon without regard to consequences exhibits a criminal tendency just as much as a person who steals.

Appeal under section 417 of the Code of Criminal Procedure 1898, against the acquittal of the aforesaid accused Nos. 1 to 3 of offence under section 302, Indian Penal Code, by the Sessions Judge of South Kanara Division in S.C. No. 7 of 1948 on his file.

Assistant Public Prosecutor (*A. S. Sivakaminathan*) for Appellant.

Muhammad Hibbathulla, Amicus Curiae, for Accused.

The Court delivered the following

JUDGMENTS: *Subba Rao, J.*—This is an appeal by the Crown against the acquittal of the accused 1 to 3 under section 302, Indian Penal Code. The learned Public Prosecutor argued that on the facts the first accused should have been convicted under Part I of section 304. But on the facts as found by us he rightly conceded that the offence should fall more appropriately under section 335. There is no particular reason why a differentiation should be made between the first accused and accused 2 and 3. They combined together and beat the deceased, and the evidence does not show that the first accused gave any particular blows which caused the death of the deceased. Indeed the evidence shows that he beat the deceased on the head, whereas the medical evidence shows that the deceased did not die of the wounds on the head. Further it is also in evidence that the rice pounder M.O. 3 was broken into two pieces, and it is impossible to say who used the other bit and with which bit the major wounds were caused. We therefore modify the sentence of the first accused also and convict him under section 335 of the Indian Penal Code and sentence him to the period already undergone.

Before we close the judgment, it is necessary to make an observation in regard to the view expressed by the Sessions Judge on the scope of section 8 of the Madras Borstal Schools Act. The learned Judge observed as follows :—

" The first accused is a lad who, according to his own statement, is aged 16 years, and according to the medical evidence is aged between 16 and 18. There is no evidence that he has criminal tendencies or bad associations. He evidently committed the offence under provocation and in the heat of passion and not on account of any criminal tendencies. I do not consider, therefore, that section 8 of the Madras Borstal Schools Act can be properly applied to him."

The condition precedent to the application of section 8 is that the adolescent offender should have criminal habits or tendencies or association with persons of bad character. If the learned Judge's interpretation of that section were to be accepted, it would mean that a person who has no criminal tendencies would be sent to the ordinary jail, whereas a person with criminal tendencies will be sent to the Borstal School. This interpretation would defeat the object of the Act itself. If a person without criminal tendencies is sent to a jail there is a greater danger of his contamination

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* Crl. Appeal No. 453 of 1948. 5th October, 1948.

by his association with hardened criminals, whereas the object of the Act is to send such people to a Borstal School, so that they may have good training and come out of it to become useful citizens. The words "criminal tendencies" should not be given a narrow interpretation. If a boy had no criminal tendencies he would not be convicted of any crime at all. The fact that a boy is convicted for one offence or other under the Indian Penal Code shows in the view of the Court convicting him that he has criminal tendencies. We would interpret the section to mean that whenever an adolescent was convicted of an offence ordinarily he should be given the advantage of being put in the Borstal School so that by long association and training he would come out after the termination of the stay as a useful citizen of the country.

The appeal is dismissed.

Mack, J.—I should like to add a word while in substantial agreement with my learned brother about the scope of section 8 of the Madras Borstal Schools Act. I share his opinion that there has been a tendency to narrow down the scope of the Act to adolescents who have been shown to have previous criminal tendencies or bad associations. A criminal tendency does not manifest itself only in acts involving dishonesty such as theft, or cheating. A person who, owing to lack of self-control or as the result of his environment, is unable to restrain himself and commits an offence of either grievous hurt or homicide by using a deadly weapon without regard to consequences exhibits a criminal tendency just as much as a person who steals. The alternative to applying the Borstal Schools Act to cases such as these, as my learned brother has said, is, to send him for a long period to an ordinary jail. It is difficult to lay down hard and fast conditions as to the type of adolescents who should be sent to a Borstal School. We can think of no cases in which an adolescent should be sent for a long period to an ordinary jail in which he cannot with better advantage to himself and the community at large be sent to a Borstal institution.

K.C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

The Maharajah of Pithapuram .. *Appellant**

v.

Cittoori Venkataraju .. *Respondent.*

Limitation Act (IX of 1908), Article 120—Collection by Zamindar of rent on pre-settlement inam land not liable to pay rent—Suit for declaration that inamdar was entitled to enjoy land free of rent—Limitation—Starting point.

The collection by a Zamindar of rent from an inamdar (entitled to enjoy the land free of rent) however long continued will be wrongful and every time the Zamindar demanded rent which was not legally payable by the inamdar, the demand gave rise to a fresh cause of action to the inamdar.

Sriman Madhabushi Achamma v. *Gopisetti Narayanaswamy Naidu,* (1909) 19 M.L.J. 734 : I.L.R. 33 Mad. 171, relied on.

Kodoth Ambu Nayar v. *Secretary of State for India,* (1924) 47 M.L.J. 35: L.R. 51 I.A. 257 : I.L.R. 47 Mad. 572 (P.C.) considered.

Appeal against the decree of the District Court of East Godavari at Rajahmundry passed in A.S. No. 133 of 1944 preferred against the decree of the Court of the Subordinate Judge of Cocanada passed in O.S. No. 40 of 1942.

Ch. Raghava Rao for Appellant.

P. Somasundaram and *P. Suryanarayana* for Respondent.

The Court delivered the following

JUDGMENT.—The question that arises in this Second Appeal is whether the respondent is entitled to enjoy land free of rent that was the subject of a pre-settlement

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*S. A. No. 1395 of 1946. 11th August, 1948.

grant. A few documents were filed in the case; and on this evidence the Subordinate Judge held that the respondent had not proved his claim. The suit, which was one for a declaration that the plaintiff was entitled to enjoy the land free of rent and for a refund of rent already paid, was dismissed in toto. In appeal, the District Judge held that the documents proved that the plaintiff (respondent) possessed the rights which he claimed. He held that a declaration should be given, as there had been a continuing wrong in collecting the rent from the plaintiff but that he could obtain a refund of rent wrongly paid only for a period of six years prior to suit.

We know that from 1895 the land was described as *Asalminaha* Inam. Macleane defines this tenure thus :—

> 'The term is therefore applied to rent free and other favourably assigned lands. Commonly used for unoccupied and unassessed land."

The words used show that the land was excluded from the account of the total revenue. It is not denied that the use of this word is not altogether conclusive of the nature of the grant and would not exclude the possibility that the Zamindar had a right to impose rent later. The fact that the land was at one time described as a tope has led to the suggestion by the Zamindar's learned advocate that the land may have been granted originally to an ancestor or predecessor-in-title of the plaintiff, to encourage him to cultivate the tope. If that is so, it is rather difficult to attach any importance to the subsequent description of that land as Darbar inam. This has given rise to another suggestion on behalf of the Zamindar that when the predecessor-in-title of the plaintiff ceased to comply with the terms of the original grant, he was allowed to continue in enjoyment of the land free of rent on condition that he rendered service at darbars. There is no material on which a Court could uphold such a contention; and the learned District Judge before whom such argument was not put forward was certainly entitled to conclude that, whatever the rights of the plaintiff's predecessor might have been when the grant was made, those rights continued, unless the Zamindar was able to show that by some change in circumstances or on account of some infringement of the terms of the original grant, he became entitled to levy rent. Even as late as 1916, in Ex. P-5, an extract from the Record of Rights Register maintained by the Registrar dated 11th May, 1913, the land was described as *asalminaha* inam.

The learned District Judge very rightly placed a great deal of reliance on Ex. P-4, the inam register prepared in 1916. The Inam Deputy Collector made his recommendation on 29th November, 1915; and during the course of his enquiries into the nature of the inam he stated in column 6 of the form :—

> "This is a personal inam held with grant. Gift deed is produced for inspection by the claimant of case No. 4. The garden finds mention in the bhuband of fasli 1207 (1797) as a deduction from the village gudicut as Ravu Venkayya Cocoanut garden 4 visams."

This entry negatives the suggestion that this was a Darbar service inam. Unfortunately, that grant has not been produced, although a copy of it was tendered in the trial Court and rejected; but this entry proves that the title of the plaintiff lay in a personal grant. We must presume, since we know that no rent was paid from the time of the grant until recent years and there being no evidence to the contrary, that the plaintiff was entitled to continue to enjoy the land free of rent. It is no doubt true that column 22 of Ex. P-4 shows that rent in 1915 was being paid by the plaintiff or his predecessor-in-title to the Zamindar; but from when payment of rent was made, we do not know. Were it not for this entry,

> "May be resumed and fully assessed as it is held subject to payment of rent to the zamindar."

there would be every reason to believe that no rent was paid until 1915, when on the representations of the Zamindar that this was a service inam which he intended to resume, a full assessment was paid. It is unnecessary to discuss in detail the various documents referred to in the judgment of the learned Subordinate Judge and dealt with rather sketchily by the learned District Judge in appeal; because those documents only show that the land was described as *asalminaha* from time to

time, and that from 1905 onwards the inam was described as Darbar service inam. The conclusion arrived at by the learned District Judge that the inam was a pre-settlement inam on which no rent was payable by the plaintiff was certainly one possible on the facts, and since this is a second appeal, that finding has to be accepted.

On the question of limitation it is argued that when the Zamindar resumed this land in 1925 he did an act which negatived finally the plaintiff's title, and that since the plaintiff did not file a suit within six years of that act of 1925, the suit is barred by limitation. It is undoubtedly true that if a trespass or a similar negation of a person's rights took place at a particular date and that trespass or denial of rights continued from that date, the date from which limitation runs is the date when that right was first denied or the trespass took place ; but if the act of trespass or denial is a discontinuous one, then every fresh denial affords a fresh cause of action. The argument of the learned advocate for the appellant is on the basis that the act of resumption was a definite act which amounted to something akin to taking possession of the land from the plaintiff, and that from that date therefore time began to run. If however he had no right to resume the land, as has already been held, his sending the plaintiff an order of resumption would have no legal effect whatsoever, nor would it have any practical consequence for the plaintiff, since his possession was undisturbed. It is true that when the Zamindar represented, either honestly or by mistake, that the plaintiff held this land on service tenure, the plaintiff accepted the statement of the Zamindar and paid the rent demanded by him ; but it seems to me that the collection of such rent, however long continued, was wrongful, and that every time the Zamindar demanded rent which was not legally payable by the plaintiff, the demand gave rise to a fresh cause of action ; because the plaintiff knew that if he did not pay the rent, the landlord would take coercive steps to enforce his supposed right.

The facts in this case seem very close to those in *Sriman Madhabushi Achamma* v. *Gopisetti Narayanaswamy Naidu*[1], where a Zamindar demanded a higher annual payment from certain Agraharamdars than that to which he was legally entitled. He even succeeded in one year in obtaining a decree for the higher amount ; and it was argued in that case that at any rate from that year in which he had successfully maintained the suit against the Agraharamdars, time ran against the Agraharamdars and that a suit not filed within three or six years from that date was barred by limitation. The learned Judges however held that that was not so, and that if the Agraharamdars were not bound to pay the higher rent, every time that the higher amount was demanded, a fresh cause of action arose. The learned advocate for the defendant has referred to the decision of the Privy Council in *Kodoth Ambu Nayar* v. *Secretary of State for India*[2], in which a person who had been cultivating some Government forest land, brought a suit to establish his rights. It was found that he had failed either to establish his title or to prove that he was entitled to the land on account of long possession. Their Lordships went on to consider the question of limitation, although it was not really necessary to do so. In a very brief paragraph, they remarked that since Article 120 applied and since the suit was not brought within six years of the date when the Government negatived the plaintiff's rights, the suit was barred by limitation. On what facts their Lordships relied on as basis for their dictum we do not know. There is no reason to think that by implication *Sriman Madhabushi Achamma* v. *Gopisetti Narayanaswamy Naidu*[1] is no longer good law.

The learned District Judge seems to be of opinion that the plaintiff was entitled to recover six years' rent under Article 120 of the Limitation Act ; but it is conceded here that although Article 120 will have application as far as the relief for a declaration is concerned, it will not apply to the prayer for refund of the rent ; and that the plaintiff would be entitled to recover only three years' arrears of rent.

Except for this modification the appeal is dismissed. Since the appellant has partially succeeded, he will pay only half the costs of the respondent in this Court.

K.S. *Appeal dismissed.*

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1. (1909) 19 M.L.J. 734 : I.L.R. 33 Mad. 171.
2. (1924) 47 M.L.J. 35 : L.R. 51 I.A. 25 I.L.R. 47 Mad. 572 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

R. Ramanathan .. *Petitioner**

Madras Maintenance of Public Order Act (I of 1947), *section* 2 (1) (a)—*Mere membership of a body not declared unlawful—If a valid ground for detention.*

Mere membership of a body not declared unlawful, in the absence of any overt acts of a nature suggesting that the particular person was acting or about to act in a manner prejudicial to the public peace and public order, is not a ground for detention under the Madras Maintenance of Public Order Act.

Petition under section 491, Criminal Procedure Code praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue directions in the nature of Habeas Corpus for his production before the High Court, Madras for being dealt with according to law and for orders that he be set at liberty.

A. Ramachandran of Messrs. Row and Reddy for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) as the Crown Prosecutor on behalf of the Crown.

The Court made the following

ORDER.—The petitioner R. Ramanathan was arrested under the Provisions of the Madras Maintenance of Public Order Act, 1947, on 1st April, 1948, at 6 A.M. in Royapettah. He was taken to the Royapettah Police Station and thence to the Madras Penitentiary where he was detained. The detention was under the orders of the Commissioner of Police, Madras, who on the same day intimated to the Government the fact of the issue of the order of detention along with the grounds for detention. The grounds were despatched by the Provincial Government to the Central Jail, Vellore, for service on the petitioner on 24th April, 1948. In the affidavit filed by a friend of the detenu it is stated that Ramanathan had been working as Joint Secretary of the Madras Provincial Trade Union Congress, and that for ten years he was doing trade union work and as such was carrying on lawful activities connected with M.P.T.U.C. A further ground was taken in that affidavit that the order of detention was passed by the Commissioner on 1st April, 1948, after the arrest and not before, and that he could have had no reasonable grounds for suspecting that the petitioner was acting in a manner prejudicial to the maintenance of Public Order. The plea was however not pressed at the time of the hearing of this application, and consequently it was not necessary to examine the Commissioner as it was done in other cases. It has to be presumed that the requirements of the action, as far as the procedure is concerned were duly fulfilled by the detaining authority.

After the grounds were served, as previously stated, upon the petitioner in the Vellore Jail, a supplemental communication was sent by the Provincial Government to the detenu on 14th May, 1948, containing further grounds. It is not clear under what necessity or provocation the subsequent communiction was sent.

The original grounds are to the following effect :—

> "He came to Madras in 1940 and was in contact with S. M. Ramiah, a staunch Communist. After the round up of Communists in March, 1941, in the City he established contact with the Youth League in the City in order to rally the anti-Imperialist elements and to reorganise the Communist groups. He joined his brother R.H. Nathan, a communist deportee from Malaya. He held secret meetings to revive Communist activities. He is in contact with the leaders of the Communist-controlled labour unions in the City and is responsible for strikes in the City. He is an active Communist worker and the Joint Secretary of the Madras Provincial Trade Union Congress."

There is in them a certain amount of vagueness, and most of the facts that are referred to appear to be nearly a decade old. The material part of the grounds is that the detenu held secret meetings to revive Communist activities, that he was

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*Crl. M.P. No. 943 of 1948. 20th May, 1948.

in contact with the leaders of the Communist-controlled labour unions in the City, and that he was responsible for strikes in the City. It is also urged that he is an active Communist worker and Joint Secretary of the Madras Provincial Trade Union Congress, which fact is not denied. There is thus very little in the original grounds to show that any authority could have been reasonably satisfied upon those grounds that the person of that description fell within the mischief of section 2 (1) (*a*). It is not alleged that the Madras Provincial Trade Union Congress is an unlawful body or is engaged in activities of a prejudicial nature ; nor is it alleged that organising of strikes *per se* is unlawful, so long as they are conducted in a peaceful manner without any interference with the lawful exercise of rights by the public and by the respective authorities. Even otherwise, the statement, that the detenu held secret meetings and was in contact with Communist-controlled labour unions is bald and does not convey any clear impression as to when he was concerned, in those activities with reference to the date of the order of detention.

Turning to the additional grounds, it is necessary, since they are of an extensive nature, for me to deal with them in some detail. I shall read each paragraph and make my comments.

(1) "In 1933-34 he went to Malaya and started a Tamil Journal "Samuthaya Ooliyam" advocating the cause of Nationalism and Communism. In 1936 he made contact with S. M. Ramiah, member of the Malayan Communist party, and assisted him in running his paper."

Obviously these are matters relating to past acts that took place more than a decade prior to the detention and can have no direct bearing upon the question at issue.

The second paragraph is as follows :

"He published and distributed objectionable leaflets, for which he was prosecuted and bound over to be of good behaviour. Undeterred by this prosecution, he carried on objectionable Communist activities among the unemployed and the youth of the City. He took an active part in the Madras Youth Conference in April, 1941, and instigated Simpson & Co. workers engaged in Army contracts to strike. He interested himself in the Madras Bus strike and created unrest amongst industrial workers in Madras City. He was arrested and detained in 1941."

These also concern activities prior to 1941 and are mostly related to work he is said to have done among the industrial workers in Madras City.

In the following paragraph (3) it is said :—

"He was released from detention in May, 1944, and continued to work in the Communist Party office as a whole time worker. He is a member of the Madras District Committee of the Communist Party of India. He has participated in several meetings held in the City under the auspices of the Communist Party. He was detained in January, 1947, and released in August, 1947."

This brings us to facts nearer the relevant date. All that appears from the facts recited therein is that after his release in 1944 he practically became a whole time worker in the Communist Party. He was detained for a second time in January, 1947, and released in connection with the Independence Day.

The next paragraph is of some importance :

"Speaking at a meeting of workers on 28th November, 1947, he strongly criticised the Government's policy and exhorted the workers to go on strike if their demands were not conceded. In the same meeting he expressed sympathy with the N.G. Os. Addressing the Electric and Tramway workers on 10th December, 1947, he criticised and warned the Government for taking sides with the capitalist and crushing the labour. At a workers' meeting on 27th December, 1947, he opposed the Government's policy of de-control and said that the Government had yielded to the pressure of the Capitalists. He supported the cause of the N.G.Os. and moved a resolution criticising the abolition of control and rationing of foodgrains. On 11th January 1948, while speaking at a workers' meeting he condemned the Government's policy towards labour and alleged that the Government had combined with the capitalists in pulling down the workers."

The Maintenance of Public Order Act came into force on 12th March, 1947. The acts mentioned in this paragraph are subsequent to that date. The gravamen of the charge against the detenu levelled in this paragraph is that he was strongly criticising the policy of the Government with regard to certain matters, by characterising their attitude as being anti-labour and pro-capitalist, and he held up to criticism their treatment of the non-gazetted officers and their policy in respect of food decontrol and de-rationing. Nowhere in this paragraph or in any of the three preceding paragraphs is there the slightest indication of the detenu having in any of those

utterances counselled the audience or the workers to employ violent means in pursuing their agitation. Presumably all the meetings which are referred to were conducted openly and with the previous permission of the concerned authorities, at all events with their full knowledge.

The next paragraph runs thus :—

> " He participated in secret party meetings held on 6th December, 1947, and 7th January, 1948, to draw up the programme of the party. In these meetings it was decided to put up a strong protest against the food policy of Government by public meetings and processions. Allegations were also made that the Government was hand in glove with capitalists and that some cases of black-marketing and corruption unearthed by the partymen were hushed by Congress M.L.As. and Ministers."

This also concerns criticism by the detenu on the food policy of the Government, and it is added that allegations were made by him at secret party meetings that the Government was hand in glove with captilists, and that some cases of black-marketing and corruption unearthed by the partymen were hushed by Congress M.L.As. and Ministers. Here again I am unable to see anything from which it can be inferred that the conduct of the detenu in exposing certain matters concerning those topics—I am not now concerned with whether his allegations were true or not—amounted to such prejudicial conduct as would attract the application of section 2 (1) (*a*).

The only material portion in the additional grounds is what is found in the last two paragraphs 6 and 7.—

> " He is an important member of the Communist party which is now out for violence and is engaged in subversive activities."
>
> " Most of the important members of the party have gone underground and from there they are guiding various crimes such as arson, loot, murder etc., committed by Communists. Communists are also extorting money from the public by illegal means for party purposes. Leaflets are also published praising the work of Communist hooligans and encouraging the ignorant to follow them. He being an important member of the party will be guided by the instructions of those leaders and is likely to indulge in crimes, etc."

It may be seen that all that is charged against the detenu is that he is an important member of the Communist Party which is out for violence and that he is engaged in subversive activities. It is then stated that the Communist Party has gone underground and that they are guiding from there certain grave crimes such as arson, loot, murder, etc., committed by Communists. Other similar allegations are made with reference to Communists in general and it is finally stated that he is likely to be guided by the instructions of those leaders and to indulge in crimes. The gist of the grounds excluding matters which do not appear to have any bearing is that he is an active and important member of the Communist Party, that that party has for its creed the cult of violence and that in view of his position in the party he is likely to carry out the programme of that party.

I questioned the learned Assistant Public Prosecutor categorically whether membership of a party which has not been declared unlawful is by itself sufficient to justify an order of detention under the Act, in the absence of anything more specific to indicate that by reason of that membership or in consequence thereof the member was acting or about to act in a manner prejudicial to public peace and public order. I was unable to obtain a direct answer to this question for the obvious reason that such a ground, free as it is of any aspect of unlawful conduct, is not sufficient to deprive a subject of his liberty. If, however, in addition to membership, anything else exists or is shown to exist from which the detaining authority was satisfied that the particular person was about to act in a prejudicial manner and that it was necessary to detain him for preventing him from doing so, there cannot be the slighest doubt that the Provincial Government or the delegated authority would have the power to direct his detention. In the present case I have very closely srutinised both the original and supplemental grounds, and I fail to see anything therein to indicate that beyond his membership of the Communist Party and his activities in connection with the Trade Union Congress, there is anything else to indicate an attitude on his part of doing acts likely to disturb public tranquillity. It need hardly be pointed out that this special enactment is directed not against organisations or parties or groups of persons but against

particular individuals, and it is their conduct, their attitude, their tendency which has to be borne in mind in coming to the conclusion whether they are persons who should be held under detention in the interest of public safety. Mere membership of a body not declared unlawful, in the absence of any overt acts of a nature suggesting that the particular person was acting or about to act in a manner contemplated in the act, is, in my opinion, not a ground for detention. The last sentence in the supplemental grounds that the detenu will be guided by the instructions of the leaders and is likely to indulge in crimes is at best conjectural, and I am not satisfied that the detaining authority is entitled on a conjecture of that kind to say that he is satisfied that the particular person is about to act in a prejudicial way.

The aspect which has impressed me most in the matter is that for a long time the petitioner admittedly has been an active worker in the Trade Union Congress, and during that period, although he has encouraged strikes and criticised the Government in regard to some of their policies, it does not appear that he has committed or threatened to commit any overt acts of violence. There does not seem to me to be any basis even for the conjectural statement that is found in the last sentence of the additional grounds. I am not satisfied about the *bona fides* of the detention of the petitioner. I hold that upon the grounds that are mentioned the detaining authority could not have been satisfied that the petitioner was acting or about to act in a manner prejudicial to public safety and public order. In this view, the detention has to be held to be illegal.

The petitioner is directed to be released immediately.

K.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MACK.

M. K. Shanmugam Pillai and others .. *Petitioners**

v.

Sri Sankaranarayanaswami Devastanam, Sankarankoil Cusba, through its Executive Officer, Sri K. V. Subbiah Pillai .. *Respondent.*

Court-Fees Act (VII of 1870), Schedule II, Article 17-A—Suit under section 44-B of the Madras Hindu Religious Endowments Act for declaration that order of Collector directing resumption of inam is wrong—Court-fee.

A suit under section 44-B of the Madras Hindu Religious Endowments Act for a declaration that the order of the District Collector confirming the order of the Revenue Divisional Officer directing the resumption of an inam is wrong requires when the lands are worth more than Rs. 10,000, a Court-fee of Rs. 500 under Article 17-A of Schedule II of the Court Fees Act. The Collector passing the order was not a Revenue Court passing a summary order and therefore the plaint cannot be filed with a Court-fee of Rs. 15 under Article 17 (1) of Schedule II of the Court Fees Act.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge, Tuticorin, dated 18th April, 1947, in Check Slip No. 267/VIII-1/47, Diary No. 14, dated 27th March, 1947 in O. S. No. 51 of 1946.

C. S. Rajappa for Petitioners.

The Government Pleader (*K. Kuttikrishna Menon*) for Government.

K. V. Ramachandra Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—This petition raises a question of Court-fee payable on a plaint filed in a suit under section 44-B of the Hindu Religious Endowments Act for determining whether an inam comprises melwaram and the kudiwaram or only the kudiwaram. The District Collector of Tinnevelly confirmed in appeal

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*C.R.P. No. 1057 of 1947 and C.M.P. No. 6776 of 1948. 7th October, 1948.

an order of the Revenue Divisional Officer, Koilpatti, directing the resumption of an inam and its re-grant in the name of Sri Sankaranarayanaswami of Sankarankoil and holding further that the inam comprised both the land and the assessment. The plaintiffs who are the alienees filed the suit within the six months period prescribed by section 44-B of the Hindu Religious Endowments Act for a declaration that the order of the District Collector was null and void, that the plaintiffs are the absolute owners of the property, and that the inam is only " a portion of" the melwaram due to Government and not of the land at all. They paid in the first instance a fixed Court-fee of Rs. 100 under Article 17-A of Schedule II on the basis of a declaration involving property less than Rs. 10,000. The Court-fee Examiner took an objection that the lands were worth more than Rs. 10,000 and that a Court-fee of Rs. 500 was therefore payable. Then the plaintiffs adopted the position that only Rs. 15 was payable on the plaint under Article 17 (1) of Schedule II as a suit to set aside a summary order of a Revenue Court. The learned Subordinate Judge repelled this contention, and holding that a Collector passing an order under section 44 of the Hindu Religious Endowments Act resuming an inam was not a revenue Court held that the correct Court-fee payable was Rs. 500 under Article 17-A of schedule II.

The learned Government Pleader points out that the relief claimed by the plaintiffs is curious and outside the scope of even section 44-B, namely, a declaration that only a portion of the melwaram constitutes the inam. The learned advocate for the petitioners was prepared to amend the plaint by deleting the words " a portion of" and after arguments did, in fact, file such a petition. Had this been the only obstacle in the way of the petitioners, I should have been inclined to allow the amendment even if at this stage. But Article 17 (1) of Schedule II regulates the Court-fee on a plaint to alter or set aside a summary decision or order of any of the Civil Courts not established by Letters Patent or of any Revenue Court. It requires only a Court-fee of Rs. 15 to be paid irrespective of whether it is filed in a District Court, Sub-Court, or District Munsiff's Court. The decision of the District Collector resuming an inam under section 44-B and deciding the nature of the inam within the ambit of this statutory provision is in one sense summary in that there is no appeal from it and is final, unless in accordance with section 44-B it is set aside in a regular suit filed within six months. The only point for determination is whether such an order resuming an inam and deciding whether the inam is a grant of both the melwaram and the kudiwaram or only the melwaram is an order of a Revenue Court. The Subordinate Judge held that the Collector did not sit as a Court, there being no statutory direction to him to examine parties or witnesses on oath with no indication further that he should conform to the provisions of the Code of Civil Procedure or the Evidence Act, and that the orders of the Collector and the District Collector in appeal were purely executive, although they adjudicated the rights of parties.

The learned advocate for the petitioners relies on *Annamalai Chetti* v. *Lt. Col. J. G. Cloete, Deputy Superintendent of Revenue Survey*[1], an old decision of 1881, where it was held that a suit to contest the award of a Settlement Officer under section 25 of Act XXVIII of 1860 fell within the scope of Article 17 (1); but that Act specifically empowered the Settlement Officer to refer to disputes *re* : boundaries to arbitrators, take evidence and to record his decision. A relevant decision on the point I have to decide is *Athimoola Mudaliar* v. *Kubra Begum*[2], a decision of Wadsworth, J., which decided that the Court-fee payable on a suit brought by an unsuccessful applicant to the Collector for registration as a landholder under section 3 (5) of the Madras Estates Land Act was governed by Article 17-A of the Court-Fees Act. Wadsworth, J., was of the opinion that the proper criterion in such case must be whether a suit asking for a declaration was one of a special character specially provided for by a special statute. If it was merely a suit for a declaratory decree, the declaration asked for being a right which itself arises from a special statute,

1. (1881) 4 Mad. 204. 2. (1935) 71 M.L.J. 493 : I.L.R. 59 Mad. 882.

it should come under Article 17-A of the Court-Fees Act. If, however, it was a special form of suit involving special procedure and special defences such as a suit under section 112 of the Madras Estates Land Act, it fell outside the scope of section 17-A. Reference was made in that decision to another decision placed before me, *Rama Iyer* v. *Sankara Iyer*[1], where a Full Bench of this Court took the view that a suit for registration of a document under section 77 of the Registration Act was not one for a declaratory decree and fell within the residuary provision Article 17 (*vi*) where it was not possible to estimate at a money value the subject-matter in dispute, and which was not otherwise provided for by this Act. In this case, however, the subject-matter is land in respect of which a declaration is sought and is capable of valuation. It is common ground that the value of this inam land is in excess of Rs. 10,000. In the present case the plaintiffs are really seeking, as did the plaintiffs in *Athimoola Mudaliar* v. *Kubra Begam*[2], nothing more than a simple declaration that they were entitled as of right to possession of the whole of the land. The learned Subordinate Judge, was, I consider, correct in applying Article 17-A of Schedule II to the present suit and requiring the plaintiffs to pay on the plaint a Court-fee of Rs. 500.

In the result, the petition is dismissed with costs. One set of advocate's fee. Time for payment of Court-fee six weeks from this date.

K.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MACK.

Contractor Kattupuchi Arumugham .. *Appellant**

v.

Nagammal and others .. *Respondents.*

Workmen's Compensation Act (VIII of 1923), section 2 (n)—Workman—Cooly engaged by and working under maistry, who is employed by a contractor for the purpose of his business—Payment of a lump sum to the cooly out of the sum paid to the maistry—Accident to such cooly—Liability of the contractor to pay compensation.

A contractor who had a contract to unload wagons in a railway station had a maistry who worked under him and who engaged coolies to whom he paid a fixed sum for unloading each wagon keeping a portion to himself per wagon. One of the coolies so employed met with an accident while engaged in the unloading of the wagons and died. On a question as to whether the cooly was a workman within the meaning of section 2 (*n*) of the Workmen's Compensation Act and whether the contractor was liable to pay compensation to the widow and children of the deceased cooly,

Held, that the cooly was employed for the purpose of unloading the wagon at the time of the accident which was the business of the contractor. It cannot be said that the employment of the cooly by the maistry was not a contract of service. He was clearly engaged for a specified remuneration to help in the unloading of a wagon of goods and there was no ground on which he could be excluded from the definition of a workman in the Act and as such the contractor was liable to pay compensation.

To come within the exception provided for in the definition of workman itself, the employment of the workman must be of a casual nature and in addition he must have been employed otherwise than for the purpose of his employer's business.

Appeal against the order of the Court of the Commissioner for Workmen's Compensation, Madras, dated 17th May, 1947, in Case No. 142 of 1947.

K. E. Rajagopalachari and *P. B. Ananthachari* for Appellant.

K. Arunachala Sastri for Respondents.

The Court delivered the following

JUDGMENT.—This is an appeal under section 30 of the Workmen's Compensation Act against the order of the Commissioner for Workmen's Compensation, Madras, awarding Nagammal, the widow of a cooly, Venkataswami Naicker and his three minor children Rs. 810 as compensation. Venkataswami was employed along

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1. (1907) 17 M.L.J. 573 : I.L.R. 31 Mad. 89 (F.B.).
2. (1935) 71 M.L.J. 493 : I.L.R. 59 Mad. 882.

* A. A. O. No. 417 of 1947. 2nd November, 1948.

with some other coolies to unload a wagon of dehydrated potatoes at Avadi station. While carrying a box on his head it is said to have slipped on to his stomach and caused him an abdominal injury. This was on 4th September, 1946. He was removed to his village in the first instance and brought to hospital on 7th September, 1946, where he died on 14th September, 1946.

An appeal lies only if a substantial point of law is involved in the Commissioner's order. The learned counsel for the appellant, who is a contractor by the name of Arumugham, fully realises this. He urges that the Commissioner on the evidence and on the facts wrongly found that Venkataswami was a workman within the scope of section 2 (*n*) of the Act. This section defines a " workman " as :

> " any person (other than a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business) who is . . . employed on monthly wages not exceeding four hundred rupees, in any such capacity as is specified in schedule II, whether the contract of employment was made before or after the passing of this Act and whether such contract is expressed or implied, oral or in writing."

It is common ground that the appellant, Arumugham, had a contract to unload wagons in the Avadi station for which he was paid Rs. 7 for each wagon. He had a maistry, one Somu, who worked under him and who, according to him, engaged coolies to whom he paid Rs. 5-4-0 for unloading each wagon keeping four annas for himself per wagon. On these admitted facts it is contended that Venkataswami was not a " workman." It is urged that he was a cooly who volunteered his services as a mere licensee and was under no contract of service with the contractor Arumugham. At the same time it is conceded that under section 12 of the Act, Armugham as principal would be liable to compensate this cooly, if he was employed by Somu for the purposes of his business. Reliance is placed on a series of Rangoon decisions for a distinction in the matter of contracts contemplated in the definition of " workman " in section 2 (*n*) of the Act on the ground that they must entail control over the workman and also *inter alia* powers of dismissal. The decisions cited before me are *Lee Shi* v. *Consolidated Tin Mines of Burma, Ltd.*[1], *Ma Htwa Yin* v. *Maung Thet Hnin*[2] and *Workmen's Compensation of Jaglipathan*, In re[3]. A distinction in those decisions does not appear to have been drawn in the case of a person who worked as a mere licensee paid by piece work rates for work which he did and over whose work the employer had no direct control. The view taken in these Rangoon decisions does not appear to have been adopted by any other High Court. It is conceded that it does not make any difference whether a person received monthly, weekly or daily wages and that recipients of wages in all those categories would come within the statutory definition of a " workman." One exception to the definition is that contained in the definition itself namely, that he must not be a person :

> " whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business."

It has been suggested that the employment of this cooly was of a casual nature but the exception requires both this qualification and in addition the qualification that he was employed otherwise than for the purposes of his employer's business. In the present case this cooly was clearly employed for the purposes of unloading the wagon at the time of the accident which was the business of the petitioner.

Coming then to the contract of employment contemplated by the definition, there is nothing in the language which imports into the contract of service powers of dismissal or powers of direct superintendence or control. It can scarcely be argued that the employment of this cooly by Somu was not a contract of service. He was clearly engaged for a specified remuneration to help in the unloading of a wagon of goods. I am unable to see any ground on which this cooly Venkataswami, can be excluded from the definition of a workman in the Act. In *Nadirsha Hormusji* v. *Krishnabai*[4], Beaumont, C.J., in considering the definition of casual nature

1. A.I.R. 1939 Rang. 428.
2. A.I.R. 1941 Rang. 61 (S.B.).
3. A.I.R. 1936 Rang. 89 (S.B.).
4. (1936) I.L.R. 60 Bom. 701.

of employment took the view that the rule adopted in England was that it was impossible to define exactly what casual employment was. He observed that there are some cases in which employment is not obviously casual and other cases in which employment is obviously casual and that there were a number of debatable cases between these two extremes on which a finding of the Commissioner must be treated as a finding of fact and not subject to any appeal. In this particular case there is the evidence of another cooly examined as P. W. 3 to the effect that he and Venkataswami were working together at Nafi godowns for the past eight months under the appellant Arumugham and that Arumugham used to be himself at the work spot and that Somu Maistry used to supervise the work of the coolies. This evidence has not been specifically contradicted either by Somu Maistry himself or by Arumugham both of whom have been examined. There is therefore plenty of evidence to support the Commissioner's finding of fact that Venkataswami was a workman within the required legal definition. It would appear that he was not even merely a casual cooly employed that day only to assist in unloading but that he was fairly regularly employed in unloading wagons by this contractor Arumugham. I can find nothing illegal in the order of the Commissioner. The appeal is dismissed with costs.

Pending the hearing of the appeal an order was passed requiring security before the withdrawal of the compensation which is under deposit with the Commissioner. The respondents are his widow and three minor children. The compensation can be withdrawn now by the widow without any security.

V.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

Moodananchu Borrayya and others .. *Petitioners**

v.

Kasa Vajjulu Ramakoti Sastri .. *Respondent.*

Civil Procedure Code (*V of* 1908), *Order* 16, *rule* 19 (b)—"*Established public conveyance*"—*If includes disconnected buses belonging to different companies running in different routes—Important witness—If can ask to be examined on commission.*

The "established public conveyance" mentioned in rule 19 (*b*) of Order 16, Civil Procedure Code does not mean disconnected buses belonging to different companies and with no certainty of continuous travel. Where a witness is living at a place which is about 300 miles by train from the place where the Court is situate, a prayer to examine such a witness cannot be refused on the ground that the place where the witness lives is less than 200 miles from the Court house, if a person is to travel by buses, where there is no "*through*" or connected bus service, ensuring continuous travel.

Any witness however important, is entitled to ask to be examined on commission if he lives in a place more than 200 miles from the Court house and the Court sees no fraud or *mala fides* in the application.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the District Munsiff, Markapur, dated 10th February, 1948, in I. A. No. 89 of 1948 in O. S. No. 224 of 1947.

W. Kothandaramiah for Petitioners.

T. S. Vaidyanatha Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—The only point for determination in this petition is whether the lower Court erred in law in ordering some witnesses cited by the plaintiff to be examined on commission. The learned Counsel for the petitioners urged that the lower Court erred in three ways. The first was that the witnesses in question were living in Nandalur which, though about 300 miles by train from Markapur

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* C. R. P. No. 312 of 1948. 27th October, 1948.

where the lower Court is situated, is less than 200 miles from Markapur if a person is to travel by buses, and that Order XVI, rule 19 (*b*) Civil Procedure Code, covers also other "established public conveyance," like buses. I cannot agree. There is no "established public conveyance" or "through buses" from Markapur to Nandalur, and not even a certainty of catching a series of buses, changing from one to the other. There are, it is said, buses from Markapur to Cumbum, Cumbum to Cuddappah and Cuddappah to Nandalur. It is obvious however, that a man going from Markapur to Cumbum in a bus may miss his bus at Cumbum for Cuddappah and again at Cuddappah for Nandalur. It is not like changing trains where one ticket can be bought and any connecting train got into. In these days, where buses are overcrowded, a man may even be detained for a day in a strange place if he undertakes such a hazardous journey of great inconvenience. I am of opinion that "the established public conveyance" mentioned in Order XVI, rule 19, Civil Procedure Code does not mean such disconnected buses belonging to different companies and with no certainty of continuous travel.

The second contention was that the application was belated and should not have been granted. But I do not see any such gross delay here; and, after all, the trial Court is a better judge of the delay than the parties.

The third contention was that one of the witnesses sought to be examined on commission was the vendor of the properties to the plaintiff, and stood in no better footing than the plaintiff, and should not have been allowed to be examined on commission. I cannot agree. The law does not recognise "equivalents to the plaintiff" and "equivalents to the defendants" and the rules must be strictly construed. Any witness, however important, is entitled to ask to be examined on commission if he lives outside its jurisdiction in a place more than 200 miles from the Court house, as here, and the Court in which the application for commission is filed sees no fraud or *mala fides* in such an application.

All the contentions have failed. The lower Court's order was, in my opinion, correct. This petition deserves to be and is hereby dismissed with costs.

V.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAJAGOPALAN.

Alagirisami Naidu .. *Petitioner**

v.

Chinna Veerammal and another .. *Respondents.*

Criminal Procedure Code (V of 1898), section 146 (1)—Order for attachment under—If can be made when both the parties were found to be in possession on the date of the preliminary order.

It is not correct to say that once the Magistrate comes to the conclusion that both the parties to the dispute were in possession of portions of the land in dispute on the date of the preliminary order, no matter how recent was that possession of one or the other, the Court loses all jurisdiction vested in it under section 146 (1) of the Criminal Procedure Code to pass an order of attachment.

Mohammad Koolayappa Rowthan v. *Sheik Abdulkhadir Rowthan*, (1914) 27 M.L.J. 169, distinguished.

Petition under sections 435 and 439, Criminal Procedure Code, 1898 praying that the High Court will be pleased to revise the order of the Court of the Additional First Class Magistrate, Sivakasi in M.C. No. 1 of 1947 dated 15th May, 1947.

K. Veerasami for the Petitioner.

V. Ramaswami Iyer for the Respondents.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

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* Cr. R. C. No. 865 of 1947.
(Cr. R. P. No. 755 of 1947).

4th November, 1948.

The Court made the following

ORDER.—The petitioner and the second counter petitioner,—counter petitioner 1 is the mother of the counter petitioner 2,—each claimed exclusive possession of the land in dispute. The learned Magistrate before whom proceedings under section 145, Criminal Procedure Code were initiated reached the conclusion that neither side was in exclusive possession on the date of the preliminary order (18th January, 1947), and that the evidence on record did not establish conclusively that either side had been dispossessed within two months before the order. The learned Magistrate ordered the attachment of the property under section 146 (1), Criminal Procedure Code. The petitioner seeks to have that order set aside in revision.

The learned Magistrate was certainly entitled to rely upon the oral evidence of the village Headman C.W. 6.

> "He (C. W. 6) says that each cultivated half, petitioner and counter-petitioner 2. I do not for a moment disbelieve the evidence of this witness who is very straightforward."

Considering that it was a six month crop that was raised when C.W. 6 harvested it the learned Magistrate was certainly right in his observation,

> "with regard to recent possession, it cannot be definitely said who was in exclusive possession."

I am unable to see any real substance in the contention put forward by the learned advocate for the petitioner, that on the evidence on record the learned Magistrate should have come to the conclusion that the petitioner was in exclusive possession of the land. To reiterate, the learned Magistrate was entitled to rely upon the oral testomony of C.W. 6. There was nothing in the documentary evidence to indicate with any finality that, if the second counter petitioner got any possession at all it must have been within two months before the date of the preliminary order.

The learned advocate for the petitioner relied on *Mohammad Koolayappa Rowthan* v. *Sheik Abdul Khadar Rowthan*[1], which was followed in *Errappa Reddiar* v. *Guruswami Reddiar and others*[2], and contended that once the learned Magistrate came to the conclusion that both the petitioner and the counter petitioner were in possession of the land in dispute on the date of the preliminary order, the learned Magistrate had no jurisdiction at all to order an attachment under section 146 (1), Criminal Procedure Code. In *Mohammad Koolayappa Rowthan* v. *Sheik Abdul Khadar Rowthan*[1], while setting out the facts of the case, Seshagiri Aiyar, J., observed,

> "The petitioner complained . . . . . that the counter-petitioner was preparing to commit a breach of the peace by forcibly entering upon properties which were in his exclusive possession. The defence was that the properties in dispute were the joint properties of the petitioner and the counter-petitioner and 'that they are in their joint enjoyment.' The Magistrate . . . . came to the conclusion that the allegation of the counter-petitioner as regards item 3 was true."

The facts of this case are totally different. Each side claimed exclusive possession, and what the learned Magistrate found was that some time before the date of the preliminary order, more than two months prior to the date of the preliminary order, counter petititioner 2 managed to get into possession of a portion of the land in dispute. I am unable to see any authority in *Mohammad Koolayappa Rowthan* v. *Sheik Abdul Khadar Rowthan*[1], for the extreme position contended for by the learned advocate for the petitioner, that once a conclusion is reached that both the parties were in possession of portions of land in dispute on the date of the preliminary order, no matter how recent was that possession of one or the other, the Court loses all jurisdiction vested in it under section 146 (1), Criminal Procedure Code.

I see no justification for any interference in revision. The petition is dismissed.

V.S. *Petition dismissed.*

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1. (1914) 27 M.L.J. 169.
2. 1935 M.W.N. 367.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

Dharmalinga Chetti .. *Petitioner**

v.

A.M. Krishnaswami Chetty .. *Respondent.*

Civil Procedure Code (V of 1908), *Order* 6, *rule* 17—*Application for amendment of written statement—Laches of defendant—Refusal of amendment—Propriety—Falsity of the case in the amendment—If can be gone into at that stage—Application if belated, when trial has not begun.*

Where the defendant seeking an amendment of the written statement is guilty of gross laches in not setting out the necessary facts earlier and which he ought to have set out even in the original statement, refusal of the amendment on that ground would be too drastic a penalty. For such laches, it is enough to saddle him with costs, which are the supreme panacea for all procedural ills.

When a Court has to decide whether the amendment of a written statement is to be allowed or not, that is not the stage when it can canvass the truth or falsity of the allegation in the proposed amendment and such allegations need not and should not be gone into then.

An application for amendment of the written statement cannot be said to be so belated as to deserve a refusal of the prayer where the trial of the case has not yet begun; amendments are allowed even in the course of first appeal and second appeal in deserving cases.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the District Munsiff of Trivellore dated 16th August, 1948, in I.A. No. 659 of 1948 in O.S. No. 156 of 1947.

T. Ramaprasada Rao and *M. Paul Mohammad Usman* for Petitioner.

M. Natesan for Respondent.

The Court delivered the following

JUDGMENT.—The only point for determination in this petition is whether the lower Court erred in law by failing to exercise a jurisdiction vested in it by refusing to grant the amendment prayed for by the petitioner in his written statement. In his original written statement in the suit, which had been filed against him regarding four survey numbers, he had contended that he had got all the four survey numbers on transfer of their patta from the original owner of those numbers, Ellammal, in 1944, and had been in possession of all the survey numbers since then, paying the tax, and that the suit should be dismissed. Issues were framed on that footing. Later on, he put in an amendment petition for amending his written statement by pleading that items 1 and 2 of the plaint property had been sold to him orally by Ellammal in 1923 itself, and that he had been delivered possession thereof and had perfected his title thereto, and that he had been given items 3 and 4 only in 1944 when the patta of all the four items was transferred to him and he was given their ownership, as he discharged a small cause suit debt of Ellammal. The learned District Munsiff dismissed the amendment petition, holding that a completely new and inconsistent case was being set up, and that there was also no *bona fides*, and that the application was belated. The application cannot be said to be so belated as to refuse the prayer for amendment, since the trial had not begun, and amendments are allowed even in the course of first appeal and second appeal in deserving cases. As regards the absence of *bona fides*, that is a point which would only be made clear, in the circumstances of this case, when the trial is over and the evidence is let in. There is also no proof that *a totally new and inconsistent case* was sought to be substituted by the amendment in question. The petitioner had stated in his original written statement, in a general way, that the patta covering all the four properties had been transferred to him in 1944 and that he had been in enjoyment ever since. The statement in the amendment petition, that he had got a right to items 1 and 2 out of those four properties by oral sale in 1923, will be certainly an addition to what he stated in the original written statement, but is not wholly inconsistent with that statement. It may be that the man forgot or overlooked the oral sale when he filed his written statement, and only relied on the

* C. R. P. No. 1270 of 1948. 29th October, 1948.

transfer of patta regarding all the four items in 1944. It must be remembered that the patta regarding items 1 and 2 was not transferred in 1923 or on any date earlier than 1944. Undoubtedly, the petitioner was guilty of gross laches in not stating about the oral sale earlier. He ought to have stated that even in the original written statement; but for such laches, it is enough to saddle him with costs. Refusing the amendment would be too drastic a penalty. Costs are the supreme panacea for all procedural ills.

The alleged *falsity of his case in the amendment* need not, and should not, be gone into now. Doubtless, if it is false, he will fail in the suit itself with costs. This is not the stage where we can canvass the truth or falsity of the allegation in the plaint or written statement or amendment.

So, in my opinion, this is a case eminently fit for ordering an amendment on terms. The lower Court's order refusing the amendment will be set aside and the amendment asked for will be granted on condition of the petitioner's depositing in the lower Court within a month from today, a consolidated sum of Rs. 75, which will not be costs in the suit, petition, or any other proceedings whatever, for payment to the plaintiff as compensation for the waste of time, money, and energy, caused to him by his laches. If the amount is not paid, the amendment will not be allowed. The amount, if deposited will be allowed to be drawn out by the plaintiff or his counsel without any security.

V.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MACK.

Polammal .. *Petitioner**

v.

K. Rathna Mudaliar and others .. *Respondents.*

Court-fee—Suit for specific performance of a contract of sale with alternative prayer for refund of advance paid and for damages—Separate court-fee for alternative reliefs—If payable.

In the case of alternative reliefs arising out of the same contract only one court-fee is payable on the relief which is more highly valued. That is the existing practice and it cannot be said in a suit for specific performance of a contract of sale with an alternative prayer for refund of the advance paid and for damages, that the claim for damages arose not out of the contract but out of the breach of the contract.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the District Munsiff, Trivellore, dated 29th June 1946, in O.S. No. 86 of 1946 with regard to the checkslip matter issued by the Court-fee Examiner.

T. K. Srinivasa Thathachariar for the Petitioner.

K. Karunakaran for the Government Pleader (*K. Kuttikrishna Menon*) for the Government.

Respondent not represented.

The Court made the following.

ORDER.—This petition raises a simple question of Court-fee. A suit was filed for specific performance of a contract of sale valued at Rs. 800 with an alternative prayer for a decree for a refund of Rs. 75 paid as advance and for damages of Rs. 725. For rather curious reasons, the Court-fee Examiner made the objection that a double Court-fee was payable on these reliefs. The ground he gave was that the relief of specific performance or for refund of advance arose out of the same cause of action, the contract of sale, but that the claim for Rs. 725 damages arose not out of the contract but out of the breach of contract.

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* C. R. P. No. 1374 of 1946. 9th November, 1948.

The learned District Munsiff was, apparently, satisfied with this curious reasoning and directed payment of the deficit Court-fee of Rs. 82-1-0. In this case of alternative reliefs arising out of the same contract only one Court-fee is payable on the relief which is more highly valued. This is, in accordance with existing practice and the representative for the learned Government Pleader can cite no decision to support the view taken by the lower Court. The petition is allowed. The deficit Court-fee which is said to have been paid will be refunded. No order as to costs.

K.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

Ramaswamy Chetty .. *Petitioner**

Criminal Procedure Code (V of 1898), sections 423 and 528—Power of appellate Court to transfer case to itself for retrial—Indian Penal Code (XLV of 1860), section 471—Offence under—Mere possession of forged document—If enough.

The petitioner was convicted by the Court of the Sub-Magistrate for an offence under section 417 read with section 511, Indian Penal Code. On appeal, the first class Magistrate found that the offence committed on the facts and circumstances placed before the Court was, not one of attempt to cheat, but one of using as genuine a forged document under section 471, Indian Penal Code. On this finding, the appellate Court holding that the trial Court was not competent to try the offence under section 471, ordered that the petitioner should be retried by the appellate Court itself, as a First Class Magistrate. On a contention in revision that it was not open to the appellate Court to direct the trial of the case by itself,

Held, that there was nothing wrong in the lower appellate Court holding that the petitioner should be tried by itself, as under section 423 read with section 528, Criminal Procedure Code, the superior Court is empowered to transfer the case to itself for trial.

Emperor v. *Manicka Gramani*, (1906) 16 M.L.J. 546 : I.L.R. 30 Mad. 228, followed.

The mere fact that a person is found in possession of a forged document would not show that he knew it was a forged document or had reason to believe so.

Petition, under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the City 1st Class Magistrate, Madura, dated 31st October, 1947, in C.A. No. 39 of 1947 (C.C. No. 1027 of 1947 Sub-Magistrate's Court, Madura Town.)

V. Meenakshisundaram for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—The petitioner was convicted by the Court of the Sub-Magistrate, Madura Town, of an offence under section 417 read with section 511, Indian Penal Code and directed to be released under section 562 (1), Criminal Procedure Code on his own bond for Rs. 500, to appear and receive sentence within the period of one year and in the meantime to be of good behaviour. On appeal, the City First Class Magistrate, Madura, found that the offence committed on the facts and circumstances placed before the Court was, not one of attempt to cheat but would amount to an offence under section 471, Indian Penal Code *viz.*, using as genuine a forged document. On this finding, the appellate Court holding that the trial Court was not competent to try the offence under section 471, Indian Penal Code, ordered that he should be retried by the appellate Court itself, as a First Class Magistrate and it is this order that is now sought to be revised at the instance of the accused-petitioner.

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* Cr. R. C. No. 1259 of 1947. 28th October, 1948.
(Cr. R. P. No. 1145 of 1947).

The first point argued by Mr. Meenakshisundaram is that it is not open to the appellate Court to direct the trial of the case by itself for the offence under section 471, Indian Penal Code because the necessary result of the framing of a charge by the trial Court under section 417, Indian Penal Code read with section 511, Indian Penal Code is the discharge of the petitioner of an offence under section 471, Indian Penal Code. That being so, unless that discharge is set aside by proper proceedings, it is not competent for any other Court to take cognizance of the offence. Secondly it is urged that in any event the appellate Court ought not to have directed the trial of the offender by itself, because it has already practically formed an opinion against the accused on the merits of the case. The case against the petitioner as put forward in the Court of first instance is that he wrote three letters Exs. P. 1. P. 2 and P. 3 purporting to have been written by one Mr. Venkatramier, requesting the issue of a free pass in the buses of Messrs. T. V.S. Co., Madura, in favour of the petitioner, as he was a Congress worker doing propaganda work in Nilakottai. The ostensible writer of these letters, Venkatramier, denied having written any such letter and therefore it was that the appellant was charged with the offence of attempting to cheat.

The lower appellate Court has relied upon the decision in *Emperor* v. *Manikka Gramani*[1], for holding that it has jurisdiction to try the case itself on the ground that the provisions of section 423 (1) (*b*) do not preclude an appellate Court, when it reverses the finding and sentence under appeal, from trying the offender itself, if the offence is one ordinarily triable by it. In such cases, the appellate Court takes cognizance under section 190 (*b*), and not section 190 (*c*). Mr. Meenakshisundaram contends that this decision cannot be applied to the facts of the present case and even if it is so, it requires reconsideration. No authority of this Court questioning the correctness of the judgment of Benson, J., mentioned above has been brought to my notice. It has stood the test of time and has been in vogue for more than forty years and there are no circumstances which would justify me in coming to a conclusion other than what the learned Judge did. If under section 423, Criminal Procedure Code, the appellate Court can commit a case to the Court of Session or direct its trial by a competent Court subordinate to it, it necessarily follows that under section 528, Criminal Procedure Code, the superior Court is empowered to transfer the case to itself for trial. What the appellate Court has now done is practically to incorporate both the orders in the one, *viz*., sending the case for trial to some competent subordinate Court and then transferring it to itself. There is nothing wrong in the lower appellate Court holding that the petitioner should be tried by itself.

But the real question in the case is whether on the facts placed before the lower appellate Court, there is sufficient material for holding that the petitioner is guilty of an offence under section 471, Indian Penal Code, *viz*., using as genuine any document which he knows or has reason to believe to be a forged document. It is no doubt true that the document was not written by the person by whom it purports to have been written. But the mere fact that the petitioner was found in possession of a forged document would not show that he knew or had reason to believe that it was a forged document. Having carefully gone through the evidence in the case I am not satisfied that there are sufficient materials on record to hold that the petitioner knew that the letters produced by him were forged ones. Under the circumstances I find it difficult to hold that any useful purpose will be served by a retrial of the petitioner for an offence under section 471, Indian Penal Code. The order of the lower appellate Court directing a retrial is set aside and the revision petition is allowed. The order of the trial Magistrate is therefore restored.

V.P.S. *Petition allowed*.

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1. (1906) 16 M.L.J. 546 : I.L.R. 30 Mad. 228.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

Kotha Venkatasubba Rao .. *Petitioner**

v.

Majeti Sreeramulu .. *Respondent.*

Civil Procedure Code (*V of* 1908), *section* 51—*Order to arrest without giving reasons—Jurisdiction.*

The Legislature has thought fit to order arrest and detention of civil debtors only where the conditions prescribed in section 51, Civil Procedure Code are strictly satisfied. Reasons must be given every time a man is ordered to be arrested, and in every proceeding where he is ordered to be arrested, even if it is on the same day. Where a Court makes an order for arrest without giving reasoms, it acts without jurisdiction.

Petition under section 25 of Act IX of 1887 praying that the High Court will be pleased to revise the order of the Court of the District Munsiff of Coconada dated 12th April, 1948 in E.P. No, 669 of 1944 in S.C. No. 214 of 1932.

K. Venkataramana and *G. Suryanarayana* for Petitioner.

C. V. Dikshitulu for Respondent.

The Court delivered the following

JUDGMENT.—The only point for determination in this petition is whether the lower Court erred in law in directing the petitioner to be arrested and sent to a civil jail without recording its reasons in writing regarding its being satisfied, under section 51 Civil Procedure Code, as amended, that the judgment-debtor had rendered himself liable to be arrested and sent to a jail on any one of the grounds mentioned therein. The lower Court has not recorded the reasons contemplated in section 51, Civil Procedure Code. It has simply rejected the contention of the petitioner that he was unable to pay the debt. It has not found positively that he has had, since the date of the deeree, the means to pay the amount of the decree or some substantial part thereof and has refused or neglected to pay the same, or that, after the institution of the suit in which the decree was passed, he has dishonestly transferred, concealed or removed any part of his property, or committed any other act of bad faith in relation to his property, under section 51 (*a*) (2) and (*b*), or that he is likely to abscond, or leave the jurisdiction of the Court, under section 51 (*a*) (1), section 51 (*c*) having no application to this case.

It was urged by the learned Counsel for the respondent that this judgment-debtor was on a former occasion, ordered to be arrested and that full reasons were then given for his arrest, and that the lower Court had omitted to give the reasons now because of that. That order for arrest was not taken advantage of or carried out. This is a fresh application made months later. My view is that reasons must be given *every time a man is ordered to be arrested*, and in every proceeding where he is ordered to be arrested, even if it is on the same day ; for, cases differ, and much depends on lapse of time also. The Legislature has thought fit to order arrest and detention of civil debtors in jail only where the conditions prescribed in section 51 of the Civil Procedure Code are strictly stisfied. The lower Court did not even say that it was relying on the reasons already given. It therefore acted without jurisdiction in ordering the arrest of the petitioner without recording its reasons under section 51, Civil Procedure Code. Its order is set aside so far as it relates to the arrest. The respondent will proceed to sell the attached moveables (if still available) said to be worth Rs. 109 or Rs. 500—(it is not clear which, the parties differing on this) left with the sureties ; then he can again ask for the arrest of the petitioner, and abide by the orders of the Court which will, of course, comply with the provisions of section 51, Civil Procedure Code strictly. In the circumstances, all the parties to this petition will bear their own costs.

K.C. —— *Petition allowed in part.*

* C. R. P. No. 844 of 1948. 27th October, 1948.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO.

The Public Prosecutor .. *Appellant**

v.

Illur Thippayya and another .. *Respondents.*

Essential Supplies (Temporary Powers) Act (1946)—*Contravention of orders passed under—Proof of those orders or their publication—Necessity—Court, if bound to take judicial notice of such orders under section* 57 (1), *Evidence Act—Discretion of Court in refusing to take judicial notice—Interference in appeal.*

The respondents (accused) were charged under sections 7 and 8 of the Essential Supplies (Temporary Powers) Act, for having contravened various orders passed by the Government. The first Court convicted all the accused but in appeal the convictions were set aside mainly on the ground that there was no proof of the orders or their publication. On a contention in appeal to the High Court that such proof was not necessary and that the lower Court should have taken judicial notice of the same under section 57 (1) of the Evidence Act,

Held, the various orders in contravention whereof the accused acted were orders made by a competent authority or person in British India within the meaning of section 3 (27-a) of the General Clauses Act and therefore they are part of Indian Law attracting the provisions of section 57 of the Evidence Act. But the lower appellate Court in its discretion having refused to take judicial notice as neither the orders nor the documents showing the publication of such orders were placed before it, it is impossible to say that the discretion exercised by it is either perverse or illegal.

Appeal under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid respondents (accused) by the Court of Session of Bellary Division in C.A. No. 23 of 1947 preferred against the judgment of the Court of the Sub-Divisional Magistrate of Bellary in C.C. No. 62 of 1947 on 28th May, 1947 etc.

The Public Prosecutor (*V. L. Ethiraj*) in person.

B. V. Ramanarasu, P. Chandra Reddi, K Venkataratnam and *M. V. Nagaramiah* or Respondents.

The Court delivered the following

JUDGMENT.—These are appeals by the Public Prosecutor against the acquittal of the accused in all the cases. The accused in all the appeals were charged under sections 7 and 8 of the Essential Supplies (Temporary Powers) Act 1946 for having contravened the various orders passed by the Government. The following tabular statement shows the orders contravened by the Accused in the various cases :

Accused in C.A. No. 629 of 1947	G.O. Ms. 1026 Food dated 19th November, 1946.
Accused in C.A. No. 23 of 1948	Do.
Accused in C.A. No. 631 of 1947	B.P. No. 626 dated 15th May, 1946.
Accused in C.A. No. 632 of 1947.	Do.
Accused in C.A. No. 663 of 1947.	Do.
Accused in C.A. No. 22 of 1948.	Do.
Accused in C.A. No. 633 of 1947.	Clause 4 (1) of the Madras Cloth (Dealers) Control Order, 1946

The first Court convicted all the accused but in appeal the convictions were set aside mainly on the ground that there was no proof of the orders or their due publication. The Public Prosecutor contended that the proof of the said fact was not necessary and the lower Court should have taken judicial notice of the said facts under section 57 (1) of the Evidence Act. The learned counsel for the accused argued that that section of the Evidence Act has no application to the facts to be proved in this case and in any view the lower Court had rightly, in the exercise of its discretion, refused to take judicial notice of the facts without the production of the necessary documents.

* Crl. As. Nos. 629, 631 to 633 and 663 of 1947 and 22 and 23 of 1948. 29th October, 1948.

The question to be decided in this case turns upon the construction of section 57 of the Evidence Act. The relevant provisions of section 57 read as follows :—

> " The Court shall take judicial notice of the following facts :—
>
> (1) All Indian Laws . . . . . . In all these cases and also on all matters of public history, literature, science or art, the Court may resort for its aid to appropriate books or documents of reference.
>
> If the Court is called upon by any person to take judicial notice of any fact, it may refuse to do so unless and until such person produces any such book or document as it may consider necessary to enable it to do so."

The scheme of the Evidence Act is clear. Generally all the facts alleged have to to be proved in the manner provided by the Act but there are three exceptions ; facts admitted, facts presumed and facts of which the Court should take judicial notice need not be so proved. Section 57 enumerates the facts of which the Court should take judicial notice. Under section 57 (1) the Court should take judicial notice of all Indian Laws.

" Indian Laws " is defined by the General Clauses Act under section 3 (27-*a*). It includes any law, ordinance, order, bye-law, rule or regulation passed or made at any time by any competent Legislature, authority or person in British India. The question for consideration is whether the orders contravened by the accused are orders within the meaning of this definition. If so, section 57 (1) of the Evidence Act would apply. Under section 3 (1) of Act XXIV of 1946, the Central Government so far as it appears to it to be necessary or expedient for maintaining or increasing supplies of any essential commodity, or for securing their equitable distribution and availability at fair prices, may by notified order provide for regulating or prohibiting the production, supply and distribution thereof, and trade and commerce therein. Under section 4 of the same Act, the Central Government may by notified order direct that the power to make orders under section 3 shall be exercisable by such officer or authority subordinate to the Central Government or such Provincial Government or such officer or authority subordinate to a Provincial Government as may be specified in the direction. Section 7 (1) prescribes the penalties for contravention of the said orders.

The aforesaid orders in contravention whereof the accused acted in all the cases were issued in strict compliance with the provisions of this Act by the Government or by authority or persons duly authorised by the Government and they have also been duly notified in the manner provided by the Act. They are clearly orders made by a competent authority or person in British India within the meaning of section 3 (27-*a*) of the General Clauses Act and therefore they are part of Indian Law. If the said orders come under the definition of the Indian Laws, the provisions of section 57 are attracted and the Court should take judicial notice of the same.

But the question still remains whether this is a fit case for interference in these appeals. Though a Court should take judicial notice of the facts mentioned in section 57, it could only take such notice if unimpeachable books or documents are put before it or are otherwise accessible for its reference. Under the last paragraph of the section the Court is given the discretion to refuse to take judicial notice of any fact unless such person calling upon the Court to take judicial notice of such fact produces any such book or document as it may be necessary to enable it to do so. In this case no such book or document was placed before the lower Court for its reference to enable it to satisfy itself that such order or notification was in existence. In its discretion the lower Court refused to take judicial notice as neither the orders nor the documents showing the publication of such orders were placed before it. It is therefore impossible to say that the discretion exercised by the lower Court is either perverse or illegal.

In the result all the appeals are dismissed.

V.P.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MACK.

Geddam Venkamma and another .. *Petitioners**

v.

Geddam Venkataramayya and others .. *Respondents.*

Court-fee and Jurisdiction—Valuation of suit—Suit for declaration that the plaintiff was nearest reversioner of a Hindu, and that an alienation of some property was not binding on plaintiff—Valuation for court-fee and jurisdiction.

Under cover of a very small alienation of property by a Hindu widow whose life estate comprises very substantial property it is not open to a reversioner to seek to have his rights declared even though they only amount to a *spes successionis*—which may never be realised—and a will bequeathing considerable property to the widow by her husband set aside in a District Munsiff's Court on a Rs. 15 Court-fee stamp. The subject-matter of such a suit is not the small alienation alleged to be invalid and not binding but in substance and in fact the entire estate of the last holder, succession to which is sought to be established. If the value of such estate is more than Rs. 10,000 the Court-fee for such declaration will under Article 17-A of the Court Fees Act be Rs. 500 and if between Rs. 3,000 and Rs. 10,000 the Court-fee will be Rs. 100, the plaint lying in a Sub-Court or District Court as the case may be. In a suit for declaration that the plaintiffs are the nearest reversioners of a deceased Hindu and that the sale deed executed by his widow is not binding on them, on each of the declarations in the plaint a separate Court-fee of Rs. 100 is payable under Article 17-A of the Court Fees Act. The pecuniary jurisdiction is regulated by the subject-matter of the property involved namely the value of the widow's estate.

Petition under section 115 of the Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Amalapuram dated 7th July, 1947, in C.M.A. No. 3 of 1947 (O.S. No. 61 of 1946, District Munsiff's Court, Razole.)

V. Parthasarathy for Petitioner.

V. Subramanyam for Respondent.

The Court delivered the following

JUDGMENT.—This petition raises an interesting question of jurisdiction and a Court-fee. The respondents were the plaintiffs who filed O.S. No. 61 of 1946 in the District Munsiff's Court of Razole praying for two declarations, (1) that they were the nearest reversioners of one Geddam Venkayya who died issueless and intestate in 1936 ; and (2) that a sale deed dated 30th October, 1936, executed by his widow, the 1st defendant, and the late Venkayya's foster daughter, the second defendant was not binding on them. Only Rs. 15 was paid on the plaint for one declaration, it is not quite clear for which. The District Munsiff in a considered order returned the plaint for re-presentation holding that the plaint impliedly sought to set aside a will by the late Venkayya, who admittedly died possessed of more than 3 acres of land. By the sale deed dated 30th October, 1946, defendants 1 and 2 sold only about an acre of land for Rs. 1,500. It is common ground that Venkayya's estate is worth more than Rs. 3,000. The District Munsiff held the suit was outside his pecuniary jurisdiction and returned the plaint for presentation to the proper Court. The Subordinate Judge held that the subject-matter of the suit was only that covered by the sale deed valued at Rs. 1500 and remanded the suit to the District Munsiff for disposal on merits. As regards the will and the reversionership he made the following observation :—

"For the purpose of deciding whether the alienation made by the first defendant in favour of the third defendant is valid and binding it is necessary to determine whether the plaintiffs are reversioners and whether the will relied on by the first defendant is true. They are incidental to the determination of the issue whether the alienation is valid."

I am quite unable to accept the view taken by the learned Subordinate Judge. Under cover of a very small alienation of property by a Hindu widow whose life estate comprises very substantial property it is not open to a reversioner to seek to have his rights declared even though they only amount to a *spes successionis*—which may never be realised—and a will bequeathing considerable property set aside in a

*C.R.P. No. 1373 of 1947. 7th October, 1948.

District Munsiff's Court on a Rs. 15 court-fee stamp. The subject-matter of such a suit is in my view not the small alienation alleged to be invalid and not binding but in substance and in fact the entire estate of the last holder succession to which is sought to be established. The question immediately arises on a perusal of such a plaint, what is the value of the estate to which a reversionary right is sought to be declared. Such a plaint should be returned for such valuation being inserted for it is this valuation which should, as it appears to me, determine the pecuniary jurisdiction of the Court. If the value of the estate is more than Rs. 10,000, the Court-fee for such a declaration will under Article 17-A of the Court Fees Act be Rs. 500 and if between Rs. 3000 and Rs. 10,000 the court-fee will be Rs. 100, the plaint lying in a Sub-Court or a District Court as the case may be.

The learned advocate for respondents has strenuously contended that it is not necessary for them to pay court-fee on a separate declaration that the will of Venkayya is not genuine or valid. He relies on *Gokula Venkamma* v. *Gokula Narasimha*[1], a Bench decision of our High Court. That decision is I think in point. I do not think that any Court-fee need be paid for a declaration to set aside as invalid or as a forgery any will set up by the defendants. Some reliance has also been placed on a Calcutta decision which went up to the Privy Council *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi*[2], to avoid paying any Court-fee for even a declaration that plaintiffs are the nearest reversioners. Their Lordships of the Privy Council held in that decision that a widow's alienation is not absolutely void, but was *prima facie* voidable at the election of the reversionary heirs who may approve it or treat it as a nullity without the intervention of any Court, there being nothing to set aside or cancel as a condition precedent to their right of action. The important point to note is that those observations were made in a suit for actual possession. Their Lordships further observed in that same decision that the institution of a suit for possession shows an election to treat the alienation as a nullity and that in such a suit it is therefore unnecessary for the reversionary heir to ask for a declaration that the alienation is inoperative. Adequate court-fee there had been paid on the basis of recovery of possession. The present suit however is not one for recovery of possession and the plaint asks for two separate declarations (1) of the rights of plaintiffs as nearest reversioners, whatever that may mean ; and (2) that the sale deed executed by the widow is not binding on them. The plaintiffs in fact cannot sue now for recovery of possession. This appears to me precisely the sort of prayer contemplated by Article 17-A of the Court Fees Act and in my view on each of the declarations in the plaint a separate court-fee of Rs. 100 is payable under this Article. The pecuniary jurisdiction is as I have shown regulated by the subject-matter of the property involved which in this case is the value of the widow's life estate. As the plaintiffs ask on the basis of such a declaration for a further declaration that a sale deed by the widow is not binding on them, they must pay a further court-fee of Rs. 100 for this prayer, the suit lying in a sub-Court. The petition is allowed with costs throughout. The order of the Subordinate Judge is set aside. The plaint and the connected papers will be sent to him for registration and disposal on the merits in the light of these observations. It is open to him to give the plaintiffs a reasonable time within which to pay the deficit court-fee.

K.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MACK.

Abdurahiman Settu .. *Petitioner**

v.

Muhammad Kasam Settu .. *Respondent.*

Civil Procedure Code (V of 1908), Order 26, rule 15—Expenses of the commission—If includes expenses of other parties—Decision as to who is to pay—When to be decided.

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1. (1916) 2 M.W.N. 325.
2. (1907) 17 M.L.J. 154 : L.R. 34 I.A. 87 : I.L.R. 34 Cal. 329 (P.C.).

* C. R. P. No. 668 of 1947. 29th October, 1948.

The "expenses of the Commission" can be made to include the expenses of the other party to the litigation and can in suitable cases be ordered to be deposited by the party at whose instance the Commission was taken out. Where the trial court is of the view that the case is not one in which any such deposit should be ordered the expenses of the opposite party incurred in the Commission will be considered at the time of the judgment when the value of the evidence obtained by the Commission can be fully assessed.

Petition under section 115 of Act of 1908 praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge, Ottapalam, dated 11th January, 1947, in I.A. No. 1446 of 1946 in O.S. No. 26 of 1945.

M. K. Nambiar T. C. Raghavan and *M. Sekhara Menon* for Petitioner.

S. Venkatachala Sastri for Respondent.

The Court delivered the following

JUDGMENT.—The Subordinate Judge dismissed an application by the plaintiff-petitioner for payment of Rs. 1000 (Rupees one thousand) by the first defendant to defray the expenses in a commission to examine witnesses in various places ordered to be taken out at the instance of the first defendant. The Subordinate Judge was doubtful whether he could order such costs under Order 26, rule 15 of the Civil Procedure Code. The " expenses of the commission " can be made to include expenses of the other parties to the litigation and can in suitable cases be ordered to be deposited by the party at whose instance the commission was taken out. The Subordinate Judge however expressed his view that this was not a fit case in which any such deposit should be ordered. Plaintiff's expenses incurred in the commission will of course be considered at the time of judgment when the value of the evidence obtained by this commission can be fully assessed. Petition is dismissed but in the circumstances without any order as to costs.

K.C. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

Velayudha Mudali and others .. *Petitioners**

Criminal Procedure Code (V of 1898), section 494—Calender case—Charge framed—Conversion into a preliminary register case—Withdrawal by prosecution with permission to file fresh charge sheets against accused separately—Withdrawal amounts to acquittal regarding charges already framed—Prosecuiton can prove other offence for which no charges have been framed.

During the trial of calender cases after the charges were framed, the accused applied to the Court to convert the calendar cases into a preliminary register case as the combination of some of the charges would constitute an offence exclusively triable by a Court of Sessions. The calendar cases were converted into a preliminary register case and during the progress of inquiry into it, the Public Prosecutor applied for permission to withdraw the case stating also that the intention was to file separate prosecutions against the accused differently for various offences. The Court granted the permission for withdrawal and discharged the accused under section 494 (*a*) of the Code. Cases were subsequently filed by the prosecution in each of which some of the accused in the preliminary register case were charged with offences under various provisions of the Indian Penal Code. It was contended for the accused that the result of the withdrawal of the preliminary register case, amounted to an acquittal of the accused for such of the offences as were triable by the Magistrate himself.

Held, in revision, that the Code does not provide for the conversion of the category of calendar cases into the category of preliminary register cases. Under section 347, if, after the commencement of an enquiry or trial it appears to the Magistrate at any stage of the proceedings before signing the judgment that the case ought to be tried by a Court of Session or the High Court and if he is empowered to commit for trial, he shall commit the accused under the provisions of the Code. In this case the 1st Class Magistrate converted the calendar cases into a preliminary register case. Without altering the nomenclature if he had committed the case the section would have been satisfied. The alteration of the nomenclature does not legally affect the nature of the proceedings and if the nature of the proceedings is not affected, the withdrawal of a case after the framing of the charge can amount to an acquittal of the accused and nothing else, and therefore the prosecution is not entitled to file fresh charge sheets against the accused for such of the offences for which charges had already been framed. But it is open to the prosecution to show, on the facts proved and on the facts elicited, an offence exclusively triable by a Court of Session for which no charge had been framed before the withdrawal, has been committed.

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*Cr.R.C. Nos. 394 to 397 of 1948. 3rd November, 1948.
(Cr.R.P. Nos. 363 to 366 of 1948.)

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Additional First Class Magistrate, Ranipet, dated 13th February, 1948, in C.C. No. 141 of 1946, etc.

P. C. Parthasarathy for the Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—The circumstances arising in these four revisions have to be set out briefly in order to understand the point of law raised by Mr. P. C. Parthasarathy Ayyangar, the learned counsel for the petitioners.

C.C. No. 138 of 1946 on the file of the Sub-Divisional Magistrate, Vellore, was the result of a charge against forty accused for various offences under the Indian Penal Code. When that was taken up for hearing six of the accused were absconding and so the case was split up against the absconders and numbered as C.C. No. 207 of 1946. Subsequently C.C. No. 207 of 1946 was transferred to the Additional First Class Magistrate of Cheyyar at Ranipet and numbered as C.C. No. 74 of 1946. In the meanwhile, the Sub Divisional Magistrate, Vellore, proceeded with the enquiry against the 34 accused before him in C.C. No. 138 of 1946 and framed charges against them for offences under sections 147, 448, 427, 435, 325 and 332 Indian Penal Code. Afterwards this case was also transferred to the Additional First Class Magistrate of Cheyyar at Ranipet and numbered as C.C. No. 73 of 1946. Subsequently on an application made by the accused in C.C. Nos. 73 and 74 of 1946, they were clubbed together as one case and intended to be tried as such. The accused again filed an application praying that as a combination of the fifth and sixth charges, *viz.* those under sections 325 and 332, Indian Penal Code, would constitute the more serious offence under section 333, Indian Penal Code, exclusively triable by a Court of Session, the calendar cases should be converted into a preliminary register case and proceeded with on that basis. On this petition arguments were heard and an order passed by which C. C. Nos. 73 and 74 of 1946 were converted into P. R. C. No. 1 of 1946. During the progress of the enquiry in P. R. C. No. 1 of 1946, the Public Prosecutor applied under section 494, Criminal Procedure Code for permission to withdraw the case stating also that the intention was to file separate prosecutions against the accused differently for various offences. The Court granted the permission for the withdrawal and discharged the accused under section 494 (*a*), Criminal Procedure Code.

The four cases out of which the above criminal revision cases arise were subsequently filed, in each of which some of the accused in P. R. C. No. 1 of 1946 have been arraigned again for offences under various provisions of the Indian Penal Code. Thereupon counsel for the accused took the objection that the result of withdrawal of P. R. C. No. 1 of 1946 amounted to an acquittal of the accused for such of the offences as were triable by the Additional First Class Magistrate, such as offences under sections 147, 448, Indian Penal Code, etc. The lower Court has overruled these objections and the petitioners have sought to revise these orders.

The question for consideration is what in substance is the effect of the withdrawal of P. R. C. No. 1 of 1946. The ruling in *Sriramulu* v. *Veerasalingam*[1] is authority for the position that when once a charge is framed, it cannot be wiped off by either discharging the accused or withdrawing the case. It is clear that proceedings before a Magistrate in a warrant case are only enquiries until the charge is framed and as soon as the charge is framed, the enquiry is transformed into a trial. Where the case has developed into a trial stage, its dismissal or withdrawal will result only in an acquittal of the accused. The original charge framed cannot be ignored or cancelled without either a conviction or an acquittal. Even if after the framing of a charge, a succeeding Magistrate examines the witnesses afresh and passes an order of discharge, still such an order would amount to an acquittal.

1. (1914) 27 M.L.J. 589 : I.L.R. 38 Mad. 585.

The decision in *Sriramulu* v. *Veerasalingam*[1] has been consistently followed in this Court: See *Abdul Hameed* v. *Muhammad Sali*[2]. As early as 1888, a Bench of this Court in *Queen Empress* v. *Sivarama*[3] has held that an accused committed to sessions on a charge cannot be discharged by the Sessions Court under section 494, Criminal Procedure Code but must either be convicted or acquitted. The withdrawal of a charge by the Public Prosecutor with the permission of the Sessions Judge amounts to an acquittal of the accused. Bearing the principles underlying the above decisions, let us see what is, in effect, the result of the withdrawal. The learned Public Prosecutor urges that the request for withdrawal was combined with the statement that the intention of the prosecution was to file separate cases against individuals or groups of accused separately and according to him, in pith and substance, the order giving permission to withdraw the case amounts also to an order empowering the institution of the present cases. If the Code of Criminal Procedure contained a provision similar to Order XXIII, rule 1, Civil Procedure Code, allowing the withdrawal of a case with permission to file, on the same facts, a fresh complaint, this argument is entitled to weight. But in the absence of any such rule of law, one has to envisage the result of a withdrawal in accordance with the ideas underlying the sections of the Criminal Procedure Code. If it is impossible to wipe off or obliterate a charge already framed without an acquittal or with the culmination of the charge in a conviction, any withdrawal with permission to file a fresh complaint cannot be understood as the keeping alive of a charge. Moreover, the Criminal Procedure Code does not, in specific terms, provide for the conversion of the category of calendar cases into the category of preliminary register cases. By section 347, the Code enacts that if, after the commencement of an enquiry or trial, it appears to the Magistrate at any stage of the proceedings before signing the judgment that the case ought to be tried by a Court of Session or the High Court, and if he is empowered to commit for trial, he shall commit the accused under the provisions of the Code. In this case the First Class Magistrate converted the calendar case into a preliminary register case under the powers conferred by this section. Without altering the nomenclature of the cases, if he had committed the case, the section would have been satisfied. The alteration of the nomenclature into a preliminary register case does not legally affect the nature of the proceedings and if the nature of proceedings is not affected, the withdrawal of a case after the framing of a charge, can amount to an acquittal of the accused and nothing else.

I would therefore hold that the prosecution is not entitled to file fresh charge-sheets against the accused for such of the offences for which charges had already been framed. But it is open to the prosecution to show, on the facts proved and on the facts elicited, an offence exclusively triable by a Court of Session for which no charge had been framed before the withdrawal has been committed. These revision petitions are therefore allowed only to the extent that the enquiry in the various calendar cases before the lower Court cannot proceed for any offences for which charges had already been framed. The Courts are at liberty to proceed with the enquiry in relation to an offence triable exclusively by a Court of Session which might emerge from the evidence adduced.

V.P.S. *Petition allowed in part.*

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1. (1914) 27 M.L.J. 589; I.L.R. 38 Mad. 585.
2. (1939) 52 L.W. 348.
3. (1888) I.L.R. 12 Mad. 35.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P.V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE MACK.

M. Abdul Rahim .. *Appellant**

v.

The Official Assignee of Madras .. *Respondent.*

Presidency Towns Insolvency Act (III of 1909), sections 17 and 52—Scope and effect—After-acquired property of undischarged insolvent—Vesting in the Official Assignee—Intervention of Official Assignee not necessary—Anomaly and differences in insolvency law between Presidency town and moffusil—Need for abolition by legislation pointed out.

The moment a property is acquired by or devolves on an undischarged insolvent, such property becomes *eo instanti* vested in the Official Assignee or Receiver. No distinction is made between property belonging to and vested in the insolvent at the commencement of the insolvency and property which may be acquired by or devolve on him subsequent to the adjudication and before discharge. Both kinds of property are comprised in the property of the insolvent divisible among his creditors. Both kinds of property vest in the Official Assignee or the trustee in bankruptcy and they vest in him in precisely the same manner.

The distinction between the real and personal property made in England in applying the rule of postponement of vesting of after-acquired property till intervention by the trustee cannot be properly applied in India.

There is no difference in India between moveable and immoveable property of an insolvent for the purpose of vesting in the Official Assignee.

Case-law discussed.

Difference between English and Indian law pointed out. Desirability of Legislature intervening and abolishing anomalies and differences between the law of insolvency applying to Presidency towns and that applying to the moffusil stressed.

Per Mack, J.—The important differences between the policy of the English Bankruptcy Statutes and Indian Insolvency Legislation towards uncertified bankrupts and undischarged insolvents discussed.

Appeal preferred against the Order of Clark, J., dated 12th November, 1947, and made in the exercise of the insolvency jurisdiction of the High Court in Application No. 508 of 1947 in I. P. No. 404 of 1930.

M. S. Venkatrama Aiyar, Nagarajan and *Salam* for Appellant.

Deputy Official Assignee (*P. Sivaramakrishnayya*) for Respondent.

The Court delivered the following

JUDGMENT : *The Chief Justice.*—This is an appeal against an order of Clark, J., passed in insolvency on the Original Side of this Court. One Syed Yousuff Sahib was adjudicated insolvent on 22nd October, 1930. On 20th September, 1934, he purchased a house for Rs. 800 and on 22nd May, 1943, he conveyed it to his brother-in-law, the appellant before us. The consideration was a sum of Rs. 750, but of which Rs. 350 were paid in cash and the appellant undertook to pay the balance in discharge of a mortgage which the insolvent had executed in favour of one Bijraj Sowcar on 6th April, 1937. On 5th July, 1943, the appellant in his turn sold the property to one Mahomed Badsha Sahib for Rs. 600, out of which a sum of Rs. 400 was utilised to pay off the mortgage in favour of the Sowcar. Contemporaneous with the sale by the appellant to Mahomed Badsha Sahib, there was an agreement by Mahomed Badsha Sahib to re-convey the property to the appellant. In pursuance of this latter agreement, the appellant paid the consideration for the reconveyance to Hasena Bi, the widow of Mahomed Badsha who had died in the meantime. Before the property was re-conveyed, the Official Assignee coming to know of these transactions, after notice to the appellant and the tenant of the property, filed an application to this Court in the exercise of insolvency jurisdiction for an order declaring that the property in question was vested in him and that neither the appellant nor Hasena Bi had any rights to the said property. He also claimed delivery of title deeds of the property and prayed for a direction that the appellant or Hasena Bi should pay to him the rent for three years collected by them from

*O.S.A. No. 5 of 1948.

13th August, 1948.

the property in question. The application was made on the ground that Syed Yousuf Sahib continued at all material times to be an undischarged insolvent and the property vested in the Assignee on and from the date of the purchase by the insolvent in 1934 and the subsequent transactions were not valid and binding upon the Assignee. It was conceded by the Official Assignee at the trial that the transfer by the insolvent to the appellant was *bona fide* and for value.

The learned Judge granted the application of the Official Assignee in so far as it prayed for a declaration that the property was vested in him and that the appellant had no right to the property and for delivery of the title deeds. But he dismissed the application in so far as it prayed for the recovery of the rent for three years collected by the appellant and Hasena Bi from the property.

The law relating to insolvency in the Presidency Towns is contained in the Presidency Towns Insolvency Act (III of 1909). The provisions relevant to the disposal of the present appeal are the following :

" 17. On the making of an order of adjudication, the property of the insolvent wherever situate shall vest in the Official Assignee and shall become divisible among his creditors. . . . . "

" 52. The property of the insolvent divisible amongst his creditors, and in this Act referred to as the property of the insolvent shall not comprise the following particulars, namely :—

(a) property held by the insolvent on trust for any other person ;

(b) the tools (if any) of his trade and the necessary wearing apparel, bedding, cooking vessels, and furniture of himself, his wife and children. . . . .

(2) Subject as aforesaid, the property of the insolvent shall comprise the following particulars, namely—

(a) all such property as may belong to or be vested in the insolvent at the commencement of the insolvency or may be acquired by, or devolve on him before his discharge ;

(b) the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the insolvent for his own benefit at the commencement of his insolvency or before his discharge ; and

(c) all goods, being at the commencement of the insolvency in the possession, order or disposition of the insolvent, in his trade or business by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof."

The language of these provisions follows the language of the corresponding provisions of the English Bankruptcy Act of 1883, the material portions of which run thus :

" 44. The property of the Bankrupt divisible amongst his creditors and in this Act referred to as the property of the bankrupt. . . . shall comprise the following particulars :

(1) All such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy or may be acquired by or devolve on him before the discharge.

54. (1) Until a trustee is appointed the official receiver shall be the trustee for the purposes of this Act and immediately on a debtor being adjudged bankrupt the property of the bankrupt shall vest in the trustee ;

(2) On the appointment of a trustee the property shall forthwith pass to and vest in the trustee appointed."

Confining one's attention to the words of the sections, it is clear that no distinction is made between property belonging to and vested in the insolvent at the commencement of the insolvency and property which may be acquired by, or devolve on him subsequent to the adjudication and before discharge. Both kinds of property are comprised in the property of the insolvent divisible amongst his creditors. Both kinds of property vest in the Official Assignee or the trustee in bankruptcy, and they vest in him in precisely the same manner. It follows that the moment a property is acquired by, or devolves on, an undischarged insolvent, such property becomes *eo instanti* vested in the Official Assignee or receiver. A similar provision of the Provincial Insolvency Act (III of 1907) was construed in that manner by their Lordships of the Judicial Committee in *Kala Chand Banerjee* v. *Jagannath Marwari*[1]. Section 16 (4) of the Provincial Insolvency Act is as follows :

1. (1927) 52 M.L.J. 734 : L.R. 54 I.A. 190 : I.L.R. 54 Cal. 595 (P.C.).

"All such property as may be acquired by or devolve on the insolvent after the date of an order of adjudication and before his discharge shall forthwith vest in the Court or Receiver and become divisible among the creditors in accordance with the provisions of sub-section (2), clause (a)."

Dealing with this provision, their Lordships say :

"This provision is perfectly clear. The moment the inheritance devolved on the insolvent Amulya, who was still undischarged, it vested in the Receiver already appointed, and he alone was entitled to deal with the equity of rdemption. The alternative in the section applicable to vesting in the Court was no doubt inserted to provide for the case of a Receiver not being appointed at the same time as the adjudication of insolvency was made and to foreclose an argument that vesting was suspended until the actual appointment of a Receiver."

The matter, however, is complicated by the course of case-law in England and the importation into the law in this country of principles laid down in the English decisions, so far as after-acquired property is concerned. The result has been not a little of uncertainty and divergence of judicial opinion.

In England, from the earliest times, in spite of provisions in the statute that after-acquired property passes to the assignees without any new assignment, it had been held that subject to the right of the trustee to intervene, an undischarged bankrupt could maintain any action with relation to after-acquired property or sue on any contract made with him after bankruptcy or for damages for breach, after bankruptcy, of a contract for personal service made before and remaining unexecuted at the date of bankruptcy. (See *Webb* v. *Fox*[1], *Fowler* v. *Down*[2] and *Herbert* v. *Sayer*[3]). A great deal of historical information on this subject is to be found in the judgment of Tindal, C.J., in the case of *Herbert* v. *Sayer*[3] in which the action was on a bill of exchange by an indorsee who had twice become a bankrupt and had not obtained discharge. The learned Chief Justice describes the point to be considered and decided as of great importance, and states the question thus : Whether a bankrupt twice certificated and who has not paid 15 shillings in the pound has a good right to after-acquired property, in that case, the bill of exchange, against the parties to the bill and all the world except the assignees or no right whatever so that he could not sue at all upon the bill. The opinion of the Court was that he had a good right except as against the assignees, and as the plea did not state that they had interfered, it did not contain a complete defence. This conclusion was arrived at "as well upon the authorities as upon the reason and convenience of the principle which they establish." The Learned Chief Justice, after dealing with the successive statutes relevant to the question, arrived at the conclusion that whatever right an uncertificated bankrupt had before the statute then in force in after-acquired property an uncertificated bankrupt had still. It became therefore necessary to ascertain what was the right of an uncertificated bankrupt to after-acquired property before the recent statutes. After discussing several earlier decisions including *Fowler* v. *Down*[2] and *Webb* v. *Fox*[1], which according to him, enunciated a well-known principle in that branch of law, a principle well established for a long series of years, he summed up the result of common law, statute law and judicial decisions thus :

"All future property and contracts vest int he assignees, by the words of Stat. 6 G. 4, clause 16 sections 63, 127 and by the construction put by the Courts on the words of the older statutes. But there must be property in the bankrupt, or contracts with him, before such property or contracts can vest in the assignees. The effect of the statutory enactments may be either to transfer immediately such property or contracts from the bankrupt to the assignees, vesting the property in the bankrupt for an instant only, or to give the assignees the beneficial interest and to make the bankrupt acquire property or contract for their benefit only, in the nature of an agent. The cases accord with the latter construction of the statute ; and it is most consistent with convenience, for otherwise there would be no protection to persons dealing with an uncertificiated bankrupt. Not only would they acquire no title by purchases from him, but payments for such purchases, and for all other debts due to the uncertificated bankrupt, would be invalidated. The legislature, by several statutes, have protected all payments by and to, and all dealings and transactions with, the bankrupt bona fide made or entered into without notice of the act of bankruptcy before the fiat ; but there is no provision by the statute law for such payments

1. (1797) 7 T.R. 391 : 101 E.R. 1037.
2. 1 Bos and Pall Rep. C.B. 44 : 126 E.R. 769.
3. (1844) 5 Q.B. 965 : 114 E.R. 1512.

dealings or transactions after the fiat; and the only way by which they can be rendered valid, and great confusion, inconvenience and hardship prevented, is by adopting the latter construction, and holding that the bankrupt acquires property, and contracts, for the assignees, who may, whenever they please, disaffirm his act, but, until they do so, his acts are all valid. If, then, an uncertificated bankrupt contracts on behalf of and for the benefit of his assignees, it is perfectly clear that he may sue on such contracts in his own name; and it is no plea that the property is vested in, or the contracts made for the benefit of, the assignees, unless it contains an averment that they have interfered and desired the defendant to pay to them, any more than it would be a defence to an action by a factor, broker or agent for another, to plead that the property belonged to, or the contract was made by the plaintiff for his principal. Such a plea, to be a good answer, must aver that the principal has interposed, or disclosed some other ground of defence."

Though the decision dealt with the right of an undischarged bankrupt to maintain an action in respect of after-acquired property, the implied basis of the decision was that the undischarged bankrupt had an interest in after-acquired property which might even be described as a "special property." This was made explicit in the decision of the Court of Appeal in *Cohen* v. *Mitchell*[1] the leading case on this branch of bankruptcy law in England. The facts in that case were as follows: An undischarged bankrupt carried on a business in buying and selling agricultural machines. To enable him to carry on this business, he borrowed several sums of money from the plaintiff who had knowledge of the bankruptcy. Some of the machinery which had been acquired in the business after the bankruptcy was seized wrongfully by one Foale, and the bankrupt brought an action in his own name against the wrongdoer and recovered judgment for a sum of money as damages. To enable him to carry on the action, he borrowed further sums of money from the plaintiff and assigned to him the cause of action as security for the moneys due. After judgment and before the money was paid over, the trustee claimed it for the benefit of the estate. The plaintiff also claimed the amount under his assignment. The judgment-debtor paid the money into Court and interpleaded. The question arose whether the plaintiff who was the assignee of the cause of action or the trustee in bankruptcy was entitled to the money. It was held that the assignment was valid against the trustee and that the plaintiff was entitled to the money. Lord Esher, M.R., laid down a proposition which was agreed upon by Fry, L.J., and Lopes, L.J. It is this:

"Until the trustee intervenes, all transactions by a bankrupt after his bankruptcy with any person dealing with him *bona fide* and for value, in respect of his after-acquired property, whether with or without knowledge of the bankruptcy, are valid against the trustee."

Though the learned Master of the Rolls admitted that in terms they were laying down a proposition wider than what appeared to have been laid down before, nevertheless he observed that what had been laid down before involved a principle which supported the proposition to its full extent. The following steps in his reasoning are important. In the case of property which vested in the trustee at the time of adjudication, if the bankrupt were to endeavour to maintain an action, it would be a good plea that the property was not his but vested in the trustee. But with regard to after-acquired property it had been held that such a plea would be bad unless the trustee had intervened before the transaction in respect of which the action was brought. That was conclusive to show that the bankrupt had a property, whether absolute or not is immaterial, in such things till the trustee interfered. Fry, L.J., expressly relies on the judgment of Tindal, C.J., in *Herbert* v. *Sayer*[2]. His Lordship also observes that the rule had not been formulated in such definite terms before, but that it appeared to him to be the result of the earlier authorities, which established a fundamental distinction between the two modes of vesting in respect of the two kinds of property, namely, property belonging to the bankrupt at the commencement of the bankruptcy and after-acquired property.

Though the proposition enunciated in *Cohen* v. *Mitchell*[1] was very wide in its terms, it was held in In re *New Land Development Association and Gray*[3] that the rule laid down therein did not apply to real property. It is true that the Court of Appeal

1. (1890) 25 Q.B.D. 262.
2. (1844) 5 Q.B. 965: 114 E.R. 1512.
3. (1892) 2 Ch. 138.

did not decide the case in In re *New Land Development Association and Gray*[1] on this point, but in a subsequent case, it was assumed that the Court of Appeal approved of the view expressed by Chitty, J., that the rule in *Cohen* v. *Mitchell*[2] would not apply to real estate. This limitation on the rule was recognised in subsequent decisions (vide *Bird* v. *Philpott*[3], *London and County Contracts, Ltd.*, v. *Tallack*[4], and In re *Clayton and Barclay's Contract*[5]. Chitty, J., had again to deal with this matter with reference to 99 years' leases. Such leases were granted to an undischarged bankrupt and were subsequently demised by him by way of mortgage without any intervention by his trustee in bankruptcy. Chitty, J., held that the mortgage was valid. Though he adhered to the view that real estate was not within the view of the Court of Appeal in *Cohen* v. *Mitchell*[2] he was of the opinion that he ought not to attempt to introduce any further limitation as the language was large enough to include all property and certainly to include a chattel interest in land.

In *Official Receiver* v. *Cooke*[6], Neville, J., was apparently not impressed with the distinction made between personality and reality in In re *New Land Development Association and Gray*[1] though he considered that he was bound by the interlocutory remarks made in the course of the argument in that case by both Kay, L.J., and Lindley, L.J. After referring to the case of In re *Clayton and Barclay's Contract*[5] he observed thus :

"But why there should be a distinction between real and personal estate in this regard I confess I do not think has been satisfactorily explained by the decisions which have been cited to me."

He hoped that at no distant date the matter might come before the Court of Appeal in order that it may be put on a more satisfactory footing than it stood on at present. This hope was not fulfilled and it became necessary for Parliament to intervene and cure the defect by legislation, namely, section 11 of the Bankruptcy Act of 1913 reproduced in section 47 of the Bankruptcy Act of 1914, which runs thus :

"(1) All transactions of a bankrupt with any person dealing with him *bona fide* and for value, in respect of property, whether real or personal, acquired by the bankrupt after adjudication, shall, if completed before any intervention by the trustee, be valid against the trustee, and any estate or interest in such property which by virtue of this Act is vested in the trustee shall determine and pass in such manner and to such extent as may be required for giving effect to any such transaction. This sub-section shall apply to transaction with respect to real property completed before the first day of April, 1914, in any case where there has not been any intervention by the trustee before that date. For the purpose of this sub-section, the receipt of any money, security, or negotiable instrument, from, or by the order or direction of, a bankrupt by his banker, and any payment and any delivery of any security or negotiable instrument made to, or by the order or direction, of a bankrupt by his banker, shall be deemed to be a transaction by the bankrupt with such banker dealing with him for value.

(2) Where a banker has ascertained that a person having an account with him is an undischarged bankrupt, then unless the banker is satisfied that the account is on behalf of some other person, it shall be his duty forthwith to inform the trustee in the bankruptcy or the Board of Trade of the existence of the account, and thereafter he shall not make any payments out of the account, except under an order of the Court or in accordance with instructions from the trustee in the bankruptcy, unless by the expiration of one month from the date of giving the information no instructions have been received from the trustee."

It is now necessary to refer to decisions relating to insolvency provisions applicable to the Presidency Towns in India. Before the passing of the Presidency Towns Insolvency Act of 1909, the law relating to after-acquired property of an insolvent in Presidency Towns was contained in the provisions of 11 and 12, Vict., Ch. 21, section 7, the material parts of which ran as follows :

"...... it shall be lawful for the said Court and the said Court is hereby authorised and required to order that all the real and personal estate and the effects of such petitioner. . . . and all debts due to him and all the future estate, right, title, interest and trust of the said petitioner in or to any real or personal estate or effects within or without the said territories which such petitioner may purchase or which may revert, descend, be devised or bequeathed or come to him, and all debts growing due to him before the Court shall have made its order in the nature of a certificate as hereinafter mentioned do vest in the official assignee for the time being of the said Court . . . . . And such order when so made shall by virtue of this Act relate back to and take effect from the filing of the said petition and shall instantly and without any conveyance or assignment vest all the real and personal estate effects and debts as aforesaid in the said official assignee. . . ."

1. (1892) 2 Ch. 138.
2. (1890) 25 Q.B.D. 262.
3. (1900) 1 Ch. 822.
4. (1903) 51 W.R. 408.
5. (1895) 2 Ch. 212.
6. (1906) 2 Ch. 661.

In *Kerakoose* v. *Brooks*[1], the Judicial Committee of the Privy Council, in construing this provision, said :

"Under the Statute, 11th and 12th Vict. C. 21, the assignee has a right to the subsequently-acquired property of an insolvent, unless the insolvent has obtained a certificate and discharge; but the Assignee's right to the subsequently-acquired property is subject to two qualifications. In the first place, if the insolvent has acquired property subject to liens and obligations, then any property taken by the Assignee under that state of things is taken subject to those charges and equities which affect the property in the hands of the insolvent. The second qualification is this that if the insoolvent carries on trade at a subsequent period, with the assent of the Assignee of the estate under the Insolvent Act, in the first instance the property which is acquired in the subsequent trade will be subject in equity to the charge of the creditors in that trade, in priority to the claim of the Assignee under the first insolvency."

It is important to note that their Lordships make no reference to the doctrine of postponement of vesting of after-acquired property until intervention by the assignee. But it must be mentioned that this case was long before the decision in *Cohen* v. *Mitchell*[2]. In *Krishtocomal Mitter* v. *Suresh Chunder Deb*[3], which was also before *Cohen* v. *Mitchell*[2], Wilson, J., held that till intervention by the Official Assignee an uncertificated bankrupt had power to deal with and dispose of after-acquired property. He considered that the law on the point was summed up in *Herbert* v. *Sayer*[4], and that *Karakoose* v. *Brooks*[1] was clear authority that the Indian Act was to be construed on the same principle. Though I can appreciate the learned Judge saying that the law in England was summed up in *Herbert* v. *Sayer*[4], with respect, I am unable to follow how *Kerakoose* v. *Brooks*[1], is authority that the Indian Act is to be construed on the same principle, especially when their Lordships of the Judicial Committee made no reference whatever to the intervention of the assignee in determining the vesting of after-acquired property. The case before Wilson, J., related to immovable property but no point was made about the nature of the property because the case was decided long before the case of In re *Clayton and Barclay's Contract*[5].

When the case of *Rowlandson* v. *Champion*[6] came up for decision the statute applicable continued to be 11 and 12 Vict. C 21. In that case, the adjudication was in 1888. The insolvent obtained a house under a deed of gift in April 1891. In December, 1891 she executed a mortgage in favour of the respondents. She died in May 1892, having never obtained a discharge. In September, 1892, the Official Assignee intervened and claimed the property free from the mortgage. It was held that the Official Assignee was entitled to the mortgaged property free from the mortgage. Clark, J., decided in favour of the Official Assignee in this case mainly on the strength of this decision, and Mr. M. S. Venkatarama Aiyar for the appellant has tried to persuade us to hold that it requires re-consideration. It is therefore necessary to examine it in detail. The application by the Official Assignee came up in the first instance before Collins, C.J. He applied the rule in *Cohen* v. *Mitchell*[2] and upheld the validity of the mortgage. The appeal against his decision was heard by Muthuswami Aiyar and Best, JJ. The appeal was allowed and it was held that the Official Assignee was entitled to the property free from the mortgage. The learned Judges, however, arrived at the same conclusion on different grounds. Best, J., was of the opinion that in order to be binding on the Official Assignee, a charge on after-acquired property created by an adjudicated insolvent who had not obtained his final discharge must come within the scope of one or the other of the two qualifications stated in *Kerakoose* v. *Brooks*[1] and the mortgage in question did not come within either of those qualifications. He was inclined to understand the rule in *Cohen* v. *Mitchell*[2] in a very limited and restricted sense as applying only to cases where an insolvent was allowed to carry on trade or other business in circumstances in which the official assignee's assent will be presumed up to such time as he might intervene. Muthuswami Aiyar, J., on the other hand held that the reasoning in the English cases, *Herbert* v. *Sayer*[4] and *Cohen* v. *Mitchell*[2] was applicable in construing the provisions of the Indian Insolvency Act (11 and

1. (1859-61) 8 M.I.A. 339 (356).
2. (1890) 25 Q.B.D. 262.
3. (1882) I.L.R. 8 Cal. 556.
4. (1844) 5 Q.B.D. 965 : 114 E.R. 1512.
5. (1895) 2 Ch. 217.
6. (1894) I.L.R. 17 Mad. 21.

12, Vict., c. 21); the learned Judge saw no substantial difference on the point between the Indian Act and the English Bankruptcy Acts. But in his opinion, according to the decision in In re *New Land Development Association and Gray*[1] the rule laid down in *Herbert* v. *Sayer*[2] and *Cohen* v. *Mitchell*[3] was not applicable to immoveable or real property and was limited in its scope to moveable property. The learned Judge felt himself bound to adopt the proposition laid down by the Court of Appeal in the interlocutory remarks made during the hearing by Kay, L.J. and Lindley, L.J., in In re *New Land Development Association and Gray*[1]. There is a clear divergence of opinion between the two learned Judges as to the method of vesting of after-acquired property. Best, J., would not at all apply the doctrine of intervention, while Muthuswami Aiyar, J., was apparently willing to apply it in the case of moveable property.

In *Sriramulu Naidu* v. *Andalammal*[4] there was no question of any contract or transfer by the insolvent relating to his after-acquired immoveable property. The only question there was whether an undischarged insolvent could sue to recover property which devolved on him subsequent to his adjudication. Sir Arnold White, C.J., and Subramania Aiyar, J., held that he could sue, following the decision in *Herbert* v. *Sayer*[2]. The learned Judges assumed the correctness of the decision in *Rowlandson* v. *Champion*[5], in so far as it held that the rule in *Cohen* v. *Mitchell*[3] did not extend to an interest in immoveable property. But apparently they were not inclined to agree with Muthuswami Aiyar, J., that the rule in *Herbert* v. *Sayer*[2] should be limited to personality. Though the actual decision in the case was as regards the right of an undischarged insolvent to maintain a suit in respect of after-acquired property, the basis of the decision was the existence of special property in the bankrupt both in regard to personality and reality which was good against all the world except the assignee. Mr. Venkatarama Aiyar, relied on this decision in support of his contention that the rule in *Cohen* v. *Mitchell*[3] was applicable to both moveable and immoveable property, but I do not think it supports him in any way, because (1) the learned Judges clearly assumed the correctness of *Rowlandson* v. *Champion*[5], and (2) they say that the right of the insolvent to after-acquired property is good against all the world *except* the assignee, this is to say, that the insolvent cannot pass a title to any one which will hold good or which would prevail against the assignee.

No decision of this Court subsequent to *Sriramulu Naidu* v. *Andalammal*[4] was cited before us dealing directly with this question. There is an instructive account of case law in England and India on this question in *Satyanarayanamurthy* v. *Papayya*[6]. But that case arose under the Provincial Insolvency Act.

There is a considerable number of decisions of other Courts in India, according to which the rule in *Cohen* v. *Mitchell*[3] would apply to all kinds of after-acquired property of an undischarged insolvent, moveable and immoveable, personalty and realty. (*Alimahmad Abdul Hussain* v. *Vadilal Devchand*[7], *Chhote Lal* v. *Kolarnath*[8] and the *Official Assignee* v. *N. P. A. K. Chettlar Firm*[9]. The following passage in Mulla's Law of Insolvency, at page 363, may be taken as a correct summary of the conflict of judicial opinion in India:

> "In India there is a conflict of opinion whether the rule in *Cohen* v. *Mitchell*,[3] applies to immoveable property. If it does a transfer by an insolvent of immoveable property acquired after adjudication and before discharge to a *bona fide* purcaser for value before the intervention of the Official Assignee is binding on the Official Assignee. If it does not the transfer is void as against the Official Assignee. The High Court of Madras hs held that the rule in *Cohen* v. *Mitchell*,[3] does not apply to immoveable property, on the other hand, it has been held by the High Courts of Bombay, Calcutta, Allahabad, and Rangoon, that it does so apply."

Mr. Venkatarama Aiyar, by his able and exhaustive argument persuaded us to hold that there was no justification for restricting the application of the rule in

1. (1892) 2 Ch. 138.
2. (1844) 5 Q.B.D. 965 : 114 E.R. 1512.
3. (1890) 25 Q.B.D. 262.
4. (1906) 17 M.L.J. 14 : I.L.R. 30 Mad. 145.
5. (1894) I.L.R. 17 Mad. 21.
6. (1941) 2 M.L.J. 834 : I.L.R. 1941 Mad. 824.
7. (1919) I.L.R. 43 Bom. 890 (905).
8. (1924) I.L.R. 46 All. 565.
9. (1927) I.L.R. 5 Ran. 229.

Cohen v. *Mitchell*[1] to moveable property, so far as this country was concerned, which did not recognise any difference in law between realty and personalty. With very great respect to the eminent Judge, Muthuswami Aiyar, J., I am unable to see why the restriction of the rule in *Cohen* v. *Mitchell*[1] based upon a distinction between realty and personalty should be imported into Indian Law which knows of no such distinction. On this point, I agree with Shah, J., of the Bombay High Court, when he said in *Alimahmad Abdul Hussain* v. *Vadilal Devchand*[2] :

> " I do not think that the nature of the after-acquired property forms any essential part of the rule ; . . . . The reason of the rule does not compel the recognition of any restriction as to the nature of the property in its application and I do not think that the distinction between real and personal property made in England in applying the rule can be properly applied to immoveable and moveable property in India."

In the words of Venkataramana Rao, J., in *Satyanarayanamurthy* v. *Papayya*[3] :

> " There is no distinction between realty and personalty in Indian law, either the principle of simultaneous vesting or that of vesting being deferred until intervention must apply to both."

If I were of the opinion that the rule in *Cohen* v. *Mitchell*[1] should be followed in India, I would have referred this case to a Full Bench to reconsider the decision in *Rowlandson* v. *Champion*[4]. But I am convinced that there is no justification for importing this rule of English law when considering the provision of the Indian statute namely, the Presidency Towns Insolvency Act of 1909. On the date of the passing of this enactment, the law in England on this point was very uncertain. Alongside provisions of the English Bankruptcy Act of 1883 was the large body of case law, replete with divergence of judicial opinion. There were first decisions like *Herbert* v. *Sayer*[5] and *Cohen* v. *Mitchell*[1], there was then the case of In re *New Land Development Association and Gray*[6] which restricted the scope of the rule in *Cohen* v. *Mitchell*[1] and there were later decisions in which there was a clear note of dissatisfaction with the imposition of such a restriction. It is unreasonable to presume that the Legislature, when enacting sections 17 and 62 of the Presidency Towns Insolvency Act, intended to import wholesale this conflicting state of English law, without an express provision on the point.

I am aware that the provisions of the Presidency Towns Insolvency Act of 1909 with respect to after-acquired properties are identical with the corresponding provisions of the English Bankruptcy Act of 1883. If learned Judges in England have construed sections of the English Act in a particular way, their opinion is certainly entitled to very great weight and ought to be followed in the absence of valid grounds for disregarding it. But on a careful examination of the English decisions on the point, I find that this rule of postponement of vesting of after-acquired property in the trustee in bankruptcy till his intervention is not a rule deduced from the provisions of the statute but a rule engrafted on the statutory provision and based on common law and equitable considerations. Eminent Judges have again and again pointed out that on the plain language of the statute there is no difference in the time or the manner of vesting of existing property and after-acquired property nor is there any difference between real and personal property. Fry, L.J., in *Cohen* v. *Mitchell*[1] concedes this. He says :

> " If one merely confined one's attention to the words of the section the reader might suppose that both those kinds of property vested absolutely in the trustee—vested in him in precisely the same manner."

Nevertheless, that learned Judge considered that the nature of the distinction between the two modes of vesting of the two kinds of property had been long ago established and had not been in his opinion altered in any way by recent legislation in bankruptcy. Even the earlier case of *Herbert* v. *Sayer*[5] proceeds on the footing that before the Bankruptcy statutes an uncertificated bankrupt had certain rights and such rights continued. In In re *Clark*, Ex parte *Beardmore*[7] A. L. Smith, L.J., after citing section 44 of the Bankruptcy Act, 1883, observed :

1. (1890) 25 Q.B.D. 262.
2. (1919) I.L.R. 43 Bom. 890.
3. (1941) 2 M.L.J. 834 : I.L.R. 1941 Mad. 824.
4. (1894) I.L.R. 17 Mad. 21.
5. (1844) L.R. 5 Q.B.D. 965: 114 E.R. 1512.
6. (1892) 2 Ch. 138.
7. (1894) 2 Q.B. 393 (405).

"... . If matters rested there, not only property which belonged to the bankrupt at the commencement of the bankruptcy but all property which he might acqure or which might devolve upon him before his discharge . . . , would be the property of the first trustee and not of the second. But an exception has apparently been engrafted upon the section, and a distinction has been drawn in some cases between property which belonged to the bankrupt at the commencement of the bankruptcy and property afterwards acquired by him. It has been held that as regards the after-acquired property, until the trustee intervenes, the bankrupt, though undischarged, is in a position to give a title to persons who deal with him *bona fide* and for value."

In the same case, Davey, L.J., said :

" We have first to look at the words of the statute. The effect of sections 44 and 54 of the Bankruptcy Act is this, that all such property as may be acquired by or devolve upon the bankrupt after the commencement of the bankruptcy, and before his discharge, is to vest in the trustee, and to be divisible by him amongst the creditors, meaning of course, the creditors who are entitled to prove in the bankruptcy, and who have done so. If we apply the words of the statute literally there can be no doubt what our decision ought to be in this case."

And then he goes on to refer to the rule engrafted by decisions like *Cohen* v. *Mitchell*[1]. The following passage in the judgment of Lord Cozens-Hardy, M. R. in *Hill* v. *Settle*[2] is very illuminating :

" Now it is necessary to consider somewhat carefully what is the law upon matters of this kind Under section 44 of the Bankruptcy Act, 1883, all the property belonging to or vested in the bankrupt or acquird by him or devolving upon him before his discharge is vested in the trustee. . . . . Then, by a long series of authorities which it is quite impossible, I think, for this Court, or any Court, to review, it was held that that vesting could not be regarded as operating in the strict and full sense of the term. As long as the trustee did not intervene, the bankrupt himself had power to enter into transactions for value with persons dealing with him *bona fide* in relation to his after-acquired property. That is dealt with in so many cases that I do not think it is necessary for me to refer to any more than *Cohen* v. *Mitcheell*[1], ... The Legislature has plainly recognised the validity and effect of that which is to be found in what is, no doubt, judge-made law as expressed in a series of decisions extending over some 200 years."

The reference to the Legislature is to the enactment of section 47 of the Bankruptcy Act of 1914 which has been extracted earlier in this judgment. This section according to the learned Master of the Rolls, furnishes a firm foundation for the theory established by numerous decisions and in his view, the section was only an assertion of what was the common law.

It is clear, therefore, that the rule of postponement of vesting of after-acquired property till intervention by the trustee is not based upon an interpretation of the language of the statute but is really a rule of judge-made law and an engrafting on the statutory provisions. It also appears to have its foundations in the common law of the country going back to the eighteenth century. I do not think that the Indian Legislature when enacting the Presidency Towns Insolvency Act in 1909 intended to import this rule of judge-made law in England into this country without making an express statutory provision.

It was urged before us that this rule in *Cohen* v. *Mitchell*[1], is a just and equitable rule though not in accordance with the strict letter of the law and therefore could be followed in this country also. It must not be overlooked that according to the rule in *Cohen* v. *Mitchell*[1], the alienee from the undischarged bankrupt is protected even when he enters into the transaction with knowledge of the subsisting bankruptcy. Mr. Venkatarama Aiyar, the learned advocate for the appellant in the course of the argument, had to admit that there is to a certain extent a mixing up of two principles in the rule accepted by some of the High Courts in India following *Cohen* v. *Mitchell*[1], the two principles being (1) the legal principle that there is no vesting in the trustee till intervention, and (2) the equitable principle that a *bona fide* transferee for value should be protected. Logically, if the first principle applies, there is no justification for insisting on *bona fides*, because if the property is not vested in the trustee but is still vested in the bankrupt, he can give to the transferee, whether *bona fide* or not, a good title. If, on the other hand, the first principle is not sound, then there is no statutory provision to support a disposal of the property by the undischarged insolvent, even in favour of a *bona fide* alienee, because the bankrupt would have no title to pass.

1. (1890) 25 Q.B.D. 262.

2. (1917) 1 Ch. 319 (324).

There are certain well recognised classes of cases in which the assignee's rights to after-acquired property appear at first sight to be affected; but on analysis it will be found that none of these involves an application of the doctrine of postponement of vesting. The following are typical examples:

(1) Where liens and obligations have been created and incurred in the process of the acquisition of the property the assignee cannot take the property free of such liens and obligations. The case of *Kerakoose* v. *Brooks*[1], is an instance in point.

(2) Where the Official Assignee knows and consents to the undischarged insolvent carrying on business, he is precluded from disputing the liability which might be incurred by the insolvent in the course of the business. This is really an application of the general rule of estoppel.

(3) An uncertificated bankrupt has been allowed to sue for recovery of property from a trespasser. This right can be supported on an implied theory of agency for acquisition.

In all these instances, it may appear that the bankrupt is allowed to exercise certain rights in respect of after-acquired property, but they do not need for their validity any affirmation of the rule of postponement of vesting.

If there is a necessity for the existence of a rule similar to that laid down in *Cohen* v. *Mitchell*[2], in India, the most appropriate and straightforward course would be to introduce a provision analagous to section 47 of the English Bankruptcy Act of 1914 into the Indian enactments. I fail to see why this equitable rule should apply only to Presidency towns and not to the rest of the country. It is certainly not permissible for Courts to import it into the law relating to Presidency towns only. While on this subject, I would like to point out the anomaly of material differences between the law applying to Presidency towns and that applying to the moffusil. Whatever historical accidents might have led to such differences, there is no longer any valid ground for perpetuating them. It is high time the Legislature intervenes and abolishes these differences. It would then be for the consideration of the Legislature whether it is desirable to make a provision similar to section 47 of the English Bankruptcy Act, 1914.

Neither the learned counsel for the appellant nor the learned Official Assignee was able to refer me to a single decided case reported or unreported in which the rule in *Cohen* v. *Mitchell*[2], has been applied by this court in any insolvency arising under the Presidency Towns Insolvency Act. In *Rowlandson* v. *Champion*[3], the learned Judges refused to apply the rule to transactions relating to immoveable property. But the decision cannot be taken to be an authority for holding that the rule applies to any other kind of property, because Best, J., was inclined to hold that the rule in *Cohen* v. *Mitchell*[2], was merely an authority for the proposition that when an insolvent is allowed to carry on trade or other business the official Assignee's assent thereto will be presumed up to such time as he may intervene. In the absence of any direct authority binding on me, I find myself free to hold that the rule in *Cohen* v. *Mtichell*[2], statutorily recognised in England in the Bankruptcy Acts of 1913 and 1914 does not apply to the transactions of an undischarged insolvent in the Presidency towns in India. I therefore agree with Clark, J., that the application of the Official Assignee must be allowed, though on different grounds.

The appeal is dismissed. No costs.

Mack, J.—I have had the advantage of perusing the judgment of My Lord the Chief Justice with which I am in complete agreement. I should like to state briefly one or two further grounds on which I do not think that the rule in *Cohen* v. *Mitchell*[2], can be applied to insolvency law in India. With great respect to the learned Judges of Indian Courts who have applied the rule in *Cohen* v. *Mitchell*[2], to Indian Insolvency

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1. (1859-61) 8 M.I.A. 339 (356). 2. (1890) 25 Q.B.D. 262.
3. (1894) I.L.R. 17 Mad. 21.

Law I think they overlooked an important difference between the policy of the English Bankruptcy statutes and Indian insolvency legislation towards uncertificated bankrupts and undischarged insolvents. The Indian statutes now in force place on the insolvent a direct and statutory obligation to apply for his discharge within a prescribed period by annulling his adjudication if he fails to do so, driving him thereby out of protection and sanctuary of insolvency and exposing him to attacks by his creditors under the ordinary civil law. In the English Bankruptcy statutes we can find no section corresponding to section 41 of the Presidency Towns Insolvency Act enacted in 1909 or section 43 of the Provincial Insolvency Act enacted in 1920.

These two sections make the policy of Indian Insolvency Law to my mind quite clear which had as its objective the termination of the period of the insolvent's civil disability in as short a time as possible. Section 41 of the Presidency Towns Insolvency Act is as follows :—

" If an insolvent does not appear on the day so appointed for hearing his application for discharge or if an insolvent shall not apply to the Court for an order of discharge within such time as may be prescribed, the Court, on the application of the Official assignee or of a creditor, or of its own motion, may annul the adjudication or make such other order as it may think fit, and the provisions of section 23 shall apply on such annulment."

Section 43 of the Provincial Insolvency Act which is mandatory and more drastic reads as follows :—

(1) " If the debtor does not appear on the day fixed for hearing his application for discharge or on such subsequent day as the Court may direct, or if the debtor does not apply for an order of discharge within the period specified by the Court, the order of adjudication shall be annulled, and the provisions of section 37 shall apply accordingly."

If insolvency courts and official assignees and receivers do what is expected of them under these two sections, cases of the present kind, namely, an alienation by an undischarged insolvent more than 7 years after adjudication should not arise. The two statutes contemplate a termination of the status of disability of the insolvent in as short a time as is compatible with efficient administration of the insolvent's assets. On the other hand under the English Bankruptcy Act, the penalty the bankrupt pays for not applying for his discharge is the disability of remaining uncertificated, there being no statutory obligation on him to apply with any penalty of annulment as under the Indian law. The English Bankruptcy Acts provide generally for two categories of annulment of adjudication, an honourable annulment on payment of all debts in full, or in those cases where the adjudication should not have been made at all, and an annulment on composition with creditors. The two insolvency statutes in India make provision not only for these but also for another form of annulment of adjudication, a dishonourable annulment for failure to apply for discharge in the prescribed time. In all cases of annulment there is a revesting of the insolvent's property in him including of course after-acquired property subsequent to the adjudication unless the Court makes a special order to the contrary under 23 (1) of the Presidency Towns Insolvency Act or under 37 (1) of the Provincial Insolvency Act. It is true that for many years after the Indian Insolvency statutes were passed the obligation on courts under the Provincial Insolvency Act to annul adjudications when no discharge was made in time was not fully realised and that many insolvents adjudicated years ago having never applied for their discharge still remained undischarged. In comparatively recent years, however, the insolvency courts are taking *suo motu* action to annul adjudications where no applications for discharge are made in time under section 43 of the Provincial Insolvency Act. I understand that in adjudications made in the High Court also a prescribed time of 18 months is now generally fixed for discharge. Under the Presidency Towns Insolvency Act, however, there is a discretion cast on the Court to annul the adjudication on application by the Official Assignee if the application is not made within the prescribed time. The Provincial Insolvency Act, however, enacted 11 years later gives no discretion for a Court and makes such annulment a mandatory obligation.

The rule in *Cohen* v. *Mitchell*[1], based on the doctrine of Official Receiver's intervention laid down in 1890 many years of course before the Indian statutes, was a judge-made expedient, it would appear, to deal with an increasing number of hard cases of *bona fide* persons who had transactions with an increasing number of uncertificated bankrupts. In 1892 another Court of Appeal in *New Land Development Association and Gray, In re*[2], declined to extend the rule to real property resolutely and in no uncertain terms. Chitty, J., however, showed himself more tolerant of it in 1895, in the case of *Clayton and Barclay's Contract, In re*[3], and extended it to a chattel interest in land or a mortgage of a leasehold for 99 years. The resulting deadlock in the application of the rule in *Cohen* v. *Mitchell*[1], is apparent from the judgment of Neville, J., in 1906 in *Official Receiver* v. *Cooke*[4], who reluctantly excluded from its operation a mortgage on freehold. The deadlock continued, as has been pointed out in my learned brother's judgment, until the Legislature came to the rescue and gave recognition to the rule in *Cohen* v. *Mitchell*[1], in the Bankruptcy Act of 1914. It is significant that the English Courts could not devise any means of applying the rule in *Cohen* v. *Mitchell*[1], to all kinds of property without statutory intervention. We are however asked to do so on two apparently simple grounds : (1) that the rule in *Cohen* v. *Mitchell*[1], having been held to apply to moveable property and there being no real distinction between moveable and immoveable property such as existed in England it may as well be extended in India to immoveable property ; and (2) to bring the judge-made law in the Madras Presidency into line with other High Courts which have applied the rule in *Cohen* v. *Mitchell*[1], to all kinds of property. As regards the first point, we are unable to break the language of the statute in order to extend the rule in *Cohen* v. *Mitchell*[1], in this way ; nor have we any greater powers in this direction than the English Judges who invoked a rule to mitigate the rigour of an existing law on a number of hard cases of innocent purchasers from uncertificated bankrupts in the conditions which existed in the year 1890 in England and found themselves powerless to extend the rule to all kinds of property. Whether a Legislature of the future in India may think it fit and necessary to bring Indian statutory law into line in this respect with English Bankruptcy law and give statutory recognition to the rule in *Cohen* v. *Mitchell*[1], it is not for me to say. I would, however, venture to express the opinion that the rule in *Cohen* v. *Mitchell*[1], is inconsistent with the policy of the Indian Insolvency Acts in relation to undischarged insolvents, and that unless the policy of the Act is changed in this respect, any application of this rule to transfers by insolvents of their after-acquired property will result in weakening the desirable objectives that the Indian statutes in some divergence from the English statutes had in view in relation to the conditions prevailing in India and in opening the avenues for further abuses.

The case of the appellant-alienee is no doubt a hard one ; but a hard case cannot make good law. Even at this late hour I think the machinery of the Presidency Towns Insolvency Act should be set in motion under section 41 to have the adjudication of this insolvent annulled and his period of disability terminated, leaving him free not only to transact business himself but also to be proceeded against under ordinary civil law by persons with whom he has transacted business while under statutory disability.

K.S. ——— *Appeal dismissed.*

END OF (1948) II M.L.J.

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1. (1890) 25 Q.B.D. 262.
2. (1892) 2 Ch. 138.
3. (1895) 2 Ch. 212.
4. (1906) 2 Ch. 661.

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